

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF PETROFLOW ENERGY LTD.

AND IN THE MATTER OF AN APPLICATION UNDER SECTION 46 AND FOLLOWING
OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36,
AS AMENDED

BENCH BRIEF of PETROFLOW ENERGY LTD.

THE LAW

The relevant provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") are attached at Tab 1.

Application for Recognition

A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative (CCAA, s.46(1)). The party seeking recognition must file: (a) a certified copy of the instrument that commenced the foreign proceeding, or a certificate from the foreign court affirming the existence of the foreign proceeding; and (b) a certified copy of the instrument or court order authorizing the foreign representative to act in that capacity (CCAA, s.46(2)). The Court may, without further proof, accept these documents as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding (CCAA, s.46(3)). In the absence of these documents, the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate (CCAA, s.46(4)).

The proceedings under Chapter 11 of the *U.S. Bankruptcy Code* fall within the definition of “foreign proceeding” set forth in section 45(1) of the *CCAA* (*Lear Canada, Re* (2009), 2009 CarswellOnt 4232 (Ont.S.C.J. [Commercial List])). **Tab 2**

A “foreign representative” means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor company, to: (a) monitor the debtor’s company’s business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding (*CCAA*, s.45(1)). Louis Schott is authorized to act as a foreign representative in the subject foreign proceeding pursuant to the terms of an order of the United States Bankruptcy Court dated September 10, 2010 (a copy of which is attached as Schedule “B” to the Originating Notice filed herein).

If the Court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that proceeding, the Court shall make an order recognizing the foreign proceeding (*CCAA*, s.47(1)). Once the requisite filings are made, the recognition order is automatic and not generally subject to the discretion of the Court (*Tucker v. Aero Inventory (U.K.) Ltd.* (2009), 2009 CarswellOnt 7007 (Ont. S.C.J. [Commercial List])). **Tab 3**

The Court shall also specify whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding (*CCAA*, s.47(2)). A foreign main proceeding is a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests (*CCAA*, s.45(1)).

Where the operations of debtors are more closely connected to a foreign jurisdiction and the Canadian operations are inextricably linked with the business located in that foreign jurisdiction, it is appropriate for the Court in the foreign jurisdiction to exercise principal control over the insolvency process in accordance with the principles of comity and to avoid a multiplicity of proceedings (*Magna Entertainment Corp., Re* (2009), 2009 CarswellOnt 1267 (Ont. S.C.J.)).

Tab 4

Petroflow Energy Ltd. has the center of its main interests in the United States (*Affidavit of Louis G. Schott*, paragraphs 3, 7) filed herein.

Appointment of an Information Officer

In the case of an application for a recognition, the court is given the express authority to make an order appointing an information officer (*CCAA*, ss.49(1), 50; *Tucker v. Aero Inventory (UK) Ltd.* (2009), 2009 CarswellOnt 2007 (Ont. S.C.J. [Commercial List])). **Tab 3**

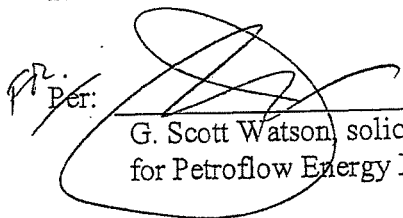
Stay of Proceedings

Once the foreign representative and foreign proceeding are recognized, a stay is mandatory on such terms and conditions that the Court considers appropriate (*CCAA*, s.48(1)).

The stay relief is subject to three conditions: (a) the order must be consistent with any order that may be made under the *CCAA*; (b) the stay provisions do apply if any proceedings under the *CCAA* or the *Bankruptcy and Insolvency Act* ("BIA") have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made; and (c) nothing in the recognition order precludes the debtor company from commencing or continuing proceedings under the *CCAA*, *BIA*, or the *Winding-up or Restructuring Act* ("WURA") in respect of the debtor company (*CCAA*, ss.48(2), (3), (4)). The order sought in this proceeding is consistent with the *CCAA*.

DATED at the City of Calgary, in the Province of Alberta, this 16th day of September, 2010.

PARLEE McLAWS LLP

Per: 
G. Scott Watson, solicitors
for Petroflow Energy Ltd.

TO: THE CLERK OF THE COURT
Calgary, ALBERTA

42. The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.
2005, c. 47, s. 131.

Claims in foreign currency

43. If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the initial application in respect of the company unless otherwise provided in the proposed compromise or arrangement.
2005, c. 47, s. 131.

PART IV CROSS-BORDER INSOLVENCIES PURPOSE

Purpose

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

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

2005, c. 47, s. 131.

INTERPRETATION

Definitions

45. (1) The following definitions apply in this Part.

"foreign court"
« *tribunal étranger* »

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding"
« *principale* »

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor

company has the centre of its main interests.

"foreign non-main proceeding"

« *secondaire* »

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding"

« *instance étrangère* »

"foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

"foreign representative"

« *représentant étranger* »

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

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

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

Centre of debtor company's main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.
2005, c. 47, s. 131.

RECOGNITION OF FOREIGN PROCEEDING

Application for recognition of a foreign proceeding

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

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

2005, c. 47, s. 131.

Order recognizing foreign proceeding

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

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

2005, c. 47, s. 131.

Order relating to recognition of a foreign main proceeding

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

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

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

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

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

Scope of order

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

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Other orders

49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

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

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

2005, c. 47, s. 131.

Terms and conditions of orders

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

2005, c. 47, s. 131.

Commencement or continuation of proceedings

51. If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

2005, c. 47, s. 131.

OBLIGATIONS

Cooperation — court

52. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Cooperation — other authorities in Canada

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

- (a) the appointment of a person to act at the direction of the court;
 - (b) the communication of information by any means considered appropriate by the court;
 - (c) the coordination of the administration and supervision of the debtor company's assets and affairs;
 - (d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and
 - (e) the coordination of concurrent proceedings regarding the same debtor company.
- 2005, c. 47, s. 131; 2007, c. 36, s. 80.

Obligations of foreign representative

53. If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

- (a) without delay, inform the court of
 - (i) any substantial change in the status of the recognized foreign proceeding,
 - (ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and
 - (iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and
- (b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

2005, c. 47, s. 131.

MULTIPLE PROCEEDINGS

Concurrent proceedings

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

2005, c. 47, s. 131.

Multiple foreign proceedings

55. (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

Multiple foreign proceedings

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

2005, c. 47, s. 131.

MISCELLANEOUS PROVISIONS

Authorization to act as representative of proceeding under this Act

56. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

2005, c. 47, s. 131.

Foreign representative status

57. An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

2005, c. 47, s. 131.

Foreign proceeding appeal

58. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

2005, c. 47, s. 131.

Presumption of insolvency

59. For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

2005, c. 47, s. 131.

Credit for recovery in other jurisdictions

60. (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

- (a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and
- (b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

Restriction

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

2005, c. 47, s. 131.

Court not prevented from applying certain rules

61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

2005, c. 47, s. 131; 2007, c. 36, s. 81.

Last updated: 2010-09-07

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Lear Canada, Re

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

AND IN THE MATTER OF LEAR CANADA, LEAR CANADA INVESTMENTS LTD., LEAR CORPORATION
CANADA LTD. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICATION UNDER SECTION 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: July 14, 2009
Docket: CV-09-00008269-00CL

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Counsel: K. McElcheran, R. Stabile for Applicants

E. Lamek for Proposed Information Officer

A. Cobb for J.P. Morgan Chase Bank, N. A.

Subject: Insolvency

Bankruptcy and insolvency — Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction
of Bankruptcy Court — Territorial jurisdiction — Foreign bankruptcies

Insolvent debtor American company had Canadian subsidiary — Debtor was unable to meet obligations and
began restructuring process in United States — Subsidiary and company brought application for recognition of
foreign order — Application granted — Stay of proceedings in Canada granted — Subsidiary was entitled to ap-
ply for order as interested person under s. 18.6(4) of Companies' Creditors Arrangement Act and as debtor with-
in s. 18.6(1) — While Companies' Creditors Arrangement Act does not define person, Bankruptcy and Insolv-
ency Act extends definition to partnership — Real and substantial connection existed to American proceedings
— Canadian operations were inextricably linked with business in foreign jurisdiction — Restructuring process
required to occur internationally — Multiplicity of proceedings should be avoided.

Cases considered by *Pepall J.*:

ceedings in the U.S. Bankruptcy Court for the Southern District of New York constitute "foreign proceedings";

2. a stay of proceedings against any of the Applicants or their property; and

3. an order appointing RSM Richter Inc. as information officer to report to this Court on the status of the U.S proceedings.

Background Facts

2 Lear Corporation is a corporation organized under the laws of the State of Delaware with headquarters in Southfield, Michigan. Its shares are listed on the New York Stock Exchange. It conducts its operations through approximately 210 facilities in 36 countries and is the ultimate parent company of about 125 directly and indirectly wholly-owned subsidiaries (collectively, "Lear"). Lear Canada Investments Ltd. and Lear Corporation Canada are both wholly-owned indirect subsidiaries of Lear Corporation. They are incorporated pursuant to the laws of Alberta. Lear Canada is a partnership owned 99.9% by Lear Corporation Canada Ltd. and 0.1% by Lear Canada Investments Ltd. and is the only operating entity of Lear in Canada.

3 Lear is a leading global supplier of automotive seating systems, electrical distribution systems, and electronic products. It has established itself as a Tier 1 global supplier of these parts to every major original equipment manufacturer ("OEM"). Lear has world wide manufacturing and production facilities, four of which are in Canada, namely Ajax, Kitchener, St. Thomas, and Whitby, Ontario. A fifth facility in Windsor, Ontario was closed in May of this year. Lear employs approximately 7,200 employees world wide of which 1,720 are employed by the Canadian operations. 1,600 are paid on an hourly basis and 120 are paid salary. 1,600 are members of the CAW and are covered by 5 separate collective bargaining agreements. Lear maintains a qualified defined contribution component of the Canadian salaried pension plan and 8 Canadian qualified defined benefit plans.

4 Lear conducts its North American business on a fully integrated basis. All management functions are based at the corporate headquarters in Southfield, Michigan and all customer relationships are maintained on a North American basis. The U.S. headquarters' operational support for the Canadian locations includes, but is not limited to, primary customer interface and support, product design and engineering, manufacturing and engineering, prototyping, launch support, programme management, purchasing and supplier qualification, testing and validation, and quality assurance. In addition, other support is provided for human resources, finance, information technology and other administrative functions.

5 Lear's Canadian operations are also linked to its U.S. operations through the companies' supply chain. Lear's facilities in Whitby, Ajax, and St. Thomas supply complete seat systems on a just-in-time basis to automotive assembly operations of the U.S. based OEMs, General Motors and Ford in Ontario. Lear's Kitchener facility manufactures seat metal components which are supplied primarily to several Lear assembly locations in the U.S., Canada and Mexico.

6 Lear Corporation, Lear Canada and others entered into a credit agreement with a syndicate of institutions led by J.P. Morgan Chase Bank, N.A. acting as general administrative agent and the Bank of Nova Scotia acting as the Canadian administrative agent. It provides for aggregate commitments of \$2.289US billion. Although Lear Canada is a borrower under this senior secured credit facility, it is only liable for borrowings made in Canada and no funds have been advanced in this country.

7 Additionally, Lear Corporation has outstanding approximately \$1.29US billion of senior unsecured notes. The Canadian Applicants are not issuers or guarantors of any of them.

8 Over the past several years, Lear has worked on restructuring its business. As part of this initiative, it closed or initiated the closure of 28 manufacturing facilities and 10 administrative/engineering facilities by the end of 2008. This included the Windsor facility for which statutory severance amounts owing to all employees have been paid.

9 Despite its efforts, Lear was faced with turmoil in the automotive industry. Decreased consumer confidence, limited credit availability and decreased demand for new vehicles all led to decreased production. As a result of these conditions, Lear defaulted under its senior secured credit facility in late 2008. In early 2009, Lear engaged in discussions with senior secured facility lenders and unsecured noteholders. It reached an agreement with the majority of them wherein they agreed to support a Chapter 11 plan.

10 On July 7, 2009, Lear filed voluntary petitions for relief under Chapter 11 of the US Bankruptcy Code and sought "first day" orders in those proceedings in the United States Bankruptcy Court for the Southern District of New York. The Applicants now seek recognition of those proceedings and the orders. Lear expects to emerge from the Chapter 11 proceedings and any associated proceedings in other jurisdictions as a substantially de-leveraged enterprise with competitive going forward operations, and to do so in a timely basis.

Applicable Law

11 Section 18.6 of the CCAA was introduced in 1997 to address the rising number of international insolvencies. Courts have recognized that in the context of cross-border insolvencies, comity is to be encouraged. Efforts are made to complement, coordinate, and where appropriate, accommodate insolvency proceedings commenced in foreign jurisdictions.

12 Section 18.6(1) provides that "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally. It is well recognized that proceedings under Chapter 11 of the U.S. Bankruptcy Code fall within that definition and that, while not identical, the substance and procedures of the U.S. Bankruptcy Code are similar to those found in the Canadian bankruptcy regime: *United Air Lines Inc., Re* [FN1]

13 *Babcock & Wilcox Canada Ltd., Re* [FN2] provided an early interpretation of section 18.6, and while not without some controversy [FN3], the practice in Canadian insolvency proceedings has evolved accordingly. In that case, Farley J. distinguished between section 18.6(2) of the Act, which deals with concurrent filings by a debtor company under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction, and section 18.6(4) which may deal with ancillary proceedings such as this one. As with section 2 of the Act, section 18.6(2) is in respect of a debtor company whereas section 18.6 (4) permits any interested person to apply for recognition. As such, he held that the applicant before him was not required to meet the Act's definition of "debtor company" which required the company to be insolvent. [FN4] In addition, he noted that section 18.6(3) provides that an order of the Court under section 18.6 may be made on such terms and conditions as the Court considers appropriate in the circumstances.

14 Applying those legal principles, the Applicants are entitled to apply for an order pursuant to section 18.6 of the CCAA. They are debtors within the definition of section 18.6(1) and interested persons falling within sec-

tion 18.6(4). In this regard, while the CCAA does not define the term "person", the BIA definition extends to include a partnership. In the absence of a definition in the CCAA, by analogy it is reasonable to interpret the term "person" as including a partnership.

15 I must then consider whether the order requested should be granted. In exercising discretion under section 18.6, it has been repeatedly held that in the context of an insolvency, the Court should consider whether a real and substantial connection exists between a matter and the foreign jurisdiction: *Matlack Inc.*, Re[FN5] and *Mugna Entertainment Corp.*, Re[FN6] Where the operations of debtors are most closely connected to a foreign jurisdiction and the Canadian operations are inextricably linked with the business located in that foreign jurisdiction, it is appropriate for the Court in the foreign jurisdiction to exercise principal control over the insolvency process in accordance with the principles of comity and to avoid a multiplicity of proceedings: *Matlack*, Re[FN7]. As noted in that case, it is in the interests of creditors and stakeholders that a reorganization proceed in a coordinated fashion. This provides for stability and certainty. "The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, wherever they are located." [FN8]

16 I am satisfied that an order recognizing the U.S. proceeding as a foreign proceeding within the meaning of section 18.6(1) should be granted and that a real and substantial connection has been established. The Applicants including Lear Canada are part of an integrated multi-national corporate enterprise with operations in 36 countries, one of which is Canada. Lear conducts its North American business on a fully integrated basis. As mentioned, all management functions are based at the U.S. corporate headquarters and all customer relationships are maintained on a North American basis. As such, the managerial and operational support for the Canadian locations is situated in the United States. In addition, Lear's Canadian operations are linked to the U.S. operations through the Lear's supply chain. As evidence of same, a note to Lear Canada's December 31, 2008 unaudited financial statement states that Lear Corporation provides Lear Canada with "significant operating support, including the negotiation of substantially all of its sales contracts. Such support is significant to the success of the Partnership's future operations and its ability to realize the carrying value of its assets."

17 I am also of the view that it is both necessary and desirable that the restructuring of this international enterprise be coordinated and that a multiplicity of proceedings in two different jurisdictions should be avoided. Granting relief will enable the Applicants to continue to operate in the ordinary course and preserve value and customer relationships. Coordination will also provide stability. The U.S. Court will be the primary court overseeing the restructuring proceedings of Lear. I also note that in its report filed with the Court, the proposed Information Officer, RSM Richter Inc., expressed its support for the relief requested by the Applicants.

18 That said, increasingly with the downturn in the global economy, this Court is entertaining requests for concurrent or ancillary orders relating to multi-group enterprises typically with a significant cross-border element. Frequently, relative to the whole enterprise, the Canadian component is small. From the viewpoint of efficiency and speed, both of which are important features of a restructuring, an applicant may be of the view that the Canadian operations do not merit a CCAA filing other than a section 18.6 request. In addressing whether to grant relief pursuant to section 18.6, the Court should, amongst other things, consider the interests of stakeholders in this country and the impact, if any, that may result from the relief requested. This would include benefits and prejudice such as any juridical advantage that may be compromised.[FN9] These issues should be addressed by an applicant in its materials. Assuming there are benefits, the existence of prejudice does not necessarily mean that the order will be refused but it is important that these facts at least be considered, and if appropriate, certain protections should be incorporated into the order granted.

19 By way of example, in this case, the Court raised certain issues with the Applicants and they readily and appropriately in my view, filed additional affidavit evidence and included other provisions in the proposed order. The Court was concerned with the treatment that might be afforded Canadian unsecured creditors and particularly employees and trade creditors. Lear Canada had total current assets of approximately \$60US million as at May 31, 2009 which included approximately \$20US million in cash. Its total assets amounted to approximately \$115US million. Total current liabilities as at the same time period amounted to about \$170US million. In addition, pension and other post-retirement benefit obligations were stated to amount to about \$170US million. There were also intercompany accounts of approximately \$190US million in favour of Lear Canada for total liabilities of about \$55US million. Counsel for the Applicants advised that significant pre-petition payments had been made to suppliers and that the intention is for Lear Canada to continue to carry on business.

20 In the additional evidence filed, the Applicants indicated that they had not yet sought approval of DIP financing arrangements but that under the proposed arrangement, the Canadian Applicants would not be borrowers or guarantors. In addition, the term sheet agreed to between the Applicants and the senior credit facility lenders provided that the Canadian Applicants had agreed to pay all general unsecured claims in full as they become due. Additionally, the Applicants had obtained an order in the U.S. proceedings authorizing them to pay and honour certain pre-petition claims for wages, salaries, bonuses and other compensation and it is the intention of the Applicants to continue to pay all wages and compensation due and to be due to Canadian employees. The Applicants are up to date on all current and special payments associated with the Canadian pension plans and will continue to make these payments going forward. Provisions reflecting this evidence were incorporated into the Court order.

21 The Canadian Applicants were not to make any advances or transfers of funds except to pay for goods and services in the ordinary course of business and in accordance with existing practices and similarly were not to grant security over or encumber or release their property. They also were to pay current service and special payments with respect to the Canadian pensions. The order further provided that in the event of inconsistencies between it and the terms of the Chapter 11 orders, the provisions of my order were to govern.

22 The order includes a stay of proceedings against the Applicants and their property, a recognition of various orders and an administration charge and a directors' charge. The order also includes the usual come back provision in which any person affected may move to rescind or vary the order on at least 7 days' notice.

23 Where one jurisdiction has an ancillary role, the Court in the ancillary jurisdiction should be provided with information on an on going basis and be kept apprised of developments in respect of the debtors' reorganization efforts in the foreign jurisdiction. In addition, stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.[FN10] In this case, RSM Richter Inc. as Information Officer intends to be a watchdog and monitor developments in the U.S. proceedings and keep this Court informed. This Court supports its request to be added to the service list in the Chapter 11 proceeding and any request for standing before the U.S. Bankruptcy Court for the Southern District of New York that the Information Officer may make. In this regard, this Court seeks the aid and assistance of that Court.

Application granted.

FN1 (2003), 43 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]), at 285.

FN2 (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]).

FN3 See for example, Professor J.S. Ziegel's article "Corporate Groups and Canada-U.S. Cross-Border Insolvencies: Contrasting Judicial Visions", (2001) 35 C.B.L.J. 459.

FN4 It should be noted that a voluntary filing under Chapter 11 does not require an applicant to be insolvent and a partnership is eligible to apply for relief as well.

FN5 (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J. [Commercial List]).

FN6 (2009), 51 C.B.R. (5th) 82 (Ont. S.C.J.).

FN7 Supra, note 5 at para. 8.

FN8 Ibid, at para. 3.

FN9 See *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907 (S.C.C.).

FN10 See *Babcock & Wilcox Canada Ltd., Re*, supra, note 2 at para. 21.

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2009 CarswellOnt 7007,

C

2009 CarswellOnt 7007

Tucker v. Aero Inventory (UK) Ltd.

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

JAMES ROBERT TUCKER, RICHARD HEIS, AND ALLAN WATSON GRAHAM OF KPMG LLP AS
JOINT ADMINISTRATORS (Applicants) and AERO INVENTORY (UK) LIMITED and AERO INVENTORY
PLC (Respondents)

Ontario Superior Court of Justice [Commercial List]

Newbould J.

Heard: November 11, 2009
Judgment: November 12, 2009
Docket: 09-CL-8456-00CL

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Counsel: Orestes Pasparakis, Virginie Gauthier for Applicants

Subject: Insolvency; International; Corporate and Commercial

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction --- Jurisdiction of courts --- Jurisdiction
of Bankruptcy Court --- Territorial jurisdiction --- Foreign bankruptcies.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act --- Initial application --- Proceedings sub-
ject to stay --- Set-off.

Cases considered by *Newbould J.*:

Air Canada, Re (2003), 45 C.B.R. (4th) 13, 2003 CarswellOnt 4016, 39 B.L.R. (3d) 153 (Ont. S.C.J.
[Commercial List]) --- considered

Lear Canada, Re (2009), 2009 CarswellOnt 4232, 55 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) ---
considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 1993 CarswellOnt 212, 20 C.B.R. (3d) 165
(Ont. Gen. Div.) --- considered

Copr. (c) West 2008 No Claim to Orig. Govt. Works

United Air Lines Inc., Re (2003), 43 C.B.R. (4th) 284, 2003 CarswellOnt 2786 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Pt. IV — referred to

s. 9(1) — considered

s. 18.1 [en. 1997, c. 12, s. 125] — considered

s. 21 — considered

s. 44 — referred to

s. 45(1) "foreign proceeding" — considered

s. 45(2) — considered

s. 47 — considered

s. 47(1) — considered

s. 47(2) — considered

s. 49(1) — considered

s. 50 — considered

Insolvency Act, 1986, c. 45

Generally — referred to

Newbould J.:

1 This application was made on November 11, 2009 under s. 47(1)[FN1] of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") for an order recognizing the administration proceedings (the "foreign proceedings") commenced in respect of each of Aero Inventory (UK) Limited and Aero Inventory plc (the "foreign debtors") in the High Court of Justice of England and Wales as a "foreign main proceeding" for the purposes of section 47 of the CCAA, and for other consequential relief. At the conclusion of the hearing I made the order sought for reasons to follow. These are my reasons.

Factual background

2 On November 11, 2009, the applicants were appointed by the High Court of Justice of England and Wales

(Chancery Division, Companies Court) as administrators (the "Administrators") over Aero Inventory (UK) Limited ("Aero Inventory (UK)") and Aero Inventory plc ("Aero plc").

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

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

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

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

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

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

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

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

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

Recognition of the UK Proceeding

(a) Jurisdiction

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

(b) Recognition

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

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

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

a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

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

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

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

18 Under s. 47(2) of the CCAA, a court making an order recognizing a foreign proceeding must specify whether such proceeding is the "foreign main proceeding" or the "foreign non-main proceeding". Under s. 45(1), a "foreign main proceeding" is a "foreign proceeding in a jurisdiction where the debtor company has the centre

of its main interests." Section 45(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

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

Other relief sought

(a) Appointment of an Information Officer

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

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

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

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

(b) Stay of Set-Off Rights

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

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

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

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

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

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

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

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

19. The Companies are, in their current financial position, extremely distressed with the threat of credit- or enforcement action in key countries. and

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

(a) the supply of airline, parts is time critical and must continue uninterrupted;

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

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

30 The applicants are concerned that as Aveos has physical control of the foreign debtors' inventory, any re-

fusal to supply their inventory without assurances of payment might lead to the grounding of several airplanes, thereby causing prejudice to the foreign debtors' customers. They submit that in the circumstances, the better option to ensure continued supply to customers and payment for fresh inventory is by the granting of a temporal stay of any right of set-off

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

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

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

34 The application is granted in accordance with these reasons.

FN1 This section and the other sections dealing with cross-border insolvencies in part IV of the CCAA came into effect on September 18, 2009

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2009 CarswellOnt 1267

Magna Entertainment Corp., Re

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

AND IN THE MATTER OF MAGNA ENTERTAINMENT CORP. (Applicant)

Ontario Superior Court of Justice

Morawetz J.

Heard: March 5, 2009
Judgment: March 9, 2009
Docket: CV-09-8054-00CL

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Counsel: John Macdonald, Jean-Marc Leclerc for Magna Entertainment Corp.

Jay Swartz for MI Developments Inc.

Subject: Insolvency; International

Bankruptcy and insolvency --- Proposal --- Companies' Creditors Arrangement Act --- Application of Act

Bankrupt was publicly-traded US corporation with head office in Ontario — Bankrupt and certain subsidiaries filed for bankruptcy protection in US — Bankrupt brought application in Ontario for stay of proceedings and related relief under s. 18.6 of Companies' Creditors Arrangement Act — Application granted — Section 18.6 of Act gave court power to grant relief to facilitate arrangements that would result in co-ordination of proceedings under Act with foreign proceeding — Stay of proceedings and related relief in Canada would ensure order, predictability, and fairness during course of bankruptcy proceedings in US.

Conflict of laws --- Bankruptcy --- General principles

Bankrupt was publicly-traded US corporation with head office in Ontario — Bankrupt and certain subsidiaries filed for bankruptcy protection in US — Bankrupt brought application in Ontario for stay of proceedings and related relief under s. 18.6 of Companies' Creditors Arrangement Act — Application granted — Section 18.6 of Act gave court power to grant relief to facilitate arrangements that would result in co-ordination of proceedings under Act with foreign proceeding — Stay of proceedings and related relief in Canada would ensure order, predictability, and fairness during course of bankruptcy proceedings in US.

Cases considered by *Morawetz J.*:

Matlack Inc., Re (2001), [2001] O.T.C. 382, 26 C.B.R. (4th) 45, 2001 CarswellOnt 1830 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

APPLICATION by foreign bankrupt corporation for ancillary relief under s. 18.6 of *Companies' Creditors Arrangement Act*.

Morawetz J.:

1 This application was heard March 5, 2009 and an order was granted that day pursuant to s. 18.6 of the *Companies Creditors Arrangement Act* ("CCAA"). I indicated that brief written reasons would follow.

2 Magna Entertainment Corp. ("MEC"), is a publicly-traded Delaware corporation, with its head office in Aurora, Ontario.

3 On March 5, 2009, prior to the hearing of this application, MEC and certain direct and indirect subsidiaries (the "U.S. Debtor Affiliates") filed for bankruptcy protection pursuant to Chapter 11 of the United States Bankruptcy Code (the "U.S. Chapter 11 Proceedings").

4 The affidavit of William G. Ford, filed in support of this application, states that the centre of main interest for MEC and the U.S. Debtor Affiliates is in the United States.

5 While the restructuring will be principally administered by the U.S. Bankruptcy Court, due to the fact that:

(i) MEC's management is based in Canada, and

(ii) because MEC has assets in Canada,
MEC requests an order under s. 18.6 of the CCAA, which provision gives the court the power to "make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding".

6 In this case, MEC is not making a full filing under the CCAA. It requests ancillary relief in connection with a "foreign proceeding".

7 MEC relies on the following facts to support its s. 18.6 application:

(a) MEC and its U.S. Debtor Affiliates have filed for Chapter 11 protection and operate under the automatic stay of proceedings pursuant to Chapter 11.

(b) MEC owns and manages horseracing and gambling facilities in the United States and Austria. MEC does not operate or own any racetracks in Canada.

(c) MEC only employs 25 residents of Canada at its head office.

(d) Although there are over 50 separate MEC subsidiaries, only 6 are Canadian based.

(e) For the year ended December 31, 2007, 96.6% of MEC's total consolidated revenues were generated in the United States, with no revenues generated in Canada. Mr. Ford states that this geographic distribution of revenues did not materially change in 2008.

(f) For the year ended December 31, 2007, 93.5% of MEC's real estate properties, fixed assets, racing licenses and other assets, were located in the United States, with no such assets located in Canada.

(g) The MEC restructuring is expected to be complex and will require MEC's management in Canada to devote significant time to the restructuring and a multitude of creditor actions in Canada would distract management from this task, which could impair the orderly restructuring of MEC and the U.S. Debtor Affiliates' operations.

8 In my view, the applicant has established that there is a real and substantial connection between MEC and its U.S. Debtor Affiliates' operations and the United States. It seems to me that a recognition order and stay in Canada would ensure order, predictability and fairness. In view of the fact that all of MEC's management and accounting functions are performed at its head office location in Aurora and because the restructuring is likely to be complex, requiring MEC's management in Canada to devote significant time to the restructuring, it seems to me that, a stay of proceedings in Canada, which mirrors the stay of proceedings in the United States, would be of assistance to ensure the orderly restructuring of MEC and its U.S. Debtor Affiliates.

9 In exercising discretion under s. 18.6, the court should consider whether there is a "real and substantial connection" between a matter and the foreign jurisdiction. Ontario courts have held that "where a cross-border insolvency is most closely connected to one jurisdiction, it is appropriate for the court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings". (See *Matlack Inc., Re*, [2001] O.J. No. 6121 (Ont. S.C.J. [Commercial List]) at para. 8.) I have been satisfied that MEC and its U.S. Debtor Affiliates should be permitted to re-organize as a global unit, supervised principally by the U.S. Bankruptcy Court, rather than in a multitude of jurisdictions and by a multitude of decision makers.

10 The draft order presented requests the following relief:

- (a) recognition of the U.S. bankruptcy proceedings;
- (b) a stay of proceedings in Canada in respect of MEC;
- (c) a prohibition on interfering with rights of MEC (i.e. contractual rights); and
- (d) a requirement to continue to provide services to MEC.

11 The order is granted in the form presented.

12 This application was brought on an *ex parte* basis. Counsel to the Bank of Montreal advised counsel to the applicant that the Bank of Montreal was specifically reserving all of its rights.

13 Paragraph 15 of the order incorporates the standard comeback provisions, which are to be interpreted as being neutral in all respects.

Application granted.

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Action No. 1001-13659

IN THE COURT OF QUEEN'S
BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF PETROFLOW
ENERGY LTD.

AND IN THE MATTER OF AN APPLICATION
UNDER SECTION 46 AND FOLLOWING OF
THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36,
AS AMENDED

CLERK OF THE COURT

SEP 16 2010

CALGARY, ALBERTA

BENCH BRIEF

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