Judicial Panel

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Hon. Justice Frank J.C. Newbould
Ontario Superior Court of Justice, Commercial List Division
Toronto

Hon. Christopher S. Sontchi
U.S. Bankruptcy Court (D. Del.); Wilmington

Overview of March 16, 2016 ABI VALCON Judges' Roundtable

1. Using The Bankruptcy Code And The CCAA To Restructure Multi-National Companies

   (a) Territoriality vs Universality

   (b) Independent main proceedings vs. main and ancillary proceedings vs. dual cooperative main proceedings

   (c) Comparison of Insolvency Regimes

   (d) Benefits to a U.S. Main Proceeding for Non-U.S. Multinational Companies

2. Implementing Cross-Border Cooperation

   (a) Cross-Border Protocols -- Are they necessary and do they work?

      (i) Global Principles of Intl. Insolvency Global Guidelines

      (ii) Barzel Industries

      (iii) Montreal Maine and Atlantic Railway

   (b) Issues and Limitations on Cooperation.

      (i) Sino-Forest

      (ii) Metcalfe and Mansfield

      (iii) Third Part Releases in the 9th Circuit

      (iv) Other Considerations

3. In The Role As A Secured Creditor In A Case That May Be Administratively Insolvent, Must A Secured Creditor Expect Its Collateral To Be Used To Fund Certain Expenses Of The Estate?

   (a) Administrative Claims?

   (b) Funding a Plan of Reorganization?

   (c) Distributions to General Unsecured Creditors?

   (d) What trends have you noticed with processes being run for the benefit of creditors?

      (i) In Canada -- Nelson Endorsement

      (ii) In the U.S. – Townsend

Proceedings under Canada's Companies' Creditors Arrangement Act

Written by:
Stephanie A. F. Grace[1]
Aird & Berlis LLP; Toronto
sgrace@airdberlis.com

Editor's Note: *For another article discussing the CCAA as it applied in* Grant Forest*, see The International Scene on page 42.*

About the Author

Stephanie Grace is a partner and a member of the Financial Services Group at Aird & Berlis LLP in Toronto. She practices bankruptcy and insolvency law, including receiverships, restructurings and liquidations.

Canada's Companies' Creditors Arrangement Act[2] (CCAA) is insolvency legislation that provides for the reorganization or restructuring of insolvent "companies," including corporations incorporated under Canadian law, corporations (wherever incorporated) that have assets or do business in Canada and certain exchange-listed income trusts that have assets in Canada. It does not include banks or railway, telegraph, insurance, trust or loan companies; it permits any such company to implement "a compromise or an arrangement" with its creditors. There are alternative proceedings under the Bankruptcy and Insolvency Act[3] (BIA) whereby companies or individuals who reside, carry out business or have property in Canada may implement "proposals" with their creditors.[4]


Stephanie A. F. Grace

As in the U.S., bankruptcy and insolvency in Canada are matters of federal jurisdiction. All of Canada's provinces and territories, except Quebec, are common-law jurisdictions and have secured-transaction regimes similar to those in the U.S. Unlike the U.S., Canadian insolvency law is administered by the superior court of each province or territory, rather than specialized bankruptcy courts, except in Toronto, where there is a separate division that deals with bankruptcy, insolvency, reorganization and commercial matters.

Overview of CCAA Proceedings

A CCAA reorganization almost always includes a court-imposed stay of proceedings against all creditors, together with approval of certain priority charges (*e.g.*, for debtor-in-possession (DIP) financing, professional fees and the payment of the statutory obligations of directors). These provisions are contained in an initial order, similar to a first-day order in the U.S.

In addition, the court will appoint a "monitor," whose duties are set out in the initial order and who is intended to be an independent court officer who reports to the court on the progress of the reorganization as well as various issues that may arise. A monitor must be a licensed bankruptcy trustee, and in Canada, most are chartered accountants rather than lawyers.

Under the CCAA, a debtor may make a compromise or arrangement between itself and all or some of its creditors (the "plan"). The plan may cover any or all classes of the creditors of the company. Subject ultimately to court approval, if the plan receives the requisite creditor approvals, it is binding on all classes of creditors covered by the plan, even if they voted against it.

Unlike under chapter 11 proceedings, however, creditors' committees are rare in CCAA proceedings. While it is not unheard of for the court to constitute a creditors' committee, the more common practice is that creditors' committees may be formed on an *ad hoc* basis and, as necessary, given standing by the court to make submissions on various matters.

Initial Court Application

A debtor company may make an application under the CCAA where it is insolvent and the total claims against it and its affiliates exceed $5 million.[5] The application is generally made where the head office or chief place of business is located.[6] The application may also be brought by a creditor, the bankruptcy trustee or liquidator of the debtor.[7] Although an application may be made without notice, the practice in Ontario is to give notice of the application to the major interested parties.

The application must be accompanied by a statement of the debtor's projected cash flow[8] and copies of all financial statements prepared during the year prior to the application, or, if no such statements exist, a copy of the most recent financial statement.[9] The court may impose a ban on publication of the statements.[10] At the application, the debtor will typically ask the court to make an initial order,[11] which will provide for the following:

1. declare that the debtor is a company to which the CCAA applies;
2. stay proceedings by creditors (including governments) to obtain payment of their claims;
3. prohibit parties from terminating or amending agreements with the debtor;
4. authorize the debtor to file a plan;
5. appoint a monitor;[12] and
6. grant various super-priority charges,[13] which may include DIP financing.[14]

The debtor must satisfy the court that circumstances exist that make the initial order appropriate.[15] If the court grants the order, the effective period of the initial stay of proceedings may not exceed 30 days.[16] When an initial order is made, the monitor must (1) publish a notice containing prescribed information about the initial order, (2) post the initial order and list of creditors with claims of more than $1,000 on the monitor's website and (3) send notice of the initial order to each creditor with a claim of more than $1,000.[17]

Feature

Deep gratitude is extended to Douglas A. Palmateer, director of Professional Development and Knowledge Management at Aird & Berlis LLP and a former partner of the firm's Financial Services Group, who was instrumental in writing this article.

2 R.S.C. 1985, c.-36, as amended.
3 R.S.C. 1985, c. B-3, as amended.
4 *See* Stephanie A.F. Grace, "Commercial Proposals under Canada's Bankruptcy and Insolvency Act," *ABI Journal* (June 2010).
5 CCAA, ss. 3(1).
6 CCAA, s. 9(1).
7 CCAA, ss. 4 and 5.
8 CCAA, ss. 10(2) (a) and (b).
9 CCAA, s. 10(2)(c).
10 CCAA, s. 10(3).
11 CCAA, ss. 11 and 11.02(1).
12 CCAA, s. 11.7(1).
13 CCAA, ss. 11.51 and 11.52.
14 CCAA, s. 11.2.
15 CCAA, s. 11.02(3)(a).
16 CCAA, s. 11.02(1).
17 CCAA, s. 23(1)(a) and Can. Reg. 2009-219, sections 6, 7 and 8.

Contents of Initial Order and Subsequent Orders

In the initial order or any subsequent order (collectively, a "CCAA order"), the court is authorized generally to make "any order that it considers appropriate in the circumstances,"[18] staying actions against the debtor as well as, in most cases, against a director of the debtor in respect of certain claims.[19] Notwithstanding the prohibition against taking certain actions, a CCAA order may not prohibit persons providing goods or services after the commencement of the CCAA proceedings from requiring immediate payment, nor may they be compelled to make any further advance of money or credit.[20] There are also certain limited exceptions to the stay of proceedings (*e.g.*, enforcement of rights under "eligible financial contracts," the exercise by various government agencies of powers, duties or functions assigned to them under certain statutes and obligations of a third party under a letter of credit or guarantee in relation to the debtor).[21] As well, a CCAA order may not affect any investigation or proceeding by a "regulatory body" against a debtor (other than enforcement of a payment ordered by the regulatory body or court, subject to certain exceptions),[22] although it may stay the government from exercising garnishment rights as long as the debtor continues to make payments during the CCAA proceedings.[23] The effective period for stays in an initial order is 30 days and will typically contain a provision giving creditors and other parties the right to bring a motion to the court to vary, amend or set aside the initial order on notice to the debtor and other interested parties.

Interim Matters

During the CCAA proceedings, there are certain interim matters that may arise and require court approval, which are discussed below.

Extension of initial order. Because the stay under the initial order may not exceed 30 days, the debtor must apply to the court, within the initial 30-day period, for an extension of the stay if additional time is required to prepare a plan. The debtor must satisfy the court both that circumstances exist that make the order appropriate and that the debtor has acted, and it is acting, in good faith and with due diligence, and the court may extend the stay order for any period of time.[24]

Interim financing. With notice to the likely affected secured creditors, the court may grant a super-priority charge in favor of a lender that provides interim financing to the debtor, either in the initial order or any subsequent order.[25]

Assignment of agreements. The court may make an order assigning a debtor's rights and obligations under many kinds of agreements except for (1) agreements entered into on or after the date the CCAA proceedings were commenced, (2) an eligible financial contract, (3) a collective agreement and (4) any other agreement that is not assignable by reason of its nature.[26]

Disclaimer of agreements. A debtor may disclaim agreements to which it was a party on the date that the proceedings were commenced, except for (1) an eligible financial contract, (2) a collective agreement, (3) a financing agreement if the debtor is the borrower, (4) a lease of real property if the debtor is the lessor and (5) an agreement granting use of intellectual-property rights, subject to court approval if there is objection by any party, including the monitor.[27]

Collective agreements. A collective agreement may not be assigned, disclaimed or revised except in limited circumstances. If a voluntary agreement cannot be reached, a debtor may apply to the court for an order authorizing the debtor to serve a notice to bargain. If an agreement is reached, the union has a claim as an unsecured creditor for an amount equal to the value of concessions granted by the union for the remaining term of the collective agreement. If no agreement is reached, the existing collective agreement remains in force.[28]

Critical suppliers. The court may make an order declaring a supplier to be a critical supplier, if it is satisfied that the goods or services in question are critical to the debtor's continued operation, and may compel a supplier to supply any goods or services on terms as the court considers appropriate, subject to granting the supplier a priority charge.[29]

Sale of assets. A debtor that is subject to the CCAA may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized by the court. Factors to be considered by the court include (1) the extent to which the creditors were consulted, (2) the effects of the proposed transaction on creditors and other interested parties and (3) whether the consideration is fair and reasonable. Assets may be sold to a related person, in which case the court will consider additional factors. Where the court authorizes a sale or other disposition of assets, the assets are sold free and clear of any security, charge or other restriction. However, the proceeds will be encumbered in favor of the creditor who had an interest in the asset(s) that were sold.[30]

Directors. The court may remove from office any director of a debtor company, and the court may fill any vacancy so created.[31]

Voidable transactions. Unless a compromise or arrangement provides otherwise, a monitor has the authority to investigate transactions made by the debtor during specified periods before the commencement of proceedings, including preferences, transfers at undervalue and payments of non-stock dividends, redemptions of shares and purchases of shares for cancellation that were made when the debtor was insolvent or that rendered the debtor insolvent.[32]

Interim receiver. Under the court's inherent jurisdiction, it may expand the monitor's powers to those of a receiver, which may include the power to take possession of all or part of a debtor's property and exercise such control over a debtor's property and business as the court considers advisable, including taking conservatory measures and disposing of property. The circumstances in which such orders have been made include the unwillingness or inability of existing management to manage the debtor's business properly during the restructuring, loss of confidence in management, or the resignation of existing management.

Proof of claim. The debtor will normally apply to the court for an order setting out the directions for proving and contesting claims and establishing a deadline for submission of claims. Claims are generally filed with the monitor, and a claims officer may be appointed to deal with disputed claims. There is usually an automatic appeal from the claims officer to the court.

Contents of the Plan

A compromise or arrangement may deal with most claims that relate to debts or liabilities, present or future, to which the debtor was subject as the commencement of the CCAA proceedings, and to

18 CCAA, s. 11.
19 CCAA, s. 11.03.
20 CCAA, ss. 11.01 and 34(4)(a) and (b).
21 CCAA, ss. 11.04, 11.08 and 34(9) and Can. Reg. 2007-257, section 2.
22 CCAA, ss. 11.1(1), (2) and (3).
23 CCAA, ss. 11.09(1) and 11.09(2).
24 CCAA, s. 11.02(3).
25 CCAA, s. 11.2.
26 CCAA, s. 11.3.
27 CCAA, s. 32.
28 CCAA, ss. 11.3(2), 32(9) and 33.
29 CCAA, s. 11.4.
30 CCAA, s. 36.
31 CCAA, s. 11.5.
32 CCAA, s. 36.1.

continued on page 72

Proceedings under Canada's Companies' Creditors Arrangement Act

from page 27

which it may become subject before the date of court sanction by reason of any obligation incurred before the day the CCAA proceedings were commenced.[33] However, certain claims may not be dealt with, unless the creditor specifically agrees, including court-imposed fines, penalties and restitution orders, and debts arising from fraud, embezzlement or misappropriation.[34]

In a plan, the debtor may assign the creditors to different classes.[35] Creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account the nature of their claims, the nature and rank of any security and the remedies otherwise available to them.[36]

The CCAA sets out several mandatory provisions that a compromise or arrangement must contain, including, if the debtor is an employer, (1) payment to employees and former employees of wages, or other compensation for services rendered during the six months preceding the date the proceedings were commenced, to the extent of $2,000 per employee, and all wages or other compensation for services rendered after the filing date;[37] (2) within six months after court sanction of the plan, payment in full to the government of various statutory employee deductions;[38] and (3) payment of any pension plan amounts, if applicable.[39]

A plan may include a provision for the compromise of claims against the debtor's directors, where the directors are liable in their capacity as directors for such obligations (*e.g.*, employee-related obligations and certain taxes), but cannot include claims that relate to misrepresentation or wrongful or oppressive conduct by directors.[40]

Plan Filing, Creditors' Meeting(s)

The debtor must file the plan with the court by the date specified in the applicable CCAA order. The debtor will apply to the court for an order specifying the date, time and place of creditors' meeting(s) to vote on the plan, along with various procedures for conducting the meeting(s) and voting on the plan (the "plan procedures order").

The monitor (or debtor) must send copies of the plan procedures order, the plan, an information circular, proxy and voting letter to creditors. The information circular includes a description of the debtor's financial condition, an explanation of the principal points of the plan and a comparison of the anticipated payment to creditors under the plan and in a liquidation scenario.

The meeting(s) of creditors will be held in accordance with the court's directions in the plan-procedures order. Where an alteration or modification of the plan is proposed at the meeting(s), the plan may be modified as proposed if the court has so provided in the plan-procedures order, or the meeting(s) may be adjourned on such terms as the court may direct.[41]

Plan approval requires that a two-thirds majority of the creditors, present and voting in person or by proxy, for each class agree to the compromise or arrangement either as proposed, or as altered or modified at the meeting.[42] A creditor who is related to the debtor may vote against, but not for, the compromise plan.[43] If not all classes receive the requisite approval, in certain circumstances one or more classes may be removed from the plan.

Court Hearing

If the required majority of creditors agree to the plan, it then may be sanctioned by the court.[44] The CCAA does not identify any factors that the court must consider. However, case authorities have established that the court must ensure that all legal requirements have been satisfied, conditions precedent to the granting of the court's sanction have been fulfilled or waived, and the plan is fair, reasonable and in the creditors' best interests. If this criteria is satisfied, the court will make an order sanctioning the plan (the "sanction order").

Performance of Plan

When sanctioned by the court, the plan is binding on all classes of creditors subject to the plan, whether secured or unsecured, and on the debtor.[45] The debtor will proceed to perform its obligations under the plan. Where the debtor defaults in performing the plan, the proper procedure is to seek an order declaring the compromise or arrangement void. However, this does not render the debtor bankrupt.

Cross-Border Insolvencies

The CCAA contains a code for dealing with cross-border insolvencies.[46] Its stated purpose is to promote, among other things, "cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies."[47] It authorizes a Canadian court, on the application of a "foreign representative," to make an order recognizing a "foreign proceeding,"[48] which is a judicial or administrative proceeding in a jurisdiction outside Canada in which a debtor's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. A foreign representative is the person or body who is authorized in a foreign proceeding to monitor the debtor's business and financial affairs for the purpose of reorganization, and to act as a representative for the foreign proceeding.

Recognition of a foreign proceeding by a Canadian court will normally include the making of orders to stay the commencement or continuation of proceedings by creditors (including governments) to obtain payment of their claims, and to prohibit the debtor from selling or otherwise disposing of its property in Canada outside of the ordinary course of business.[49] Other orders may be made to deal with the examination of witnesses, taking of evidence or delivery of information concerning the debtor's property, business and financial affairs, and to authorize the foreign representative to monitor the debtor's business and financial affairs in Canada.[50] ■

33 CCAA, s. 19(1).
34 CCAA, s. 19(2).
35 CCAA, s. 22(1).
36 CCAA, s. 22(2).
37 CCAA, s. 6(5).
38 CCAA, s. 6(3).
39 CCAA, s. 6(6).
40 CCAA, ss. 5.1(1) - (3).
41 CCAA, s. 7.
42 CCAA, s. 6(1).
43 CCAA, s. 22(3).
44 CCAA, s. 6(1).
45 CCAA, s. 6(1).
46 CCAA, ss. 44-61.
47 CCAA, s. 44.
48 CCAA, s. 46.
49 CCAA, ss. 48 and 49.
50 CCAA, s. 49.

Practice & Procedure

By Nicholas J. Cremona, Natacha Carbajal and George Klidonas[1]

Revisiting Nondebtor Releases in Chapter 15 Cases

Nicholas J. Cremona
BakerHostetler
New York

Natacha Carbajal
BakerHostetler
New York

George Klidonas
BakerHostetler
New York

Nicholas Cremona is a partner, and Natacha Carbajal and George Klidonas are associates, in BakerHostetler's Bankruptcy, Corporate Restructuring and Creditors' Rights Group. Mr. Klidonas also serves as a coordinating editor for the ABI Journal *and is co-chair of ABI's Bankruptcy Taxation Committee.*

One of the main purposes of a bankruptcy case is to give debtors a "fresh start" upon emerging from bankruptcy. Individual debtors typically seek a discharge of their debts once their cases are closed, while chapter 11 corporate debtors usually obtain releases of pre-confirmation debts. A body of law, however, has been developing for quite some time on whether third-party nondebtor releases should be granted in chapter 11 cases. Opponents of nondebtor releases argue that officers, directors, lenders, insurance carriers and others should not use the chapter 11 process as a way of extinguishing obligations. Proponents, on the other hand, argue that under the right circumstances, third-party releases might pave the way for a successful reorganization of a chapter 11 debtor.

The U.S. Court of Appeals for the Second Circuit has allowed for third-party releases where the release is vital to confirmation of a reorganization plan, and when "truly unusual circumstances" exist to render the full scope of such release essential.[2] However, a recent decision from the U.S. Bankruptcy Court for the Southern District of New York examined nondebtor releases in the context of an international bankruptcy proceeding and concluded that it is unclear whether the same standard applies in chapter 15 cases.[3] In *In re Sino-Forest Corp.*, the bankruptcy court granted comity[4] to a Canadian court's order approving a plan, which allowed the release of claims against Ernst & Young.[5] The *Sino-Forest* decision, however, is seemingly at odds with a recent opinion in the *In re Vitro S.A.B. de C.V.* case, in which the U.S. Court of Appeals for the Fifth Circuit upheld a bankruptcy court's decision denying comity in a chapter 15 case to a Mexican court order, which included third-party, nondebtor releases.[6] This article analyzes the ostensibly divergent opinions in *Sino-Forest* and *Vitro*, as well as the court's reasons for upholding the third-party release in *Sino-Forest*.

Factual Background: *Sino-Forest*

Sino-Forest filed for bankruptcy in an Ontario court, and Ernst & Young agreed to pay $117 million[7] to Canadian and U.S. class action plaintiffs who had acquired securities of Sino-Forest in the primary, secondary or over-the-counter markets.[8] The class-action plaintiffs alleged that Ernst & Young and certain officers, directors, underwriters and auditors of Sino-Forest misrepresented the debtor's financial condition.[9] In connection with the settlement, Ernst & Young relinquished its rights to any distributions under the Canadian plan and agreed to vote in favor of the Canadian plan. In exchange, Ernst & Young sought a global, third-party release.

The Ontario court approved the settlement, and the Ontario court of appeals dismissed motions for leave to appeal; both courts had concluded that the requirements for establishing third-party releases under Canada's Companies' Creditors Arrangement Act (CCAA) were satisfied.[10] Specifically, the Ontario court held that third-party nondebtor releases are not uncommon under the CCAA and that the Ontario court of appeals generally allowed them.[11] The Ontario court discussed *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*,[12] wherein the Ontario court of appeals held that third-party nondebtor releases are allowed where there is "a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan."[13] Applying the test and factors set forth by the court of appeals for Ontario, the settlement with Ernst & Young was approved. A number of plaintiffs objected to the release, but the Ontario court, as well as the Ontario court of appeals, disagreed with their objections.[14]

1 The views expressed herein are solely those of the authors.
2 *Deutsche Bank AG, London Branch v. Metromedia Fiber Network Inc. (In re Metromedia Fiber Network Inc.)*, 416 F.3d 136, 141 (2d Cir. 2005).
3 Chapter 15 recognition is sought by foreign debtors seeking protection or pursuing estate assets located in the U.S. or where the foreign debtor is seeking to enforce a foreign insolvency order in the U.S.
4 Comity "is the recognition [that] one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).
5 *In re Sino-Forest Corp.*, 501 B.R. 655, 666 (Bankr. S.D.N.Y. 2013).
6 *See generally Ad Hoc Group of Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031 (5th Cir. 2012).
7 This value is in Canadian dollars.
8 *See In re Sino-Forest Corp.*, 501 B.R. at 657.
9 *See id.* at 658.
10 The CCAA is a statute of the Parliament of Canada that allows insolvent corporations owing their creditors in excess of $5 million to restructure their business and financial affairs.
11 *Id.* at 660.
12 2008 ONCA 587 at ¶¶ 26-28, 92 O.R. (3d), *leave to appeal refused*, [2008] S.C.C.A. No. 337.
13 *Id.* at ¶ 70. Specifically, a court interpreting the CCAA must consider:
a) [w]hether the claims to be released are rationally related to the purpose of the plan; b) [w]hether the claims to be released are necessary for the plan of arrangement; c) [w]hether the parties who have claims released against them contributed in a tangible and realistic way; and d) [w]hether the plan will benefit the debtor and the creditors generally.
Id. at ¶ 50. Courts also consider whether the settlement is fair and reasonable, whether it provides substantial benefits to the other stakeholders and whether it is consistent with the purpose and spirit of the CCAA. *Id.* at ¶ 49.
14 *See In re Sino-Forest Corp.*, 501 B.R. at 661.

In attempting to enforce the release within the U.S., the foreign representative of the debtor, FTI Consulting Canada Inc., commenced a chapter 15 case in the U.S. Bankruptcy Court for the Southern District of New York. Ernst & Young requested from the bankruptcy court that the Ontario court order be recognized, thus approving the Ernst & Young settlement and release.[15] The foreign representative and the U.S. class action plaintiffs joined in Ernst & Young's motion.[16]

Court Approves Ernst & Young's Release

In concluding that the Ontario court's settlement order should be recognized and enforced in the U.S., the U.S. bankruptcy court explained that the parties in the Canadian proceeding had a full and fair opportunity to litigate the issues, and that the Ontario court had reached a reasoned and fair decision.[17] Thus, granting comity to the Canadian order was justified. In addition, the court explained that § 1507 of the Bankruptcy Code allows a bankruptcy court to provide "additional assistance" to a foreign representative.[18] The court analyzed the five "additional assistance" factors set forth in § 1507 and established that extending comity in this case will not affect (1) the just treatment of creditors, (2) U.S. creditors' protection against either prejudice or inconvenience, (3) the prevention of fraudulent or preferential disposition of property, (4) the distribution of proceeds under the Bankruptcy Code or (5) the opportunity for a fresh start.[19] Finally, courts will generally not approve a foreign action that violates public policy, but this exception is narrowly construed; thus, the public policy exception was not applied in *Sino-Forest*.

The bankruptcy court also relied heavily on its prior holding in *In re Metcalfe & Mansfield Alt. Invs.*, wherein the court faced an almost identical issue. In that case, the court was asked to enforce a Canadian order granting a third-party nondebtor injunction. The court explained that the correct inquiry "is whether the foreign orders should be enforced in the United States in this chapter 15 case."[20] The bankruptcy court in *Metcalfe* concluded that the U.S. and Canada "share the same common law traditions and fundamental principles of law"[21] and upheld the Canadian third-party, nondebtor release.

The court also relied on other precedent in reaching its conclusion. For example, the court cited to a seminal comity case, *Hilton v. Guyot*.[22] In that case, the U.S. Supreme Court concluded that comity should be granted and that foreign judgments should be enforced where there was

> a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting.[23]

15 *See id.* at 656.
16 *See id.* at 657.
17 *See id.* at 663.
18 *See id.* at 664.
19 *See id.*
20 *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010).
21 *Id.* at 698.
22 159 U.S. at 113.
23 *Id.* at 202-03.

The bankruptcy court relied on its prior decision in *Metcalfe* as well as Supreme Court precedent in reaching its conclusion. Thus, the bankruptcy court extended comity to the Canadian court's decision to release Ernst & Young from certain liabilities. The bankruptcy court reasoned that the Canadian court had proper jurisdiction to enter the order, and that the foreign proceeding was procedurally fair.[24]

The Role of *In re Vitro* in the *In re Sino-Forest* Decision

The *Sino-Forest* court acknowledged that there was a supervening case between *re Metcalfe* and *Sino-Forest,* and analyzed whether *Vitro* would change the landscape of third-party, nondebtor releases in chapter 15 cases.[25] Vitro S.A.B. de C.V., headquartered in Mexico, was one of the largest glass manufacturers in the world. On Dec. 13, 2010, Vitro filed for bankruptcy under the *Ley de Concursos Mercantiles*[26] and had a plan approved in Mexico, which released Vitro's subsidiaries of their guarantee obligations. Vitro then sought recognition of the foreign proceeding and plan approval by the U.S. Bankruptcy Court for the Northern District of Texas in a chapter 15 proceeding.

The bankruptcy court in *Vitro* enforced the plan in the U.S. but refused to approve the release, holding that it is appropriate to grant comity to the actions of foreign courts as long as those proceedings provide for the same fundamental protections that parties receive in the U.S.[27] On appeal, the Fifth Circuit determined that Vitro's plan did not qualify for enforcement, but left open the issue of whether extinguishing the obligations of nondebtor guarantors could ever be enforced in a chapter 15 proceeding.[28] The Fifth Circuit acknowledged that although there is some disagreement among the courts about whether nondebtor releases are appropriate under any circumstances, it ultimately concluded that this type of relief is not necessarily precluded.[29]

Even in light of the Fifth Circuit's decision in *Vitro*, the bankruptcy court in *Sino-Forest* concluded that the Ernst & Young release should be upheld in the U.S. The *Sino-Forest* court found similarities with its previous decision in *Metcalfe* while distinguishing the facts of *Vitro*.[30] Specifically, in both *Sino-Forest* and *Metcalfe*, each plan had near-unanimous noninsider support, and the Canadian court's reasoning to approve the nondebtor release reflected similar sensitivity to the issues that are typically present in U.S. courts.[31] Thus, because *Sino-Forest* is "virtually on all fours" with *Metcalfe*,[32] the bankruptcy court concluded that the plan, which included the third-party release, should be approved in the U.S.

24 *See JP Morgan Chase Bank v. Altos Hornos de Mexico S.A.*, 412 F.3d 418, 424 (2d Cir. 2005); *In re Atlas Shipping A/S*, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009).
25 *See In re Sino-Forest Corp.*, 501 B.R. at 665.
26 A *concurso* proceeding is the Mexican equivalent of a voluntary judicial reorganization proceeding under U.S. law. *See In re Vitro S.A.B. de C.V.*, 701 F.3d at 1038 n.1.
27 *In re Vitro S.A.B. de C.V.*, 473 B.R. 117, 132 (Bankr. N.D. Tex. 2012).
28 *In re Vitro S.A.B. de C.V.*, 701 F.3d 1063.
29 *See id.*
30 *In re Sino-Forest Corp.*, 501 B.R. at 665.
31 *See id.* at 665-66.
32 *See id.* at 666.

continued on page 89

Practice & Procedure: Revisiting Nondebtor Releases in Chapter 15 Cases

from page 13

Lessons from *In re Sino-Forest*

After reviewing *Metcalfe*, *Vitro* and *Sino-Forest*, it seems that future decisions on whether foreign third-party nondebtor releases should be enforced in the U.S. in a chapter 15 proceeding will vary from circuit to circuit based on divergent precedent and the facts of each case. For example, in the Second and Fourth Circuits,[33] third-party releases are not categorically prohibited, but they are prohibited in the Fifth, Ninth and Tenth Circuits.[34] Thus, an analysis of the law in the applicable circuit is necessary in determining whether a court is more or less likely to uphold a foreign third-party nondebtor release. In addition, principles of comity will require the proponent of the release to analyze the factors set forth in the Supreme Court's seminal case, *Hilton v. Guyot*. Although the bankruptcy court in *Sino-Forest* indicated that the analysis for granting nondebtor releases in chapter 11 cases is different from releases in chapter 15 cases, it remains to be seen whether future courts will agree. abi

33 *See generally Berhmann v. Nat'l Heritage Found. Inc.*, 663 F.3d 704 (4th Cir. 2011) *In re Metromedia Fiber Network Inc.*, 416 F.3d at 141.

34 *See generally In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995); *In re Western Real Estate Fund Inc.*, 922 F.2d 592 (10th Cir. 1990); *see* Douglas E. Deutsch and Eric Daucher, "Chapter 11 Plan Confirmation Issues: Settlements, Releases, Gifting and Death Traps," XXIX *ABI Journal* 8, 54-55, 91, October 2010.

What You Don't Know About Cross-Border International Restructuring

VALCON 2016: Emerging Valuation Issues in Bankruptcy and Beyond

March 14-16, 2016 Four Seasons Hotel Las Vegas, Las Vegas

Hon. Bruce T. Beesley
U.S. Bankruptcy Court
District of Nevada

Hon. Martin Glenn
U.S. Bankruptcy Court
Southern District of New York

Hon. Frank J.C. Newbould
Ontario Superior Court of Justice
Commercial List Division

Hon. Christopher S. Sontchi
U.S. Bankruptcy Court
District of Delaware

Ron E. Meisler
Skadden, Arps, Slate, Meagher & Flom LLP (Moderator)

What You Don't Know About International Cross-Border International Restructuring

- Using the Bankruptcy Code or the CCAA to restructure multi-national companies
- Implementing cross-border protocols
- Secured Creditors and the Administratively Insolvent Debtor (domestically and internationally)
- What's next?

The World is Small

- Businesses are global
  - Example – U.S. Corporation
  - NY headquarters & U.S. patents
  - Korean parts manufacturing plant
  - Mexican & Greek assembly plants
  - German, U.K., Canadian & U.S. stores
  - Australian company with U.S. denominated bonds and an indenture governed by New York law

Challenges Facing Cross-Border Restructurings

- What law governs a cross-border case?
  - A little U.S.
  - A little Canada
  - A little U.K.
  - A little protocol that is the law of neither?
- Can a company predict the outcome?
- Enforcement
- Territoriality vs. Universality

Challenges Facing Cross-Border Restructurings (cont'd)

- Territoriality –
    - U.S. case deals with U.S. assets, Canadian case deals with Canadian assets, etc.
- Universality –
    - one case deals with all assets and all creditors

Important Considerations for Non-U.S. and Multinational Companies Contemplating Chapter 11: *Jurisdictional and Cultural Nuances*

- Although Chapter 11 offers many benefits, advisers to non-U.S. and multinational companies may need to consider:
  - Educating local stakeholders and decision makers;
  - Board member, officer, and employee obligations under local laws; and
  - Educating board members and officers on U.S. notions of fiduciary duty laws.

Important Considerations for Non-U.S. and Multinational Companies Contemplating Chapter 11: *Location*

- Chapter 11 Debtor Eligibility
  - An entity is eligible to file for Chapter 11 if the company "resides or has a domicile, a place of business, or property in the United States." 11 U.S.C. § 109
  - Would having only a U.S. bank account suffice?
  - What if the non-U.S. company had bonds denominated in U.S. dollars and governed by New York law?
  - But, the more U.S. contacts the better.

U.K. vs. Canadian vs. U.S. Reorganization Proceedings

	U.K. Scheme of Arrangement	Canadian CCAA Proceeding	U.S. Chapter 11 Proceeding
Insolvency Test	Cash flow test or balance sheet test	Cash flow test or balance sheet test Eligibility under CCAA requires demonstration of at least $5 million of claims	Insolvency is not a pre-requisite
Duty to File	No positive duty imposed on directors; however, directors could face personal liability under some circumstances	No duty to file	No duty to file
Ipso Facto Clause Protection	None	Non-debtor counterparty has no right to reject or terminate absent a post-petition default	Non-debtor counterparty has no right to reject or terminate absent a post-petition default
Control of Company	Passes to an insolvency practitioner	Typically remains with management, under the supervision of a court appointed "Monitor"	Typically remains with management
Cramdown	There is authority for the proposition that 'out of the money' creditors can be excluded from a scheme of arrangement and effectively crammed down	Plan cannot be imposed on a junior class that does not provide the requisite support for Plan	Provided statutory thresholds are satisfied, a Plan can be imposed on a junior class that does not support Plan

The Benefits of Chapter 11 for Non-U.S. and Multinational Companies

- Well-developed insolvency law
  - Global reach of the Automatic Stay
  - No insolvency requirement
  - Predictability
- Existing management remains in place
- Ability to obtain DIP financing on a superpriority basis
- Ability to assume and assign or reject contracts and leases
- Reorganization versus liquidation
  - Well developed tools to raise capital
- Assets can be sold free and clear of claims
- Less than unanimous stakeholder support required
- Flexibility in setting up classes
  - Potential classes include bank debt, senior bond debt, subordinated bond debt, etc.

The Benefits of Chapter 11 for Non-U.S. and Multinational Companies (cont'd)

- Vote by class
  - A class is deemed to have accepted a plan if, of the claims actually voting, two-thirds in amount and greater than one-half in number vote in favor
  - If a class votes to reject the plan, it can be "crammed" down on that class so long as:
    - At least one impaired class votes to accept the plan; and
    - The plan does not "unfairly discriminate" against the rejecting class and is "fair and equitable" to the rejecting class (i.e., senior creditors are provided for in full before junior creditors recover)

Important Considerations for Non-U.S. and Multinational Companies Contemplating Chapter 11: *Timing*

- Three types of Chapter 11 cases:
  - "Freefall"
    - Relief is sought under chapter 11 without having an agreed exit strategy among the company and at least a critical mass or core group of creditors.
    - Generally last a long time.
  - Prenegotiated
    - The plan is negotiated with key constituents before the company files, often times there are lock up agreements signed but the plan is not voted on before the enterprise actually files.
    - Typically last about 60 days.
  - Prepackaged
    - The company not only has agreement, but the plan has been voted on and accepted before the filing.
    - Typically last around 30 days, but can be shorter.

Case Study: In re Barnet, 737 F.3d 238 (2d Cir. 2013)

- The Bankruptcy Court granted recognition to Octaviar Administration Pty Ltd., an Australian company, that had not introduced evidence of any assets or operations in the United States.
- Holding: Foreign entities seeking recognition under Chapter 15 must, in addition to satisfying the requirements for recognition set forth in Chapter 15, satisfy Section 109 of the Bankruptcy Code.
  - "Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States … may be a debtor under this title." 11 U.S.C. § 109. First petition was denied recognition under Chapter 15.
  - Second petition successful because of (a) claims and causes of action against U.S. entities; and (b) retainer. See In re Octaviar Admin. Pty Ltd, 511 B.R. 361 (Bankr. S.D.N.Y. 2014)

Case Study: In re Berau Capital Res Pte. Ltd., No. 15-11804 (MG), 540 B.R 80 (Bankr. S.D.N.Y. 2015)

- Supplementing In re Barnett, in October 2015, the bankruptcy court held that USD-denominated bonds issued under New York law constitute intangible property in the United States that may satisfy the criteria for chapter 15 eligibility enumerated in §109(a) of the Bankruptcy Code

Case Study: Krys v. Farnum Place (In re Fairfield Sentry Ltd.), 768 F.3d 239 (2d Cir. Sept. 26, 2014), rehearing denied (Jan. 13, 2015)

- Fairfield Sentry, a BVI investment fund that invested 95% of its assets with Madoff, was placed into liquidation in the BVI. Bankruptcy Court granted petition seeking recognition of the BVI liquidation as a foreign main proceeding.
- Fairfield Sentry had filed SIPA claims, and foreign liquidator held an auction to sell the claims.
- Farnum Place won the auction with a bid equal to 32.125% of the claim's allowed amount. Trade confirmation provided it was governed by New York law and subject to approval by the U.S. Bankruptcy Court and the BVI court.

Case Study: Krys v. Farnum Place (In re Fairfield Sentry Ltd.), 768 F.3d 239 (2d Cir. Sept. 26, 2014), rehearing denied (Jan. 13, 2015) (cont'd)

- 3 days later, the Madoff estate received an influx of $5 billion. Liquidator argued that transaction should not be approved because, given the increase in the SIPA claim's value, it was not in the best interests of the estate.
- BVI court approved the trade confirmation and directed the liquidator to bring the matter before the U.S. Bankruptcy Court.
- Bankruptcy Court denied liquidator's application to disapprove the trade confirmation holding that section 363

Case Study: Krys v. Farnum Place, LLC (In re Fairfield Sentry Ltd.), 768 F.3d 239 (2d Cir. Sept. 26, 2014), rehearing denied (Jan. 13, 2015) (cont'd)

review was not appropriate because the "sale [did] not involve the transfer of an interest in property within the United States" and that "comity dictate[d] that [it] defer to the BVI judgment."

- District Court affirmed.
- Second Circuit reversed and remanded.
- Section 363 review is required in an ancillary chapter 15 proceeding when there is a "transfer of an interest of the debtor in property that is within the territorial jurisdiction of

Case Study: Krys v. Farnum Place (In re Fairfield Sentry Ltd.), 768 F.3d 239 (2d Cir. Sept. 26, 2014), rehearing denied (Jan. 13, 2015) (cont'd)

the United States" and the SIPA claim itself (not the Madoff fund) was within the territorial jurisdiction of the U.S.

- Comity did not require deference to the BVI court.
- Directed Bankruptcy Court to "consider as part of its section 363 review the increase in value of the SIPA Claim between the signing of the Trade Confirmation and approval by the bankruptcy court."
- Second Circuit refused to grant an en banc hearing (January 13, 2015).

Types of Co-operation

- Can a U.S. and Canadian judge hold a joint televised hearing?
- Can the courts approve agreements?
  - Common - called protocols
  - Usually procedural

Global Principles for Cooperation in International Insolvency Cases

- Overriding Objective
  - Enhance Cooperation and Harmonization of International Insolvency Proceedings
- Court to Court Communications
  - A court may communicate with another court for purposes of coordinating and harmonizing proceedings
- Communication to Court
  - Counsel should be entitled to participate
  - Should be recorded and transcribed
  - Official transcripts of such proceedings should be part of the record (subject to redaction if necessary)
  - Personnel other than judges may establish appropriate arrangements for communication without participation of counsel (unless otherwise ordered)

Global Principles for Cooperation in International Insolvency Cases (cont'd)

- Joint Hearings
  - Courts should be able to conduct simultaneous hearings
  - Filing papers does in other court for such hearings should not subject a party to the jurisdiction of other court
  - Submissions/Applications by a party should only be made in the court in which the applicable party is appearing
  - Prior to joint hearings, courts should be entitled to communicate with each other with or without counsel
  - Subsequent to joint hearings, courts should be entitled to communicate with each other with or without counsel
- Coordination of Proceedings
  - Courts should be permitted to communicate with one another whenever there is commonality among the issues
  - Courts should be permitted to communicate with one another whenever interests of justice so require

Cross-Border Insolvency Protocols

- Mandate co-operation by various courts involved
- Authorize each jurisdiction an accredited representative to participate in foreign court proceedings
- Attempt to adopt a common set of timely and effective procedural rules covering matters such as:
  - Court hearings in different jurisdictions
  - Financing or sale of assets
  - Recoveries for the benefit of creditors and equality of treatment among the general body of unsecured creditors
  - Claims filing process
  - Plans or Schemes in different jurisdictions

Cross-Border Insolvency Protocols (cont'd)

- Do cross-border insolvency protocols work?
- Arguably, the very presence of a protocol can eliminate direct court involvement and enable parties to proceed smoothly accordingly to the principles contained in the protocol
- They encourage judicial restraint in favor of cooperation and depend upon the respect by courts of different countries for each other
- Procedural over Substantive

Cross-Border Insolvency Protocols (cont'd)

- Do cross-border insolvency protocols work? (cont'd)
  - Avoid inconsistent, conflicting or duplicative rulings by courts of different jurisdictions
  - All parties in interest provided sufficient notice
  - Substantive rights of all parties in interest are protected
  - Jurisdictional integrity of by courts of different jurisdictions is preserved
  - Promote international cooperation and comity

Case Study: In re Montreal Maine & Atlantic Railaway, Case No. 13-10670 (D. Maine 2013)

- The Bankruptcy Court granted cross-border court-to-court protocol governing U.S. Debtors and Canadian Debtor, approving, among others things:
  - Comity and independence of respective courts
  - Cooperation (including permission of courts to confer with or without counsel)
  - Recognition of stay of proceedings
  - Retention and compensation of professionals
  - Dispute resolution
  - Guidelines for court-to-court communications

Case Study: In re Barzel Industries Inc., Case No. 09-13204 (CSS) (D. Del. 2009)

- The Bankruptcy Court granted cross-border court-to-court protocol governing U.S. Debtors and Canadian Debtor, approving, among others things:
  - Comity and independence of respective courts
  - Cooperation (including permission of courts to confer with or without counsel)
  - Recognition of stay of proceedings
  - Retention and compensation of professionals
  - Dispute resolution
  - Guidelines for court-to-court communications

Case Study: In re Sino Forest Corp., 501 B.R. 655 (Bankr. S.D.N.Y. 2013)

- External auditor for foreign corporate debtor moved, in debtor's Chapter 15 case, for order giving full force and effect in the United States to settlement order that was entered by Canadian court in debtor's foreign main proceeding and approved settlement of securities class claims against auditor and implemented global release in auditor's favor under debtor's plan of compromise and reorganization.
- Bankruptcy Court was asked to grant third-party releases included in Canadian insolvency plan

Case Study: In re Sino Forest Corp., 501 B.R. 655 (Bankr. S.D.N.Y. 2013) (cont'd)

- Federal courts generally extend comity to foreign judgments whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy
- Once a case is recognized as a foreign main proceeding, Chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity.

Case Study: In re Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010)

- Foreign representative of debtors who were subject of foreign proceedings pending under the Canadian Companies' Creditors Arrangement Act (CCAA) moved for recognition of foreign proceedings and post-recognition relief in form of enforcement of non-debtor, third-party release approved by Canadian courts as part of restructuring plan that was adopted with near-unanimous creditor support
- Narrow constraints on availability of non-debtor, third-party release as part of Chapter 11 plan confirmed under United States bankruptcy law did not prevent bankruptcy court, in Chapter 15 case commenced by foreign representative of Canadian debtors, from granting post-recognition relief in forum of enforcement of non-debtor, third-party release approved by Canadian courts following specific argument thereon

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Case Study: In re Metcalfe & Mansfield Alternative Investments, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) (cont'd)

- No basis existed for bankruptcy court to second-guess decisions of Canadian courts
- "The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with the standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings."

Ninth Circuit and Third Party Releases

- Would a court in the Ninth Circuit extend comity?
- The Ninth Circuit is one of the few circuits that has taken a strong stance on the issue of third party releases
- 11 U.S.C. § 524(e) ("discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.").
- Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985) (holding that even though creditors approved release of non-debtor in plan and stipulated to validity of release in pending action, release was beyond bankruptcy court's power under section 524(e) and was therefore ineffective).
- In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir. 1995) (holding that "524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors.").
- American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.), 885 F.2d 621, 626 (9th Cir.1989), the Ninth Circuit Court explicitly rejected the argument that section 105 authorizes the court to use its equitable powers to discharge the liabilities of non-debtors.

Secured Creditors and the Administratively Insolvent Debtor – Internationally and in the U.S.

- There has been a great deal of debate over whether a debtor can file a chapter 11 case and utilize § 363(b) of the Bankruptcy Code to conduct a sale or liquidation process that primarily benefits its pre-petition secured lender where there is uncertainty about a recovery to unsecured creditors
- What trends have you noticed with respect to processes being run for the benefit of secured creditors
  - Internationally
  - In the U.S.
- How has the recent 3rd Circuit opinion, In re Jevic Holding Corp., which approved a structured dismissal, factor into this analysis? And, what has been the impact on 363 sale cases?

In re Nelson Education Ltd, 2015 ONSC 5557

- First Lien Lenders were under secured and submitted credit bid for company essentially wiping out Second Lien Lenders
- Court approved sale in that it satisfied the *Sondair* factors and section 36(3) of the CCAA
  - Was there sufficient effort to obtain best price
  - Have the interests of *all* parties been considered
  - Efficiency and Integrity of sale process
  - Was there any unfairness to the sale process

In re Townsend, Case No. 10-14092 (CSS) (D. Del. 2010)

- Court initially refused approval of DIP financing to implement sale process because debtors failed to provide reasonable certainty that section 503(b)(9) claims would be paid
- What is the comfort level in running a sale process for the benefit of secured creditors where there is a real potential for administrative insolvency?

What's Next?

- Where do you see the international restructurings and bankruptcy landscape unfolding over the coming 12 months?

Appendix A – General Overview of Canadian Bankruptcy, Insolvency and Restructuring Law

- The two primary pieces of insolvency-related legislation in Canada are the Companies' Creditors Arrangement Act (the CCAA) and the Bankruptcy and Insolvency Act (the BIA).
- The BIA is the principal federal legislation in Canada applicable to bankruptcies and insolvencies. It governs both voluntary and involuntary bankruptcy liquidations as well as debtor reorganizations.

A General Overview of Canadian Bankruptcy, Insolvency and Restructuring Law (cont'd)

- The CCAA is specialized companion legislation designed to assist larger corporations to reorganize their affairs through a debtor-in-possession process similar in concept to Chapter 11 of the U.S. Bankruptcy Code.

Reorganizations under the CCAA

- To seek protection under the CCAA, the debtor company (or companies) must be insolvent on either a liquidity or a balance sheet basis and must have indebtedness of at least $5 million).
- The debtor company retains possession and control of its property and assets in accordance with the Initial CCAA Order granted by the court (subject to the supervision of the court and the oversight of a court appointed monitor.

Reorganizations under the CCAA (cont'd)

- In granting the Initial CCAA Order, the court has the discretion to determine whether or not to grant a general stay of the proceedings and the nature and duration of such stay.
- Typically, the court grants a stay for not more than 30 days pursuant to which the debtor company's creditors are prevented from:
  - (a) taking any steps to enforce their claims against the debt or company and its property and assets; and

Reorganizations under the CCAA (cont'd)

  - (b) commencing or continuing any proceedings against the debtor company or its property and assets (must obtain extensions of the stay, but no limit on extentions).

- In order for the debtor company's restructuring plan under the CCAA to be implemented it must:
  - Include a provision for the payment of certain wage and pension-related amounts, if applicable;
  - Be approved by a majority in number of the creditors, representing two thirds in value of the creditors, or the class of creditors, as the case may be; and

Reorganizations under the CCAA (cont'd)

  - Be sanctioned by the court.
- Once sanctioned by the court, the plan becomes binding on all creditors to whom the restructuring plan was made
- There is no exclusivity period under which the debtor company is required to propose a plan of restructuring to its creditors.

Appendix B – U.S. and Canadian Foreign Recognition of Insolvency

- Essentially 3 approaches to multi-national insolvency
  - Different proceedings can be pursued in different jurisdictions each dealing with the assets of creditors in its own jurisdiction
  - Primary proceedings can be commenced in one jurisdiction with ancillary proceedings in others
  - Primary proceedings can be pursued in different jurisdictions with cooperation between the different jurisdictions
- Chapter 15 of the Bankruptcy Code
- Part IV of the CCAA

Chapter 15 Requirements for Recognition

- A foreign insolvency proceeding shall be recognized in the United States if:
  - "(1) such foreign proceeding … is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
  - (2) the foreign representative applying for recognition is a person or body; and
  - (3) the petition meets the requirements of section 1515."

  11 U.S.C. § 1517.

Chapter 15 Requirements for Recognition (cont'd)

- A foreign proceeding is "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. §101.

Part IV of the CCAA

- An application to the Canadian court for the recognition of a foreign proceeding may be brought by a foreign representative and must be accompanied by various documents evidencing the existence of the foreign proceeding and the authority of the foreign representative to bring the application.
- Once the Canadian court is satisfied that the recognition proceeding relates to a foreign proceeding and that the applicant has been duly appointed as the foreign

Part IV of the CCAA (cont'd)

representative in that proceeding the Canadian court essentially has no discretion, but to recognize that foreign proceeding.

- In recognizing a foreign proceeding the Canadian court must specify whether the proceeding is a foreign main or non-main proceeding. If recognized as a foreign main proceeding the Canadian court is required to grant certain specific relief under section 48 of the CCAA, including a stay of proceeding.

Part IV of the CCAA (cont'd)

- Once a foreign proceeding has been recognized by the Canadian court, the court is vested with a high level of discretion in recognizing post-recognition orders made in the foreign proceeding, or in granting supplemental relief in the Canadian recognition proceedings, provided that the court is satisfied that the orders to be recognized or the relief to be granted is for the protection of the debtor company's property or the interests of creditors.

Part IV of the CCAA (cont'd)

- Once a foreign proceeding has been recognized by the Canadian court, the foreign representative has certain specific statutory duties, including:
  - Informing the Canadian court as to any substantial change in the status of the foreign proceeding;
  - Its authority to act as foreign representative in that proceeding; and
  - Publishing a notice in one or more Canadian newspapers of certain prescribed information about the foreign proceeding.

Part IV of the CCAA (cont'd)

- A foreign representative's application to the Canadian court for a recognition order will not cause the foreign representative to have submitted to the jurisdiction of the Canadian court for any purpose other than for costs related to the recognition proceeding.
- Although not required by the CCAA, it is common practice in Canadian recognition proceedings for the Canadian court to appoint an Information Officer (similar in nature to a

Part IV of the CCAA (cont'd)

monitor) for the primary purpose of providing objective information to the Canadian court and interested Canadian creditors.