Cross-Border Insolvencies

Justice Sarah E. Pepall
Ontario Superior Court of Justice
With research assistance from
Ms. Lynn Iding, Law Clerk,
May, 2004

Introduction

[1] The increased integration of the Canadian and U.S. economies has resulted in insolvencies that know no boundaries. Borrowers are without borders and assets and operations are routinely located in both jurisdictions. When insolvencies occur, Canadian courts increasingly are required to address problems with global implications. There is an obvious need in these circumstances for domestic and foreign courts to cooperate with each other and at the same time ensure that principles of sovereignty and the independent jurisdiction of Canadian courts are not abandoned. These two sometimes competing principles permeate the legislation, legal commentary and case law on cross-border insolvencies.

[2] Traditionally, Canadian courts relied on the common law to address cross-border or international insolvencies. In response to the increase in cross-border activity, Parliament enacted changes in 1997 to both the *Companies' Creditors Arrangement Act*, R.S.C. 1995, c. C-36 ("*CCAA*") and the *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3 ("*BIA*") that specifically deal with international insolvencies. In addition, judges have responded by developing practices designed to facilitate cooperation and increase stakeholder value. This paper will discuss the legislative framework and the judicial response to Canadian/American cross-border insolvencies with emphasis on the *CCAA*.

Legislative Framework

[3] Prior to the 1997 amendments a legislative vacuum existed with respect to international insolvencies.

> The general absence of domestic legislation dealing with cross-border insolvency issues may result from the fact that, until recently, apart from a few high profile cases, there have not been the large number of cases that would normally be required to persuade domestic legislatures to act. This may be another example of developments in legislation following developments in international trade. In the mean time, the insolvency community in Canada had to deal with cross-border cases without the benefit of effective domestic legislation until late 1997.[1]

[1] B. E. Leonard, "Multijurisdictional Insolvencies and Reorganizations" (1998), 10 Comm. Insol. Rep. 49.

[4] In the absence of legislation, courts were required to develop solutions on a case-by-case basis. The 1990s saw an acceleration of insolvencies with cross-border issues and the 1997 amendments to the *CCAA* and the *BIA* were eagerly anticipated.

[5] The *CCAA* always provided that an order made by the court in one province in respect of any compromise or arrangement would be effective in all the other provinces and could be enforced as if made by the domestic court (the provincial superior court).[2] Section 188 of the *BIA* provided to like effect. Section 18.6 of the *CCAA* and Part XIII of the *BIA* were added to the two statutes in 1997 to deal with international insolvencies. In comparison with the *BIA*, the *CCAA* has traditionally provided greater flexibility in restructurings given its general terms. This distinction continues with the international insolvency amendments. While the amendments in both statutes are similar, those in the *BIA* contain greater specificity.

CCAA

(i) General Powers

[6] The key provision in the *CCAA* amendments is section 18.6(2). This section provides that 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 the coordination of proceedings under the *CCAA* with any foreign proceeding. Frequently a corporate debtor that wishes to restructure and has operations in both the U.S. and Canada will undertake proceedings in both jurisdictions. It will file concurrently in the U.S. under Chapter 11 and in Canada usually under the *CCAA*. This was the approach taken, for example, in the well known restructurings of *Olympia & York Developments Limited*, *Livent Inc.*, *Philip Services Corp.* and the *Loewen Group.*

[7] In section 18.6, the term "foreign proceeding" is given a broad definition. It encompasses a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to a bankruptcy or insolvency and dealing with the collective interest of creditors generally. There is no list of acceptable countries; the definition extends to all foreign proceedings anywhere provided they are "under

[2] Section 16.

bankruptcy or insolvency legislation". This provision gives a Canadian court jurisdiction to facilitate proceedings that involve filings in Canada and elsewhere. Further, section 18.6(3) provides that an order may be made on such terms and conditions as the court considers appropriate in the circumstances. As so described, the powers of the court are therefore very broad. These sections allow for customized judicial solutions to the variety of problems that arise in cross-border insolvencies. There is no description in the Act of the types of orders that may be sought.

(ii) Communication

[8] Section 18.6(6) states that the court may seek the assistance of a foreign court by order or written request or otherwise as the court considers appropriate. As such, the *CCAA* now provides a legislative basis for courts and counsel involved in separate jurisdictions to communicate with each other and, significantly, to choose the mode of communication. Courts are no longer required to speak to each other through their orders and reasons but may adopt other means that are more responsive to the fast pace of restructuring.

(iii) Foreign Representative

[9] Section 18.6(7) provides that a foreign representative may apply to a Canadian court. A foreign representative is defined as 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 functions under the foreign jurisdiction that are similar to those performed by a trustee in bankruptcy, liquidator or other administrator appointed by the court.

[10] It is unlikely that a debtor in possession would qualify as a foreign representative since the definition excludes the debtor itself. There is no definition of debtor in the definition section of the *CCAA* although debtor company is a defined term.

[11] A key feature of section 18.6(7) is that by making application to a Canadian court, a foreign representative is not deemed to have attorned to the jurisdiction. The application therefore does not subject the entire foreign proceeding to Canadian law and the Canadian courts, however, the Canadian court may still make an order of costs

against the foreign representative and the foreign representative may also be compelled to comply with any other order of the court as a condition of obtaining relief.

(iv) Preservation of Sovereignty

[12] All of these foregoing provisions are designed to facilitate cooperation and communication between foreign and Canadian courts. Section 18.6(5) states that the court is not required to make any order that is not in compliance with Canadian law nor need it enforce any order made by a foreign court. According to Professor Jacob S. Ziegel in his article entitled "Corporate Groups and Canada-U.S. Cross-Border Insolvencies: Contrasting Judicial Visions",[3] this provision was designed to emphasize Canada's sovereignty and was added at the request of Canadian banks who had concerns that Canadian assets held by them as security for Canadian loans would be encompassed by Chapter 11 proceedings.

[13] Section 18.6(4) provides that nothing 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 that are not inconsistent with the provisions of the *CCAA*. As will be discussed subsequently, this section has been used by Canadian courts as a basis for requests for ancillary relief in connection with a foreign proceeding.

(v) Foreign Currency

[14] The *CCAA* amendments also provide for claims for a debt payable in foreign currency. Section 18.6(8) states that foreign currency claims are to be converted to Canadian currency as of the date of the commencement of *CCAA* proceedings unless otherwise provided in the proposed compromise or arrangement.

BIA

[15] Part XIII of the *BIA* and specifically sections 267-275 govern international

[3] (2001) 35 C.B.L.J. 459, 25 C.B.R. (4th) 161.

insolvencies. In many cases, the *BIA* provisions are more specific than those in the *CCAA*[4]. There are, however, many similarities. For example, the language used in section 18.6 of the *CCAA* is repeated in the *BIA*. Sections 268(3) and (4) on the powers of the court are identical to sections 18.6(2) and (3) of the *CCAA*. Similarly, sections 268(5) and (6) of the *BIA* are identical to section 18.6(4) and (5) of the *CCAA* as are section 271(1) of the *BIA* and section 18.6(6) of the *CCAA* on communications between courts and section 275 of the *BIA* and section 18.6(8) of the *CCAA* on foreign currency. The definitions of foreign proceeding and foreign representative are also similar except that in the *BIA* the latter speaks of a trustee in bankruptcy (and not just a trustee) and also includes a receiver appointed by the court.

[16] For Part XIII of the *BIA* to apply, a debtor must have property in Canada. Part XIII does not apply if a debtor has no property in Canada even though the debtor has the status of a bankrupt under United States law: *CIBC v. ECE Group Ltd.* (2001), 23 C.B.R. (4th) 92. A certified or exemplified copy of a foreign order is, in the absence of evidence to the contrary, sufficient proof of a debtor's insolvency and of the appointment of a foreign representative. If this is tendered, a Canadian court may accept a foreign order without additional proof.

[17] The provisions in the *BIA* relating to the foreign representative contain greater detail than those set out in the *CCAA*. A foreign representative is empowered to seek relief through a variety of methods including:

- a petition (s.43), an interim receivership (s.46 – 47.2), a proposal (s. 50.1) as if the foreign representative were a creditor, trustee, liquidator or receiver of property of the debtor (s. 270).

- a stay of proceedings in Canada on terms that are similar to stays otherwise available under the *BIA* (s. 271(2)).

- authority to examine a debtor under oath in the same manner in which a bankrupt under the *BIA* may be examined (s. 271(5)).

A foreign representative is not prevented from making application by reason that proceedings by way of appeal or review have been taken in the foreign proceedings.

---

[4] In this regard, see Justice Farley's comments in *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157.

[18] Section 268(2) provides that where a foreign proceeding has been commenced and a receiving order or assignment is made under the *BIA* in respect of a debtor, the court may limit the property to which the authority of the trustee extends to the property of the debtor situated in Canada and to such property of the debtor outside Canada as the court considers can be effectively administered by the trustee. Presumably this section is designed to enhance cross-border cooperation although it should be noted that there is no power to limit the scope of a Canadian proceeding in the absence of a foreign proceeding.

[19] Section 362 of the *U.S. Bankruptcy Code* provides for a worldwide stay of proceedings against a debtor and is enforceable against Canadian creditors that do business or have assets in the U.S. No doubt reflective of the desire to maintain sovereignty, section 269 of the *BIA* provides that a stay of proceedings that operates against creditors of a debtor in a foreign proceeding does not apply in respect of creditors who reside or carry on business in Canada with respect to property in Canada unless the stay of proceedings is the result of proceedings taken in Canada. As mentioned, a foreign representative may seek a stay.

Summary

[20] It is obvious that these legislative provisions, and in particular the *CCAA*, provide considerable latitude to the presiding judge in Canada. Having said that, neither statute provides much guidance to a judge required to address cross-border insolvencies. It should also be noted that in contrast to the *CCAA*, Chapter 11 of the *U.S. Bankruptcy Code* is very detailed with specific statutory requirements.

[21] In 1994, the United Nations Commission on International Trade Law commenced work on the Model Law on Cross-Border Insolvency. The Model Law serves as a model for domestic legislation dealing with cross-border insolvencies. Its objective is to facilitate recognition of foreign insolvency proceedings and to increase international cooperation. Some of the concepts of the Model Law are incorporated into the amendments to the *CCAA* and *BIA* although the Model Law itself was not completed until May, 1997. Adoption of the Model Law has been slow and although passed by both Houses of Congress as a new Chapter 15, it still has not been enacted in the United States. In 2003, the Canadian Senate Standing Committee on Banking, Trade and

Commerce recommended adoption of the Model Law (with some conditions) in Canada. Until amendments or new legislation are passed in Canada, however, the legislative framework within which judges are to operate consists of the existing statutes and the 1997 amendments.

[22] Fortunately, as will be discussed later, Canadian judges are able to obtain some assistance from the case law that has developed in Canada in the area.

Judicial Response

a) Procedural Issues

[23] The two most significant developments with respect to procedure in cross-border insolvencies are the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") and the establishment of cross-border insolvency protocols.

(i) Guidelines

[24] In the absence of treaties and legislation, the international insolvency bar and judges who adjudicate in the insolvency area worked together to identify ways to deal with the increasing number of international insolvencies. A good deal of the progress that has been made in this area is attributable to organizations such as the International Bar Association ("IBA"), the United Nations Commission on International Trade Law (UNCITRAL), and the American Law Institute and in particular, its Transnational Insolvency Project. The focus of this Project was the harmonization and coordination of insolvency proceedings in the three NAFTA countries – Canada, the U.S. and Mexico, and it generated guidelines to be used when dealing with cross-border communications in multinational insolvency cases.

[25] The Guidelines specifically recognized the need for supervising courts to coordinate their activities, the introduction to the Guidelines stating,

> One of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their

> activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.
>
> These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

[26] The Guidelines have now been adopted by the Ontario Superior Court of Justice Commercial List for court-to-court communications between Canada and the U.S[5]. The Court's Practice Direction notes that the Guidelines are to apply only in a manner that is consistent with Ontario's *Rules of Civil Procedure* and practice. In addition, the Practice Direction notes,

> The Commercial List confirms, as noted in the Guidelines, that the Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases, and to change and evolve as experience is gained from working with them.

[27] A copy of the Guidelines as adopted by the Ontario Superior Court Commercial List is attached as an Appendix to this paper. Each of the Guidelines contains important information which should be reviewed, however, only some will be highlighted in this paper.

[28] The Guidelines provide for communications between courts directly and with authorized representatives of the respective courts. Guideline 6 specifically addresses the mode of communication between courts. Communications may take place by sending materials directly to the other court or by directing counsel or the foreign or domestic insolvency administrator to do so. It also provides that communications may take place

[5] The Guidelines have also been adopted by both the International Insolvency Institute and the Insolvency Institute of Canada.

by participating in two-way communications with the other court by telephone or video conference call or other electronic means. Guideline 7 addresses participation by counsel, notice, recording and transcriptions.

[29] Guideline 9 deals with the conduct of joint hearings and amongst other things, the ability of the courts to communicate in advance to address procedural, administrative or preliminary matters relating to the joint hearing. It also covers communications after the hearing for the purpose of determining whether coordinated orders could be made by both courts. Unless otherwise directed by either of the two courts, the communication between the courts should be recorded and may be transcribed.

[30] The Guidelines also address such matters as proof of statutes and orders and the establishment of a service list that may extend to non-resident parties. Guideline 17 again addresses the issue of jurisdiction stating,

> Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

[31] Prior to their adoption by the Commercial List of the Ontario Supreme Court of Justice, the Guidelines had been approved in *Re Matlack Systems Inc.* (2001), 26 C.B.R. (4th) 45. In that case, Justice Farley approved the Guidelines but on the basis that they would not be effective until approved by the U.S. Bankruptcy Court in Delaware which they subsequently were. This ensured that the Guidelines were approved by both courts in tandem. The Guidelines were also adopted in *Re PSI Net Ltd.* (2001), 28 C.B.R. (4th) 95 and *Systech Retail Systems Corp.*, [2003] O.J. No. 451, a decision of Justice Ground of the Ontario Superior Court dated January 20, 2003.

(ii) Protocols

[32] The other significant procedural development relates to the evolution and establishment of protocols. Typically these have arisen in cases where debtors have filed

concurrently in Canada under the *CCAA* or the *BIA* and in the U.S. under Chapter 11 of the *U.S. Bankruptcy Code*.

[33] The idea of a protocol was first developed in *Re Maxwell Communication Corporation plc,* [1992] B.C.L.C. 465. In that case, Maxwell petitioned in the U.K. for an administration order pursuant to the 1986 *Insolvency Act* and, given that 80% of the value of its assets was located in the U.S., it also filed for reorganization pursuant to Chapter 11 of the *U.S. Bankruptcy Code*. In the U.K., administrators were appointed by the U.K. Court and in the U.S., an examiner was appointed by the U.S. Court. Needless to say, conflicts arose. In order to avoid further problems, a protocol or joint agreement was established by the administrators and the examiner, which was approved by both courts. Rather than raising jurisdictional impediments, both courts endorsed the approach. In approving the protocol, Justice Hoffmann of the High Court in the U.K. acknowledged that "proceedings under the Federal Bankruptcy Code may offer a better prospect of arrangements under which at any rate that part of the undertaking which is situated in the United States can survive than might be the case under the bankruptcy laws of this country".[6] Justice Brozman of the U.S. Bankruptcy Court of the Southern District of New York approved the protocol and noted the "desire by this Court, the High Court [in England], the Examiner, the Joint Administrators and the Debtor to (i) harmonize the within proceedings with the Administration, and (ii) to facilitate a rehabilitation and reorganization of the debtor"[7]. Amongst other things, the approval order provided that the examiner and joint administrators were to,

> (a) investigate the assets, liabilities and financial condition of the debtor, the operation of the debtor's business and the desirability of continuance of such business and any other matter relevant to the case or to the formulation of a plan of reorganization;
>
> (b) facilitate the full and cooperative exchange of information with each other;
>
> (c) act to harmonize, for the benefit of all of the debtor's creditors and stockholders and other parties in interest, the debtor's United States Chapter 11 case and the administration so as to maximize the debtor's prospects of rehabilitation and reorganization;

---

[6] L.J. Crozier, "Using 'Maxwell Orders' in Aid of Transborder Reorganizations" 16 C.B.R. (3d) 86 at 88.
[7] *Ibid* at 89.

(d) canvas, determine and identify the issues and impediments that must be resolved to facilitate a reorganization of the debtor;

(e) mediate any differences in respect of the positions of the various parties in interest vis-à-vis any issues and impediments identified or arising with respect to a plan or reorganization;

(f) promote a consensus among all parties in interest so that a consensual plan of reorganization may be proposed, confirmed and consummated consistent with the Bankruptcy Code; and

(g) act as a facilitator in respect of all of the foregoing matters.

[34] The protocol also provided that nothing was to be construed to affect, diminish or increase in any way the jurisdiction provided to each of the courts nor would it require the joint administrators to do anything or refrain from doing anything which would or would be likely to result in their being in breach of any duty imposed on them by any applicable law.

[35] The first protocol in Canada was established by Justice Blair (as he then was) of the Ontario Superior Court in *Re Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165. In that case, Judge James L. Garrity of the U.S. Bankruptcy Court of the Southern District of New York appointed an examiner to conduct negotiations amongst members of the O & Y group of companies to develop a protocol to, amongst other things, harmonize matters arising in the Canadian *CCAA* proceedings and the U.S. Chapter 11 proceedings. Cyrus Vance was chosen and a protocol was negotiated. The protocol covered corporate governance issues relating to corporations that held assets directly or indirectly in real estate located in the U.S. It was approved by Judge Garrity and then came before Justice Blair for approval. As a starting point Justice Blair noted,

> The Olympia & York re-organization involves proceedings in three different jurisdictions: Canada, the United States, and the United Kingdom. Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts – sometimes substantive, sometimes procedural – between the jurisdictions. The Courts of the various jurisdictions should seek to co-operate amongst themselves, in my view, in facilitating the

> trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international co-operation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.[8]

[36] In approving the protocol, he relied on principles of international comity between nations and the Court's inherent jurisdiction. In this regard, he relied on the comments of Justice B.D. MacDonald of the B.C. Supreme Court in *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88:

> Proceedings under the *CCAA* are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.[9]

[37] Justice Blair had concerns with respect to two provisions in the protocol and approved the contents subject to those reservations. Both related to the jurisdiction of the Ontario Court. On the issue of certain immunity to be given to directors and officers, the protocol stated that the Ontario Court "shall, on grounds of comity, defer to the decision" of the U.S. Bankruptcy Court. Justice Blair held that while the Canadian court would likely be inclined to defer to the jurisdiction and decision of the U.S. Bankruptcy Court, he did not have the jurisdiction to bind the Ontario Court to an ouster of its jurisdiction in the future. His second reservation dealt with the language in the protocol that stated that the courts "shall consult with and defer to" the U.S. Bankruptcy Court in certain circumstances. The purpose of the subject provision was to require matters involving U.S. law, assets, and creditors to be determined by the U.S. Court. The decision would then be applied in Ontario. There was a reciprocal provision for the Ontario Court. Justice Blair had no problem with the concept behind the provision.

> I am satisfied the concept makes sense in this context, even though it may involve "farming out" a portion of the Court's decision making functions to another Court and the application of that other Court's decision within this Court's proceedings. In essence, all that will be happening under the proposed scheme, is that the "foreign law" question – normally determined in the domestic forum on the basis

---

[8] *Re Olympia & York Developments Ltd.*, at 167.
[9] *Re Westar Mining Ltd.* at 93.

> of evidence regarding the foreign law – will be determined by the foreign court which is familiar with that law. In the context of the kind of international trans-border insolvencies such as this O & Y reorganization, I see nothing wrong in principle with that process, for the reasons articulated earlier.[10]

He was not satisfied with the mechanism proposed, however.

> The concept of this court and the U.S. Bankruptcy Court "consulting" with each other raises awkward and difficult questions. It is not an exercise which is generally undertaken.[11]

[38] It should be noted that this decision predated the 1997 *CCAA* amendments. As will be obvious from a discussion of subsequent cases, since *Olympia & York Developments Ltd.*, there has been considerable evolution in the area of court-to-court communications.

[39] In 1996, the IBA adopted a Cross-Border Insolvency Concordat which immediately became the basis for subsequent protocols. By way of example, In *Re Everfresh Beverages Inc.* [1996] O.J. No. 105, a protocol was approved by Justice Farley of the Ontario Superior Court and Chief Judge Burton R. Lifland of the U.S. Bankruptcy Court of New York. This protocol addressed procedures for the administration and sale of assets, the distribution of proceeds of sale, the classification of claims, and the development of a plan of reorganization and a proposal in the Chapter 11 and Canadian proceedings respectively. In the unreported 1998 case of *Re Solv-X Corporation*, a protocol was developed between the Alberta Court of Queen's Bench and the U.S. Bankruptcy Court for New Mexico. A joint hearing was also held in this case.

[40] Each case of course is different from the next and protocols are designed to address the features of a particular case. In this respect, each protocol is "custom made".

[41] While protocols are not identical, certain provisions are commonplace. Typically they commence with a description of the history of the two proceedings followed by a statement of the objectives of the protocol. The body of the protocol addresses the coordination of the administration of both proceedings. This may encompass coordination of court hearings, procedures for the financing and sale of assets, recoveries,

---

[10] *Supra*, note 8 at 70.
[11] *Ibid* at 169.

claims filing procedures and the sanctioning of a plan in both jurisdictions. The Guidelines with any necessary modifications may also be incorporated into the protocol. Protocols also usually contain statements designed to preserve the independence of the respective courts. The protocols are generally stated to be effective upon approval by each of the courts involved.

[42] Proposed protocols are included as part of the initial *CCAA* order or concluded shortly thereafter.

[43] An example of a protocol that was used in the Livent Inc. proceedings is attached as Appendix B. Noteworthy paragraphs include paragraph 10 which addresses the governing law for claims. The U.S. Court would have jurisdiction over claims governed principally by the laws of the U.S. and the Canadian Court would have jurisdiction over claims governed principally by the laws of Canada. Paragraph 11 in a somewhat similar fashion addresses the subject of executory contracts and leases. Paragraph 17 reflects one of the principal objectives of joint proceedings, namely a joint or common plan. Paragraph 6 addresses joint hearings and subparagraphs (d) and (e) permits consultation between the judges without counsel present and without a recording or transcript. One of the obvious objectives behind these subparagraphs is the desire to avoid inconsistent rulings.

b) **Evolution of the Law**

[44] As is evident from the foregoing, substantial progress has been made by Canadian and American courts in the development of procedures to address cross-border insolvencies. There has also been a marked evolution in the case law dealing with substantive legal issues.

Ancillary Orders

[45] U.S. recognition of Canadian proceedings and requests for relief under s. 304 of the *U.S. Bankruptcy Code* are beyond the purview of this paper. That said, in "*Cooperation and Coordination in Cross-Border Insolvency Cases*", Justice Farley, Bruce Leonard and John Birch write,

> The U.S. courts in these cases have usually considered these applications to be non-controversial and injunctions have been routinely granted to restrain U.S.-based creditors from pursuing their remedies against the debtors' U.S.-based assets. Ancillary orders have been granted by the U.S. bankruptcy courts in recent years in aid of several important Canadian reorganizations including: *Canada 3000 Inc.* (Case 01-43656 (KM), C.D. Calif., November 9, 2001), *Air Canada* (Case No. 03-11971 (PCB), S.D.N.Y., April 3, 2003), *Ivaco Inc.* (Case No. 03-65608-R, E.D. Mich., September 17, 2003), *Re Canadian Airlines International Limited* (Bankr. Hawaii: March 2000), *Re Euro United Corporation* (Bankr. W.D.N.Y., January 2000), and, most recently, *Stelco Inc.* (Case Nos. 42402, 42404, and 42403, E.D. Mich., January 29, 2004).[12]

[46] The corollary of U.S. recognition of and assistance with Canadian proceedings is Canadian recognition of and assistance with U.S. proceedings. The historical approach to this issue was summarized by Bruce Leonard in his article entitled *Multijurisdictional Insolvencies and Reorganizations,*[13]

> Typically, Canadian courts in early cases dealt with foreign insolvency-related proceedings only to the extent that they were called upon to recognize bankruptcy and insolvency-related judgments concerning the vesting of property in the insolvency administrators appointed in a foreign proceeding ...
>
> Traditionally the recognition of foreign insolvency proceedings by Canadian courts focused on whether or not the foreign court had jurisdiction over the debtor in the international conflict of laws sense of the term. Under Canadian conflict of laws rules it has been generally understood that a foreign court has jurisdiction over a debtor where the debtor was either resident in the jurisdiction at the time the insolvency proceedings were initiated or had submitted to the foreign jurisdiction through some act on its part.

[47] With the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye,* [1993] S.C.R. 1077, courts in the insolvency arena began to adopt a new approach to recognition of foreign proceedings.

[48] In 1996, in *Microbiz Corp v. Classic Software Systems Inc.* (1996), 45 C.B.R. (3d) 40, Justice Lederman dealt with a request by a U.S. corporation for recognition of a judgment of the U.S. Bankruptcy Court in New Jersey and a stay of proceedings in

---

[12] Justice J.M. Farley et al, "Cooperation and Coordination in Cross-Border Insolvency Cases", (First Annual Insolvency Review Conference, Vancouver, B.C., February 6, 2004), at 16.
[13] *Supra* note 1 at 51.

Ontario. The applicant, Microbiz, a New Jersey corporation, carried on business in the U.S. It had no assets in Ontario and carried on business in Ontario through its distributor. Microbiz filed for bankruptcy and its plan of reorganization was approved by the U.S. Court. Plaintiffs in separate actions against Microbiz in Ontario had filed proofs of claim in the U.S. proceedings.

[49] Justice Lederman applied the principles set out in *Morguard Investments Ltd. v. De Savoye* (1990), 46 C.P.C. 1 (S.C.C.) and *United States v. Ivey* (1996), 27 B.L.R. (2d) 243 (Ont. C.A.) in holding that the U.S. bankruptcy judgment should be recognized in Ontario as there was a real and substantial connection between the judgment and the subject matter of the proceeding. Significantly, the two plaintiffs had also filed proofs of claim in the U.S. bankruptcy proceedings and therefore had attorned to the jurisdiction of the U.S. Bankruptcy Court in New Jersey. In addition, a multiplicity of proceedings was to be avoided. He accordingly stayed the plaintiffs' actions in Ontario.

[50] In *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta. Q.B.), Justice Forsyth had occasion to address the issue of recognition of proceedings of the U.S. Bankruptcy Court for the Eastern District of Michigan, Northern Division in Alberta and a stay of proceedings. He too referred to *Morguard.* The case involved a claim by a woman and her husband against Dow Corning Corporation ("DCC"). The claim arose from silicone gel breast implants manufactured by DCC. DCC had sought bankruptcy protection in the U.S. and an automatic stay of proceedings which purported to be extra-territorial was therefore imposed. The plaintiffs had filed proofs of claim in the U.S. bankruptcy proceedings along with approximately 700,000 others. The plan filed by DCC proposed settlement payments for foreign claimants such as the plaintiffs that were less than those offered to U.S. claimants. DCC applied for a stay of the plaintiffs' claims in Alberta.

[51] Justice Forsyth noted that of course he was not bound by the stay imposed by the *U.S. Bankruptcy Code.* Applying *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897, he had to determine whether there was a forum other than the domestic forum of Alberta that was "clearly more appropriate." He stated that,

> Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty.[14]

[52] He noted that the *U.S. Bankruptcy Code* and Canada's bankruptcy legislation had a similar underlying philosophy, namely a fair distribution of assets amongst all creditors. In addition if all matters were stayed, there was a better chance of a successful restructuring. Furthermore, in this case, the plaintiffs had attorned to the jurisdiction of the U.S. Bankruptcy Court by filing a proof of claim. Importantly, however, Justice Forsyth found that even if there had 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 U.S. Bankruptcy Court.[15]

Accordingly, he granted the application for a stay.

[53] In contrast, in *Re Singer Sewing Machine Co. of Canada Ltd.* (2000), 18 C.B.R. (4th) 127 (Alta. Q.B.), Registrar Funduk declined to recognize and enforce an order of a U.S. Bankruptcy Court. In that case, Singer Company, N.V. ("Singer") was the parent of numerous foreign companies including Singer Sewing Machine Company of Canada Limited ("Singer Canada"). Singer owned all the shares in Singer Canada. Singer obtained an order pursuant to Chapter 11 that extended to Singer Canada. The latter only carried on business in Canada and only had assets in Canada. Certain Canadian plaintiffs had obtained judgment against Singer Canada but had not attorned to the jurisdiction of the U.S. Bankruptcy Court. The foreign representative of Singer appointed by the U.S. Bankruptcy Court brought an application for recognition of the U.S. order which included a stay of proceedings against Singer Canada. In declining the request, Registrar Funduk questioned the real and substantial connection between Singer Canada and the U.S. Bankruptcy court order. He stated:

> Comity does not require me to recognize a Chapter 11 order over a Canadian company carrying on business only in Canada and whose

---

[14] *Roberts v. Picture Butte Municipal Hospital* at para. 20.
[15] *Ibid* at para. 31.

> assets are all in Canada. Who the shareholders are is irrelevant and who the creditors are is irrelevant. Under Alberta law neither gives an American bankruptcy court jurisdiction over Singer Canada.[16]

[54] The next significant decision in the evolution of cross-border insolvency case law and ancillary orders was *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157, a decision of Justice Farley. In this case Justice Farley addressed the *CCAA* amendments in some detail. BW Canada, a solvent company, applied for an interim order pursuant to section 18.6 of the *CCAA* that Chapter 11 proceedings commenced by BW Canada's U.S. parent, the Babcock & Wilcox Company ("BW"), and other U.S. related corporations be recognized as a foreign proceeding, that BW Canada be entitled to avail itself of the provisions of section 18.6, and that there be a stay of certain proceedings against BW Canada. In addition, BW Canada asked for authorization to guarantee obligations of the parent company to the debtor in possession lender and to grant security to the lender. Although BW Canada was not a party to the Chapter 11 proceedings, the US Bankruptcy Court judge in New Orleans noted that BW Canada might be subject to similar mass claims in Canada. He granted a restraining order against the plaintiffs and potential plaintiffs in actions or pending actions against companies that included BW Canada and requested the assistance of Canadian courts in carrying out the order. BW was not insolvent and he made the order pursuant to provisions in the *U.S. Bankruptcy Code* that permitted applicants to seek protection from mass tort claims without having to be insolvent. In essence, a plan of reorganization would be designed to avoid insolvency in a mass tort claim situation.

[55] For the Chapter 11 proceeding to qualify as a foreign proceeding under section 18.6 of the *CCAA*, it had to be in respect of a debtor. Justice Farley observed that while a debtor under the *BIA* must be insolvent, the *CCAA* contained no such requirement.

> I think it a fair observation that the *BIA* is a rather defined code which goes into extensive detail. This should be contrasted with the *CCAA* which is a very short general statute which has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation circumstances. A general categorization (which of course is never completely accurate) is that the *BIA* might

[16] *Re Singer Sewing Machine Co. of Canada Ltd.* at p. 133. This decision has been met both with applause (see Prof. Ziegel, *supra* note 3) and criticism (see Justice Farley et al, *supra,* note 12).

> be seen as being used for more run of the mill cases whereas the *CCAA* may be seen as facilitating the more unique or complicated cases. Certainly the *CCAA* provides the flexibility to deal with the thornier questions. Thus I do not think it unusual that the draftees of the 1997 Amendments would have it in their minds that the provisions of the *CCAA* dealing with foreign proceedings should continue to reflect this broader and more flexible approach in keeping with the general provisions of the *CCAA*, in contrast with the corresponding provisions under the *BIA*. In particular, it would appear to me to be a reasonably plain reading interpretation of s. 18.6 that recourse may be had to s. 18.6 of the *CCAA* in the case of a solvent debtor. Thus I would conclude that the aspect of insolvency is not a condition precedent vis-à-vis the "debtor" in the foreign proceedings (here the Chapter 11 proceedings) for the proceedings in Louisiana to be a foreign proceeding under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as "foreign proceedings" for the purposes of s. 18.6 of the *CCAA*.[17]

[56] In permitting BW Canada, a solvent corporation, to seek assistance and protection, Justice Farley relied on s. 18.6(4) which contemplates that "any other interested person" can request ancillary relief and on the broad powers contained in s. 18.6(3).

> This subsection reinforces the view expressed previously that the 1997 amendments contemplated that it would be inappropriate to pigeonhole or otherwise constrain the interpretation of s. 18.6 since it would be not only impracticable but also impossible to contemplate the myriad of circumstances arising under a wide variety of foreign legislation which deal generally and essentially with bankruptcy and insolvency but not exclusively so. Thus, the Court was entrusted to exercise its discretion, but of course in a judicial manner.
>
> Even aside from that, I note that the Courts of this country have utilized inherent jurisdiction to fill in any gaps in the legislation and to promote the objectives of the *CCAA*.[18]

[57] He drew a distinction between s. 18.6(2) which dealt with concurrent proceedings which did require a debtor company to be insolvent and s. 18.6(4) which did not contemplate a full filing under the *CCAA* but which could be used for ancillary relief in

---

[17] *Re Babcock & Wilcox Canada Ltd.* at 165. In his article entitled "Corporate Groups and Canada-US Cross-Border Insolvencies: Contrasting Judicial Visions" supra note 3, Professor Ziegel states that there is nothing in the drafting history of Part XIII of the *BIA* and s. 18.6 of the *CCAA* that supports this distinction.
[18] *Ibid* at 166.

connection with a foreign proceeding. BW Canada was not insolvent and did not seek to compromise its creditors. As such it did not apply pursuant to section 18.6(2) of the *CCAA* and the conditions of a full *CCAA* order were inapplicable. Accordingly, Justice Farley granted the relief requested by BW Canada. The order included a "comeback" clause authorizing interested persons to apply to court to vary or rescind the order. No one did so. Prior to this decision, stays under the *CCAA* had only applied to proceedings against insolvent companies.[19]

[58] Although *Babcock* dealt with ancillary proceedings, Justice Farley also advanced the following guidelines on how section 18.6 as a whole should be applied, noting that the factors listed were not exhaustive.

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

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

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

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

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

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

[19] D.E. Baird "An Insolvency Law Update" (2001) 18 Nat'l Insol Rev No. 3, 1 at 7.

(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;
(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;
(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

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

(g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.[20]

[59] The decision generated much commentary, some positive and some negative. In his article, "Corporate Groups and Canada-US Cross-Border Insolvencies: Contrasting Judicial Visions"[21], Professor Ziegel argued that the decision was inconsistent with the provenance of s. 18.6(4) and the intention of the drafters of the legislation. He also suggested that the decision raised constitutional issues and questioned the precedents relied upon by the Court. Further, he noted that in Australia, the Australian Court refused Dow Corning U.S.'s request to stay an action in comparable circumstances: *Taylor v. Dow Corning Australia Pty Ltd.* (*Dec.* 19, 1997), Dec. 4438 190; BC 9707095 (Victoria). In contrast, in *"A Roadmap for Future Foreign Insolvency Proceedings"* the authors, D. Tay, O. Pasparakis and S. Flynn wrote,

> In *Re Babcock & Wilcox Canada Ltd.*, the Court provides a road map for future international *CCAA* filings. In particular, the Court espoused principles which are sensitive to the practical realities of international restructurings yet still protect the procedural and substantive rights of stakeholders. As well, in this circumstance, the Canadian Court demonstrated a willingness to play an ancillary role where it was appropriate. Future cross-border restructuring

[20] *Re Babcock & Wilcox Canada Ltd.* at 167-168.
[21] Supra note 3.

> efforts will benefit from this practical, common sense approach to what could otherwise be sticky jurisdictional issues.[22]

[60] In *Re Matlack Inc.* (2001), 26 C.B.R. (4th) 45, in addition to approving the ALI Project's Guidelines, Justice Farley followed *Babcock.* He wrote that where a cross-border insolvency proceeding is most closely connected to one jurisdiction, it was appropriate for the court in that jurisdiction to exercise principal control over the process. This was in light of principles of comity and so as to avoid a multiplicity of proceedings. Accordingly, he recognized Chapter 11 proceedings and stayed proceedings against Matlack Inc., a Pennsylvania corporation with a substantial Canadian business.

> "It is in the interests of all creditors and stakeholders of Matlack that its reorganization proceed in a coordinated and integrated fashion. The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, *wherever they are located.* Harmonization of proceedings in the US and in Canada will create the most stable conditions under which a successful reorganization can be achieved and will allow for judicial supervision of all of Matlack's assets and enterprise throughout the two jurisdictions."[23]

[61] Justice Farley stated that in an increasingly commercially integrated world, countries could not live in isolation and refuse to recognize foreign judgments and orders. Recognition should depend on whether there was a real and substantial connection between the matter and the jurisdiction and that determination should be based on considerations of order, predictability and fairness, not on a mechanical analysis of connections[24].

[62] Although in a different context, the Supreme Court of Canada has also had occasion recently to address the issue of recognition of foreign bankruptcy proceedings. In *Holt Cargo Systems Inc. v. ABC Containerline N.V.* (Trustees of) [2001] 3 S.C.R. 907, (2002), 30 C.B.R. (4th) 6, the Supreme Court upheld a Federal Court of Canada order refusing a stay in the face of Belgian bankruptcy proceedings. In that case, relying on maritime law, an American creditor brought an in rem action in the Federal Court against

---

[22] *(2000), 18 C.B.R. (4th) 175* at 179.
[23] *Re Matlack Inc.* at 47.
[24] Since then, in *Beals v. Saldanha* [2003] S.C.J. No. 77 (S.C.C.) Justice Major has described the real and substantial connection as being with either the subject matter of the action or the defendant.

a Belgian ship for unpaid fees. The ship was arrested pursuant to an order of the Federal Court. One week later, the owner of the ship made an assignment into bankruptcy in Belgium. The Quebec Superior Court exercising its bankruptcy jurisdiction recognized the Belgium bankruptcy order. Meanwhile the ship was sold and the Federal Court awarded the proceeds of sale to the American creditor, amongst others. The trustees in bankruptcy requested a stay of proceedings from the Federal Court. The stay was refused and the case made its way to the Supreme Court of Canada which upheld the decision. While the 1997 *BIA* amendments had no direct application in that the facts of the case had arisen prior to 1997, Justice Binnie writing for the full court in 2001 made a number of general observations that are relevant to the issue of recognition of foreign bankruptcy proceedings:

> . . . a Canadian bankruptcy court has a responsibility to consider the interests of the litigants before it and other affected parties in this country as well as the desirability of international cooperation and other relevant circumstances. Its function is not simply to rubber stamp commands issuing from the foreign court of the primary bankruptcy. Thus the exigencies of international cooperation were significant to both the Federal Court and the Canadian bankruptcy court, but they were not a factor that necessarily trumped all other factors.
>
> . . . the Canadian bankruptcy court derives its authority from Canadian law. When called upon to lend assistance to foreign bankruptcy courts, Canadian law requires our courts to consider as *one* of the relevant circumstances the juridical advantage which those disadvantaged by deferral to the foreign court would enjoy in a Canadian court.[25]

[63] The Supreme Court rejected the "universalist" approach advocated by the trustees. The essence of the universalist approach was that there ought to be a primary bankruptcy proceeding; title to assets locally situated should be vested in the foreign representative of the bankrupt estate; creditors should not be permitted to realize on a foreign debtor's assets in a local court outside the framework of the primary bankruptcy; and orders made in foreign bankruptcy proceedings should be recognized and enforced elsewhere. The preferred approach was the plurality approach. Justice Binnie wrote that this approach recognized that different jurisdictions may have a legitimate and concurrent interest in the

[25] *Holt Cargo Systems v. ABC Containerline N.V.* at 23.

conduct of an international bankruptcy, and that the interests asserted in Canadian courts may, but not necessarily must, be subordinated in a particular case to a foreign bankruptcy regime. "The general approach reflects a desire for coordination rather than subordination, with deference being accorded only after due consideration of all the relevant circumstances rather than automatically accorded because of an abstract "universalist" principle."[26] International coordination, he wrote, was an important factor but it was not necessarily a controlling factor.

> Where a stay is sought of Canadian proceedings in deference to a foreign bankruptcy court, the Canadian court before which the stay application is made (in this case the Federal Court) ought to be mindful of the difficulties confronting the bankruptcy trustees in the fulfillment of their public mandate to bring order out of financial disorder and the desirability of maximizing the size of the bankrupt estate. These objectives are furthered by minimizing the multiplicity of proceedings, and the attendant costs, and the possibility of inconsistent decisions in relation to the same claims or assets.
>
> Nevertheless, courts must have regard to the need to do justice to the particular litigants who come before them as well as to the public interest in the efficient administration of bankrupt estates. It would be inappropriate to elevate any one consideration to a controlling position in the exercise of a bankruptcy court's discretion to dismiss a petition under s. 43(7) *or* to stay proceedings under Part XIII of the Act *or* in the Federal Court's decision to stay proceedings under s. 50 of the *Federal Court Act*. Discretion should not be thus predetermined. The desirability of international coordination is an important consideration. The courts nevertheless have to exercise their discretion to stay or not to stay domestic proceedings according to all of the relevant facts of a particular case.[27]

[64] As with the other decisions on recognition of foreign bankruptcy proceedings, this case has also received some criticism:

> There is hope that this decision will be taken as an oddity, based on highly specific and unusual facts, and that it will not reverse the constructive cooperation that Canadian courts have consistently

---

[26] *Ibid*, at 34.
[27] *Ibid*, at 35.

> shown to foreign courts in cross-border insolvencies for many years.[28]

Here again, the commentary and the case law emphasize the need to attempt to balance the demands of the global marketplace for cooperation and the independent jurisdiction of Canadian courts.

Concurrent Proceedings

[65] The approach of the courts to concurrent proceedings has also evolved as is evident from the case law. *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 involved the restructuring of Philip Services Corp., the parent company of approximately 200 subsidiaries in Canada, the U.S. and elsewhere. Philip was an Ontario corporation but 82% of its shares were owned by U.S. residents. Most of the trading in the company's shares occurred on the New York Stock Exchange. The majority of its operating assets and operations were in the U.S.

[66] Philip and its U.S. subsidiaries filed for Chapter 11 protection in Delaware and Philip and its Canadian subsidiaries applied for protection under the *CCAA* in Ontario. Public offerings in both the U.S. and Canada had resulted in class actions in both countries and Philip's co-defendants in those actions had claimed over against Philip. Subject to court approval, the class actions were settled but not the claims of the co-defendants against Philip.

[67] A Canadian and a U.S. Plan were prepared by the debtors. From a "business point of view" the Plans were viewed by Philip as interdependent and, in essence, as a single Plan. The general concept was that each class of stakeholders with similar characteristics was to be treated similarly whether it was located in the U.S. or Canada. Only creditors with claims against the Canadian subsidiaries were to file their claims in Canada. Claims against Philip and the U.S. subsidiaries were to be dealt with in the US Plan. This included the co-defendants in the class action in Canada. It also included Canadian creditors such as Royal Bank, which held equipment leases pursuant to lease agreements governed by the laws of Ontario. With one exception, the equipment was all

[28] Justice J.M. Farley, et al, *supra*, note 12 at p. 15.

located in Ontario. Under U.S. bankruptcy law, Philip could reject the leases which it was not entitled to do under Ontario law.

[68] Philip and the Canadian class action plaintiff sought certification of the Canadian class action and approval of the settlement and Philip also moved pursuant to the *CCAA* for authorization to enter into the settlement. Amongst other things, the co-defendants requested declaratory relief to the effect that the Canadian Plan was not fair and reasonable and that it should be amended so that their claims could be addressed as part of the Canadian plan. The co-defendants objected as they would have to be dealt with in the U.S. where they would be treated less advantageously. Philip was of the view that a successful restructuring was not possible without the implementation of the settlement. The court appointed monitor also recommended the settlement.

[69] Justice Blair stated that the fact that a Canadian creditor's rights were to be dealt with by single or parallel insolvency proceedings in the U.S. Bankruptcy Court was not, in itself, sufficient to undermine the fairness and reasonableness of a proposed Plan.

> In Canadian insolvency proceedings under the *CCAA*, however, it is the right to vote on the compromise or arrangement which the debtor company proposes to make with them which is the central counterpart, on the part of the creditors, to the debtor's right to attempt to make that compromise or arrangement. In my view, having chosen to initiate and take advantage of the *CCAA* proceedings, Philip cannot now evade the implications and statutory requirements of those proceedings by seeking to carve out certain pesky – and potentially large – contingent claimants, and to require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan. All of this without the right to vote on the proposal.[29]

[70] Justice Blair also relied on the provisions of the Philip protocol in support of his position. The effect of the protocol was "to provide some protection to claimants on either side of the border from being swept into the rigours of the other countries' regimes where to do so might prevent them from asserting their substantive rights under the applicable laws of their own jurisdiction."[30] In this regard he referred to the provisions in

[29] *Menegon v. Philip Services Corp.* at 276.
[30] *Ibid,* at 279.

the protocol that stated that the jurisdiction of the two courts was not diminished by the protocol; that the Canadian court had sole jurisdiction over the conduct and hearing of the Canadian proceedings; that the protocol did not preclude creditors, or other interested parties from asserting their substantive rights under the applicable laws of the US, Canada or any other jurisdiction; and that the protocol did not prejudice or affect the powers, rights, claims and defences of amongst others, creditors under any applicable law including the *CCAA*.

> The extension of comity as between Courts in cross-border insolvency situations, and co-operation generally in such matters, are matters of great importance, to be sure, in order to facilitate the successful and orderly implementation of insolvency arrangements in such circumstances. Nothing I have said in these Reasons is intended to counter that ethic. However, comity and international co-operation do not mean that one Court must cede its authority and jurisdiction over its own process or over the application of the substantive laws of its own jurisdiction, whenever any kind of differences between the two jurisdictions may arise. Both the Protocol and the provisions of subsection 18.6(2) of the *CCAA* – which gives this Court authority "to make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of proceedings under [the *CCAA*] with any foreign proceeding" – confirm this. Subsection 18.6(5) of the *CCAA* provides that "nothing in this section requires the Court to make any order that is *not in compliance with the laws of Canada* or to enforce any order made by a foreign court" (emphasis added).[31]

[71] Justice Blair concluded that the Canadian Plan was flawed because it sought to exclude Canadian claimants from participation in its process by providing that their claims against Philip itself were to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without affording those claimants any right to vote. He also concluded that while Philip had a real and substantial connection with the U.S., it also had one with Ontario. This connection together with its array of Canadian creditors sustained its resort to the *CCAA*.

[72] Justice Blair therefore declared that the Canadian Plan failed to comply with the *CCAA*. He also held that Royal Bank's claim under its leases was to be determined with

---

[31] *Ibid*, at 280.

reference to Canadian law and in the *CCAA* proceeding and not as part of the U.S. Plan. He reached these conclusions in the face of "the cry of doom" from the lenders, the oft-heard threat that if the reorganization were not completed quickly, they might simply abandon the process and enforce their security. To this argument, he responded,

> I am very aware of the need for timeliness in situations such as these – particularly given the sensitive nature of Consolidated Philip's service oriented business. However, I do not think that the need for a timely resolution alone is justification for depriving claimants of their substantive rights under Canadian law, and for abrogating their right to vote which lies at the very heart of the Canadian restructuring process from the creditor's perspective. It is the tool which gives them ultimate leverage in the bargaining process, and without it their practical rights – as well as their substantive and procedural ones – are greatly diminished.[32]

[73] While the ratio of the decision was that creditors could not be bound by a *CCAA* compromise without having had the opportunity to vote on it, some of the foregoing passages caused concern amongst some practitioners.

> Indeed, concerns have been raised with the authors by a number of U.S. lawyers as to whether Philip stands for the proposition that a Canadian court will never recognize a Chapter 11 compromise during parallel proceedings, if such a compromise involved a different scheme of priorities that would have been applied by the Canadian court. If that really is the effect of Philip, there would be little hope for the future of cross-border insolvency proceedings since, almost without exception, any cross-border insolvency would involve conflicting priority regimes[33].

As is evident from subsequent case law, these concerns did not materialize.

[74] In *Re Loewen Group Inc.* (2001), 32 C.B.R. (4th) 54, Justice Farley again had occasion to comment on s. 18.6 of the *CCAA* this time in the context of the scope of shareholders' rights under provincial corporate statutes. The case involved concurrent proceedings. Pursuant to s. 18.6(2) Justice Farley had ordered that the U.S. proceedings were the appropriate forum for the adjudication of claims against Loewen, recognized the

---

[32] *Ibid*, at 281

[33] D.C. Tay & A.B. Merskey "Reports of Their Demise Have been Greatly Exaggerated: Cross-Border Insolvencies after *Menegon v. Philip Services Corp.*" 13 C.B.R. (4th) 168.

jurisdiction of the U.S. court to determine and compromise the interests of claimants against Loewen including shareholders and creditors, and relieved Loewen and its Canadian subsidiaries from any obligation to file a plan under the *CCAA*. The creditors of Loewen voted in support of the U.S. Plan and Loewen applied to the Ontario Superior Court for recognition of the Plan, a confirmation order, and for a vesting order.

[75] The U.S. Plan provided for the transfer of all its assets to a new company the result of which was that the current shareholders of Loewen would be left holding shares in a company with no assets[34]. Having said that, given that Loewen was insolvent, the shareholders had no economic interest to protect. The *BC Company Act* precluded the directors from disposing of all or substantially all of the corporation's assets absent shareholder approval. The U.S. Plan did not include any shareholder approval process.

[76] Justice Farley held that the provincial legislation was inapplicable. Amongst other things, an arrangement between a bankrupt or insolvent corporation and its directors fell within the exclusive jurisdiction of Parliament and the doctrine of paramountcy prevailed.

[77] In *Re Laidlaw* (2003), 39 C.B.R. (4th) 239, Justice Farley dealt with the issue of a single claims process. In that case, the debtors, the Laidlaw group of companies, had commenced proceedings under Chapter 11 of the *U.S. Bankruptcy Code* and the *CCAA*. In the years preceding the filings, the U.S. based operations had generated more than 90% of the Laidlaw group's revenue on a consolidated basis. The Ontario Superior Court had recognized the U.S. proceedings as foreign proceedings for the purposes of the *CCAA* and granted a stay. The Ontario court and the U.S. court approved a cross-border insolvency protocol to assist in coordinating activities in the Canadian and U.S. proceedings.

[78] Justice Farley recognized and approved a single claims process that would bind all creditors wherever located of the debtors. This process had been approved by the U.S. court beforehand. Notice of the claims process was published in both Canadian and American newspapers, posted on the debtors' website, and sent to known creditors in the

[34] A major difference between the Canadian and US systems is the unfortunately described "cram down" right that exists in the U.S. In the U.S, the court may approve a plan that has not been approved by an affected class if the plan is in the best interests of the estate generally. As such, a class that has no real economic stake in a company, such as shareholders of an insolvent company, may be ignored for both voting and distribution purposes.

U.S., Canada and elsewhere. In a subsequent order, amongst other things, he declared that the U.S. had jurisdiction to compromise claims against the debtors, relieved the debtors from any obligation to file a separate plan in Canada under the *CCAA* and gave parties 14 days to apply to vary or rescind that order. Again, Justice Farley ordered that the order be reproduced in certain Canadian newspapers which it was. In these orders, come back clauses allowing interested persons to move to vary or rescind the orders were included, however, no one brought a motion to vary or rescind.

[79] The debtors subsequently brought an application for an order recognizing and implementing the U.S. order that confirmed the plan of reorganization and for an order recognizing and implementing the plan in Canada. In commenting on section 18.6 of the *CCAA*, Justice Farley wrote,

> The purpose of s. 18.6(2) is to give the court broad and flexible jurisdiction to facilitate cross-border insolvency proceedings which involve concurrent filings in Canada under the *CCAA* and in a foreign jurisdiction under the insolvency laws of that latter jurisdiction. The discretion given to a Canadian judge thereby must be exercised judicially. In appropriate circumstances, this may include a Canadian Court making an order which recognizes and gives effect to insolvency proceedings in foreign courts and orders thereby emanating from those foreign courts. As I observed in *Babcock and Wilcox Canada Ltd., Re:* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J.) [Commercial List] (at pp. 107-8), factors which reasonably ought to be considered under the "recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged" and that an enterprise should be permitted to "reorganize as a global unit.[35]

[80] Justice Farley noted that in this case: the protocol had been implemented by both courts; the U.S. proceedings were foreign proceedings for the purposes of the *CCAA*; the stakeholders had been subject to a single claims process which treated them equally regardless of the jurisdiction in which they resided; the restructuring was global in nature; notice had been given; over 90% of revenues were produced by operations in the U.S.; and the Court had been apprised of developments relating to the U.S. proceedings on a regular basis. He also noted that the Plan had been approved by the creditors with a vote

[35] ***Re Laidlaw*** **at 245.**

of over 96% in number and over 99% in value of each of the classes of creditors and that the Plan contemplated an application for recognition in Canada. In light of these facts and his earlier determinations, it seemed to him that it was appropriate to recognize and give effect to the U.S. Plan pursuant to s. 18.6(2) of the *CCAA*. Accordingly, he granted the order requested.

Conclusion

[81] It is clear from the foregoing discussion that the case law on cross-border insolvencies has evolved and doctrines have expanded to meet the needs of debtors and other stakeholders who attempt to restructure in an international environment. Obviously this has had to involve some judicial creativity which has been applauded by some and criticized by others.

[82] The former include many practitioners who, facing the realities of the global marketplace, struggle to coordinate proceedings, assets and stakeholders in different jurisdictions and who welcome cooperation and assistance from the bench.[36] From the latter constituency, "It also seems to me inimical to the rule of law and the certainty and predictability that are supposed to be the hallmarks of modern commercial law that judges continue to make up the *CCAA* rules as they go along conformably to the mandate they believe, surely mistakenly, that Parliament has given them. The decisions are not consistent and there remain large gaps and much ambiguity in the jurisprudence and orders sanctioned by the courts."[37]

[83] While clearly it would be desirable to have greater legislative guidance, the slow pace of legislative reform in the field of bankruptcy and insolvency law is legendary. Until such time as that reform materializes, it is fortunate that the judicial well of reform continues to expand.

---

[36] See for example *D. Tay, et al, supra* notes 22 and 33 and E.B.Leonard, *supra* notes 1 and 12.
[37] Prof. J.S. Ziegel, *supra* note 3 at p. 87.

APPENDIX "A"

Guidelines
Applicable to Court-to-Court Communications
in Cross-Border Cases

Introduction:

One of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

The Guidelines at this time contemplate application only between Canada and the United States, because of the very different rules governing communications with and among courts in Mexico. Nonetheless, a Mexican Court might choose to adopt some or all of these Guidelines for communications by a sindico with foreign administrators or courts.

A Court intending to employ the Guidelines - in whole or part, with or without modifications - should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later

time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parries in such manner as the Court considers appropriate;

(b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate.

(d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate;

(d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(a) Each Court should be able to simultaneously hear the proceedings in the other Court.

(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

(c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.

(d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of

the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

APPENDIX "B"

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	FRIDAY, THE 11TH DAY
	)	
JUSTICE GROUND	)	OF JUNE, 1999

IN THE MATTER OF THE APPLICATION OF LIVENT INC. under section 4,5,6,7,11,17 and 18.6(2) of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and as amended under the *Business Corporations Act*, R.S.O. 1990, c. B-16;

ORDER APPROVING CROSS-BORDER INSOLVENCY PROTOCOL

THIS MOTION made by Livent Inc. for an order approving a Cross-Border Insolvency Protocol (the "Insolvency Protocol") concerning the cross-border insolvency proceedings of Livent Inc. pending in this court and in the United States Bankruptcy Court for the Southern District of New York, and further approving and authorizing Livent Inc. and Ernst & Young Inc., as Monitor appointed pursuant to the Order of the Honourable Mr. Justice Ground made on November 19, 1998, to proceed with the implementation of the Insolvency Protocol, was heard at the Commercial Court, 393 University Avenue, 10th Floor, Courtroom 707, Toronto, Ontario.

UPON READING the Notice of Motion of Livent Inc. dated May 14, 1999, the Affidavit of Robert B. Webster sworn May 13, 1999, and the Insolvency Protocol, and on hearing the submissions of counsel for Livent Inc. and various creditors of Livent

Inc., and upon hearing that the Insolvency Protocol has been approved by the Order of the Honourable Arthur Gonzalez of the United States Bankruptcy Court for the Southern District of New York this day;

1. **THIS COURT ORDERS** that the Cross-Border Insolvency Protocol, a copy of which is annexed to this Order as Schedule "1" be and the same is hereby approved in its entirety.

COURT OF JUSTICE DATED JUNE 11, 1999
IN THE MATTER OF THE APPLICATION OF LIVENT I

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	Chapter 11
LIVENT (U.S.) INC., et al.,	Case No. 98 B 48312 (AJG)
Debtors.	(Jointly Administered)

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONORABLE MR.)
)
JUSTICE GROUND)

IN THE MATTER OF THE APPLICATION OF LIVENT INC. under section 4,5,6,7,11,17 and 18.6(2) of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and as amended under the *Business Corporations Act*, R.S.O. 1990, c. B.16;

CROSS-BORDER INSOLVENCY PROTOCOL

WHEREAS, On November 18, 1998 (the "Petition Date"), each of Livent Inc., Livent (U.S.) Inc., Livent Realty (New York) Inc. and Livent Realty (Chicago) Inc. (collectively, the "Debtors") filed, in the United States Bankruptcy Court for the Southern District of New York (together with any other Court having jurisdiction over these bankruptcy cases, the "Bankruptcy Court"), a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"); and

WHEREAS, the Debtors continue in the possession of their respective properties and the management of their

respective businesses as debtors in possession pursuant to sections 1107 and
1108 of the Bankruptcy Code. These chapter 11 cases (the "Chapter 11 Cases") have been consolidated for procedural purposes only and are being jointly administered pursuant to an order of the Bankruptcy Court; and

WHEREAS, the estate of Livent Inc. ("Livent"), one of the Debtors, is being substantially administered in the United States under the jurisdiction of the Bankruptcy Court; and

WHEREAS, on November 19, 1998, to protect the estate of Livent against the actions of creditors beyond the personal jurisdiction of the Bankruptcy Court, Livent sought and received protection from its creditors in the Superior Court of Justice (the "Canadian Court"), pursuant to the Companies Creditors Arrangement Act (the "CCAA"). In connection with that proceeding (the "Canadian Proceeding"), the accounting firm of Ernst & Young Inc. ("E&Y") has been appointed Monitor by the Canadian Court to review and oversee Livent's financial performance and to assist it in the development of its Proposal; and

WHEREAS, on December 1, 1998, the United States Trustee appointed an official committee of unsecured creditors (the "Creditors' Committee"). On December 4, 1998, the Canadian Court, and on December 30, 1998, the Bankruptcy Court, approved on a final basis a $25 million debtor in possession financing facility (the "DIP Facility") with Angelo Gordon & Co. (the "DIP Lender"). On February 22, 1999, the Debtors consummated the debtor in possession financing facility with the DIP Lender. No

trustee or examiner has been appointed in the Chapter 11 Cases; and

WHEREAS, Canadian Imperial Bank of Commerce ("CIBC") believes it holds security over all of the assets of the Debtors; and

WHEREAS, the Debtors are a leading, vertically integrated producer of live theatrical entertainment, as well as an operator of theaters in important North American markets. Among other things, the Debtors are engaged in the business of acquiring American, Canadian, and international theatrical stage rights and ancillary rights (including foreign licensing rights, merchandising rights, sponsorships rights and cast album rights) and developing, producing, managing, marketing and licensing theatrical and other forms of live entertainment throughout the United States, Canada and elsewhere throughout the world, as well as owning and managing theaters; and

WHEREAS, a frame work of general principles should be agreed upon to address, among other things, issues that are likely to arise in connection with the cross-border insolvency proceedings of Livent, including, without limitation, (a) the sale or assets; (b) the distribution and disposition of the proceeds of sale of the assets; (c) the determination of claims asserted against Livent, and the allowability and priority status of such claims; (d) the filing and implementation of a plan of reorganization under the Bankruptcy Code and a scheme or proposal under the CCAA (the "Proposal"); and (e) general administrative

matters, and that an agreement upon such matters is essential to the orderly and efficient administration of these cross-border cases; and

WHEREAS, the purpose of this protocol (the "Protocol") is to protect the interests of all parties in interest wherever located and to protect the integrity of the process by which the Chapter 11 Cases and the Canadian Proceeding is administered.

NOW THEREFORE, it is adjudged, ordered and decreed as follows:

i. The Debtors, the Creditors' Committee and the Monitor will (i) have regard for the proceedings initiated by Livent under chapter 11 of the Bankruptcy Code in the Bankruptcy Court and under the CCAA in the Canadian Court; (ii) cooperate with actions taken in either the Bankruptcy Court or the Canadian Court or both; and (iii) take steps to coordinate their respective administrations under the Bankruptcy Code and the CCAA in the Bankruptcy Court and the Canadian Court. Either Court shall honor and enforce any orders of the other Court, directed to persons within the jurisdiction of the other Court or who appeared on the motion for such order, related to investigations of any of the Debtors' assets and liabilities.

ii. The Debtors, the Creditors' Committee and the Monitor, and any other official representative that may be appointed by the Bankruptcy Court or the Canadian Court, and CIBC and the DIP Lender shall receive notice of all proceedings in accordance with the practices of the respective Courts, and have the right to appear in all proceedings in any forum, whether in

the Bankruptcy Court or the Canadian Court. Livent and the Monitor shall be subject to jurisdiction in both fora for any matter related to the insolvency proceedings, but appearing in a forum shall not subject it to jurisdiction for any other purpose in the forum state, except to the extent otherwise set forth herein to the contrary.

iii. All creditors, equity interest holders and other parties in interest of Livent shall have the right to appear in any forum to the same extent as creditors of the forum state, regardless of whether they have filed claims in that particular forum. All creditors of Livent shall have the opportunity to file a notice of appearance with the Clerk of the Bankruptcy Court, the Alexander Hamilton U.S. Custom House, One Bowling Green, 5th Floor New York, New York 10004 or to participate in the proceedings in the Canadian Court; provided, however, that such filing or participation shall subject such creditor, equity interest holder or party in interest to the personal jurisdiction in the Court in which the notice or appearance is filed or made only for the purposes of such proceeding; provided, further, that appearance by the Creditors' Committee in the Canadian Proceeding shall not form a basis for personal jurisdiction in Canada over the members of the Creditors' Committee.

iv. Information publicly available in any forum state shall be publicly available in both fora. To the extent permitted, non-public information shall be made available to

official representatives of the Debtors, including the Creditors' Committee and any other official committee appointed in Livent's chapter 11 case and shall be shared with other official representatives, CIBC and the DIP Lender, subject to appropriate confidentiality arrangements.

v. Any transactions outside the ordinary course of business concerning the sale or lease or use of Livent's assets located solely in Canada shall be subject to the sole approval of the Canadian Court. Any transactions outside the ordinary course of business concerning the sale or lease or use of Livent's assets located solely in the United States shall be subject to the sole approval of the Bankruptcy Court. Any transactions outside the ordinary course of business concerning the sale or lease or use of Livent's assets located both in Canada and the United States, including but not limited to a sale of all or substantially all of the assets of the collective Debtors, shall be subject to the joint jurisdiction and approval of the Bankruptcy Court and the Canadian Court, unless otherwise ordered by both the Bankruptcy Court and the Canadian Court upon request of the Debtors or any other parties in interest.

vi. The Bankruptcy and Canadian Courts may conduct joint hearings with respect to any matter related to the conduct, administration, determination or disposition of any aspect of the Chapter 11 Cases and the Canadian Proceedings where considered by both Courts to be necessary or advisable and in particular, without limiting the generality of the foregoing, to facilitate or coordinate the proper and efficient conduct of the Chapter 11 Cases and Canadian Proceedings. With respect to any such

hearings, unless otherwise ordered, the following directions are made:

a.) A telephone and/or video link shall be established such that both Courts shall be able to simultaneously hear the proceedings in the other Court. The Judge of the Bankruptcy Court and the Justice of the Canadian Court may appear and sit jointly in either Court as agreed between the Judge and Justice, subject to subsection (f) of this paragraph, provided, that, in such instance, creditors, equity interest holders and parties in interest may appear and be heard in person or at the courtroom of the Judge or Justice who has traveled to appear in the other courtroom.

b.) Any party intending to rely upon any written evidentiary material in support of a submission to the Canadian Court or the Bankruptcy Court in connection with any joint application shall file in each Court materials, which shall be identical insofar as possible and shall be consistent with the procedural and evidentiary rules and requirements of each Court, in advance of such application. If a party has not previously appeared in or attorned or does not wish to attorn to the jurisdiction of either Court it shall be entitled to file such material without, by the act of filing, being deemed to have attorned to the jurisdiction of the Court in which such material is filed, so long as it does not request in its materials or submissions any affirmative relief from the Court to which it does not wish to attorn.

c.) Submissions or applications by any party shall be made only to the Court in which it is appearing unless specifically given leave by the other Court to make submissions or applications to it.

d.) The Judge of the Bankruptcy Court and the Justice of the Canadian Court who will hear any such application shall be entitled to communicate with one another in advance of the said applications, with or without counsel being present, to establish guidelines for the orderly making of submissions and rendering of decisions by the Bankruptcy and the Canadian Courts, and to deal with any other procedural, administrative or preliminary matters.

e.) The Judge of the Bankruptcy Court and the Justice of the Canadian Court, having heard any such application, shall be entitled to communicate with one another after any such application, with or without counsel present, for the purpose of determining whether substantively

consistent rulings can be made by both Courts having regard to the applicable jurisprudence in each jurisdiction and to coordinate and resolve procedural or non-substantive matters relating to such applications.

f.) In the event of a sale of all or substantially all of the assets of the collective Debtors in accordance with section 363 of the Bankruptcy Code and any related authority under the CCAA before the Courts, all parties wishing to launch a competing bid for the assets shall appear before the Bankruptcy Court pursuant to bidding procedures (including bidding protections) established by the Bankruptcy Court and consented to by the Monitor for conducting such sale. The Justice of the Canadian Court will join with the Bankruptcy Court and appear and sit for the purpose of jointly conducting the sale.

7. All creditors of Livent (U.S.) Inc., Livent Realty (New York) Inc. and Livent Realty (Chicago) Inc. (collectively, the "U.S. Debtors") must file their proofs of claim against the U.S. Debtors with the Clerk of the Bankruptcy Court, the Alexander Hamilton U.S. Custom House, One Bowling Green, 5th Floor, New York, New York 10004.

8. Any creditor or equity security holder of Livent may file a proof of claim or interest in either the Bankruptcy Court or with the Monitor in the Canadian Proceeding; provided, however, that the resolution of such claim or interest shall be governed by the provisions of paragraph 10. If a creditor files a claim both in the Bankruptcy Court and with the Monitor in the Canadian Proceeding, the last timely filed claim shall govern. A timely filed proof of claim in either the Bankruptcy Court or the Canadian Proceeding will be deemed timely filed both in the Bankruptcy Court and with the Monitor under the Canadian Proceeding. The Debtors and the Monitor will endeavor to coordinate notice procedures and establish the same deadline for the filing of claims against the Debtors in both the

Bankruptcy Court and the Canadian Proceeding, and all other matters regarding the filing, reviewing and objecting to claims.

9. The Bankruptcy Court shall have exclusive jurisdiction over all claims against the U.S. Debtors.

10. The Bankruptcy Court shall have jurisdiction over all claims asserted against Livent governed principally by the laws of the United States or any of its states unless, with respect to any particular claim, the Canadian Court is a more appropriate forum in view of all of the circumstances. The Canadian Court shall have jurisdiction over all claims asserted against Livent governed principally by the laws of Canada or any of its provinces and territories unless, with respect to any particular claim, the Bankruptcy Court is a more appropriate forum in view of all of the circumstances. Subject to the last sentence of paragraph 13, the adjudicating forum shall decide the amount, value, allowability, priority, classification and treatment of claims filed in any plan of reorganization or Proposal and a creditor's rights to collateral and set-off using a choice of law analysis based upon the choice of law principles applicable in that forum. Nothing herein shall limit the right of any party-in-interest to object to claims to the extent permitted under Section 502(a) of the Bankruptcy Code and the Bankruptcy Rules and any related authority under the CCAA. Nothing herein shall limit or modify the Order of the Bankruptcy Court, dated April 15, 1999, authorizing and approving the Management Retention Incentive and Severance Plan.

11. All executory contracts, other than employment contracts to which Livent is a party, and unexpired leases between or among Livent and any party (including any of the U.S. Debtors) which is a Person subject to the personal jurisdiction of the Bankruptcy Court shall be subject to and governed by the provisions of section 365 of the Bankruptcy Code. All executory contracts and unexpired leases between or among Livent and parties which are Persons not subject to the personal jurisdiction of the Bankruptcy Court and all employment contracts to which Livent is a party shall be subject to and governed by the provisions of the CCAA.

12. Neither this Protocol nor any actions taken pursuant hereto is intended nor shall it have any affect on the rights of creditors, the Monitor, or the estates of the Debtors with regard to the applicability of Section 508(a) of the Bankruptcy Code and any similar provisions under the CCAA, it being intended that such Section 508(a) be, to the extent applicable, enforced in both fora.

13. The proceeds of any transaction other than a transaction involving the sale of all or substantially all of the assets of the collective Debtors shall be used by the Debtors to fund working capital needs subject to further or existing order of the adjudicating Court, including but not limited to orders governing the use of cash collateral. The proceeds of any transaction involving the sale of all or substantially all of the assets of the collective Debtors shall be held in escrow, by an

agent acceptable to the Debtors and the Monitor and approved by the adjudicating Court, pending distribution through a plan of reorganization and/or a Proposal or otherwise pursuant to an order approved by both Courts; provided, that nothing contained herein shall be construed to prohibit the Debtors from paying amounts owing to the DIP Lender from the proceeds of such sale pursuant to the terms of the DIP Facility and in accordance with the existing orders of the Courts approving the DIP Facility. The allocation among each of the Debtors' estates of the proceeds generated from a sale of all or substantially all of the assets of the collective Debtors shall be determined by: (i) the Bankruptcy Court and the Canadian Court at a joint hearing, in respect of the proportion of proceeds to be allocated to the estate of Livent Inc.; and (ii) the Bankruptcy Court, using a choice of law analysis if applicable, based upon the choice of law principles applicable in that forum, in respect of all other allocation matters.

14. The provisions of section 363(m) of the Bankruptcy Code shall apply in both proceedings to any transaction involving all or substantially all of the assets of the collective Debtors.

15. A "Person" (as defined in section 101(41) of the Bankruptcy Code) shall not be subject to a forum's substantive laws, including, without limitation, avoidance rules and sections 510, 544, 545, 546, 547, 548, 549, 550 and 551 of the Bankruptcy Code, unless, using a choice of law analysis based

upon the principles of international law applicable in the forum, such Person would be subject to the forum's substantive laws in a lawsuit on the same transaction in a non-insolvency proceeding. No avoiding actions will be taken by the Monitor in Canada without the express written consent of the Debtors or as may be directed by the Canadian Court.

16. For greater particularity, all lien claims, trust claims or actions in debt by the City of Toronto or for goods and services by lien claimants (the "Construction Lien Claimants") against Livent in respect of the Pantages Theater property and surrounding development in Toronto, Ontario be subject to the jurisdiction of the Canadian Court, notwithstanding that any one or more of the Construction Lien Claimants may have or maintain a U.S. office or affiliate.

17. To the extent permitted by the laws of the respective jurisdictions and to the extent practicable and procedurally applicable, the Monitor and Livent shall endeavor to submit a Proposal in Canada and a plan of reorganization in the United States substantially similar to each other and the Monitor and Livent shall endeavor to coordinate all procedures in connection therewith. In order to coordinate the contemporaneous filing of the Proposal and the plan of reorganization, Livent shall take the actions necessary to seek extensions from time-to-time of the date for the filing of the Proposal, and the Debtors shall take the actions necessary from time-to-time to seek extensions of the exclusive time period during which only the Debtors may file a plan of reorganization pursuant to Section 1121 of the Bankruptcy Code (the "Exclusive Period").

Notwithstanding the foregoing, this paragraph is without prejudice to the rights of the Creditors' Committee or any other party in interest to oppose any extension of the Exclusive Period, seek a shortening of the Exclusive Period or file a plan of reorganization after expiration of the Exclusive Period.

18. Except with respect to matters where the Monitor and other Canadian professionals appear before the Bankruptcy Court pursuant to paragraph 2 hereof, the Canadian Court shall have sole jurisdiction and power over the Monitor, including, without limitation, its tenure in office, the conduct of the liquidation proceedings under Canadian law, the retention and compensation of the Monitor and other Canadian professionals, except as otherwise provided in paragraph[s] 19 and 20, and the hearing and determination of matters arising in the proceedings under Canadian law. The Monitor and other Canadian professionals shall be compensated for their services in accordance with Canadian principles under Canadian law, such that the Monitor and other the Canadian professionals are not required to file fee applications with the Bankruptcy Court, except as otherwise provided in paragraph 20.

19. The Bankruptcy Court shall have sole jurisdiction and power over the conduct of the Chapter 11 cases, the compensation of the professionals rendering services to the Debtors in the United States, and the hearing and determination of matters arising in the Chapter 11 cases.

20. Notwithstanding anything to the contrary, the Bankruptcy Court shall have sole jurisdiction and power over any professionals hired by the Creditors' Committee, including but not limited to Canadian professionals, and such professionals shall be retained and compensated according to the rules governing retention and compensation generally in chapter 11 cases.

21. This Protocol shall be without prejudice to the rights of the Debtors to seek the substantive consolidation of their estates before the Bankruptcy Court and the Canadian Court.

22. This Protocol shall be binding on and inure to the benefit of the parties hereto and their respective successors, assigns, representatives, heirs, executors, administrators, trustees (including any trustees of the Debtors under Chapters 7 or 11 of the Bankruptcy Code), and receivers, receiver managers, trustees or custodians appointed under Canadian law, as the case may be.

23. Compliance with this Protocol may not be waived and the Protocol may not be amended or modified orally or in any other way or manner (including, without limitation, pursuant to a plan of reorganization of the Debtors) except with approval and authorization of the Bankruptcy Court and the Canadian Court.

24. Nothing contained herein shall alter the Debtors' obligations to pay fees due under 28 U.S.C. § 1930(a)(6) based upon all disbursements made in any jurisdiction.

25. Nothing contained herein shall be construed to limit or modify the DIP Facility, the existing orders of the Courts approving the DIP Facility, or the rights and obligations of the Debtors and the DIP Lender thereunder.

26. This Protocol shall be deemed effective upon its approval by the Bankruptcy Court and the Canadian Court.

Dated: New York, New York
June 11, 1999

UNITED STATES BANKRUPTCY JUDGE

Dated: Toronto, Canada
June 9, 1999

JUSTICE OF SUPERIOR COURT OF JUSTICE