

## **DEVELOPMENTS IN US-CANADA CROSS-BORDER INSOLVENCIES**

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### **Introduction**

In this era of international commerce and increased globalization, it is not surprising that when multinational corporations fail, the restructuring regimes in multiple jurisdictions become engaged. The concurrent operation of multiple restructuring regimes gives rise to a host of potential conflicts at both the procedural and substantive levels. Notwithstanding this potential for conflict, an opportunity arises for cooperation across jurisdictional lines among the debtor, its stakeholders and the courts during a multi-jurisdictional restructuring. Increased cooperation leads to increased efficiency and generally increased realizations for the stakeholders in competing jurisdictions.

In the context of US-Canada restructurings, this article will examine several areas in which a significant degree of harmonization between Canadian and US restructuring proceedings has developed. Specifically, this article will review: (i) the key provisions of Canadian restructuring/insolvency legislation that facilitate such harmonization; (ii) procedural harmonizations that have been achieved in several cross-border insolvencies through the use of court-to-court guidelines and protocols, and (iii) the increased acceptance by Canadian courts of the stalking horse bidding process in cross-border restructurings.

## The Legislative Framework for Cross-Border Insolvencies

### (a) Canadian Legislation: Section 18.6 of the CCAA and Part XIII of the BIA

The *Companies' Creditors Arrangement Act* ("CCAA")<sup>1</sup> and the *Bankruptcy and Insolvency Act* ("BIA")<sup>2</sup> contain similar provisions regarding the recognition of foreign proceedings. In the context of US/Canadian cross-border restructuring proceedings in which a debtor, with operations or property and assets in Canada, has commenced Chapter 11 proceedings in the United States, recourse will generally be made to the provisions of the CCAA, in order to obtain a corresponding stay of proceedings or to commence corresponding restructuring proceedings in Canada.

#### (i) Section 18.6 of the CCAA

When the primary restructuring proceeding has been commenced in the US and a corresponding stay order is required in Canada in order to protect the debtor's Canadian property and assets, the debtor will usually seek a stay order in Canada pursuant to section 18.6 of the CCAA. Under section 18.6(1) of the CCAA, a "foreign proceeding" is defined as "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 interests of creditors generally".<sup>3</sup>

A Canadian court which recognizes a "foreign proceeding" under the CCAA is given a wide amount of discretion to tailor the terms and conditions of the various orders which may be granted in the course of CCAA proceedings as may be appropriate for the particular restructuring in question. Specifically, under section 18.6 of the CCAA, the court can grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in the coordination of proceedings initiated under the CCAA with a "foreign" insolvency proceeding. The courts have the authority to formally recognize foreign orders and to provide assistance to foreign representatives in foreign

restructuring proceedings, provided that such recognition or assistance would not be inconsistent with the provisions of the CCAA and the laws of Canada.

The courts have provided guidance as to the objectives and application of section 18.6 of the CCAA with respect to the recognition of foreign restructuring proceedings. In *Re Babcock & Wilcox Canada Ltd.*<sup>4</sup>, Justice Farley of the Ontario Superior Court of Justice (Commercial List) (the “Ontario Court”) was asked to recognize Chapter 11 proceedings commenced by Babcock’s US parent and related companies, and to stay asbestos related claims against Babcock in Canada. In granting this relief, Justice Farley set out the following guiding principles in respect of recognizing foreign restructuring proceedings:

- Encouraging comity and cooperation between courts;
- Respect of foreign insolvency regimes, unless they are significantly different from Canada’s regime in substance or process;
- Equitable treatment of stakeholders and where reasonably possible, equal treatment of common stakeholders;
- Reorganizing a multi-jurisdictional enterprise as a global unit, and where reasonably practicable, having one jurisdiction assume principal administrative jurisdiction over the reorganization of the debtor;
- Providing courts in an ancillary role with information to keep them apprised of developments in the foreign jurisdiction and giving stakeholders appropriate access to proceedings in the principal jurisdiction;
- Giving all affected stakeholders effective notice as reasonably possible, with an opportunity to apply to the court for appropriate relief; and
- Recognizing that the extent of a court’s role and jurisdiction will vary depending on the debtor’s connection to that jurisdiction.

In determining the appropriate level of involvement and jurisdiction which the court should exercise, the reciprocating Court should also consider the location of the debtor's stakeholders and principal operations, how developed the law is in each jurisdiction to address the debtor's specific problems, whether the application of each jurisdiction's substantive and procedural law would cause undue prejudice, and other factors appropriate under the circumstances.<sup>5</sup> Justice Farley, in *Babcock*, also confirmed that the debtor need not be insolvent to avail itself of section 18.6 of the CCAA.<sup>6</sup>

*Babcock* was applied in *Re Matlack Inc.*<sup>7</sup> where the court granted a stay of proceedings pursuant to section 18.6 of the CCAA in respect of a US company which filed under Chapter 11, but which also carried on business in Canada, on the basis that there was a sufficient connection between the US and the debtor. In *Matlack*, Justice Farley held that the issue of whether such a connection existed should be determined on the considerations of "order, predictability and fairness rather than on a mechanical analysis of connections between the matter and the jurisdiction".<sup>8</sup> As in *Babcock*, Justice Farley concluded that it was in the interests of Matlack's creditors and stakeholders that the restructuring proceed in a coordinated and integrated fashion, which would ensure equitable treatment of stakeholders, wherever located.<sup>9</sup>

Other recent examples of the use of section 18.6 to conduct Canadian proceedings ancillary to primary US Chapter 11 proceedings are *Re Noma Co.*<sup>10</sup> and *Re United Airlines Inc.*<sup>11</sup> In *Re Noma*, the Ontario Court recognized the US proceedings, granted a stay of proceedings under section 18.6, and established a claims bar process for Canadian creditors. The US plan of arrangement, that addressed the claims of Canadian creditors, was ultimately recognized by the Canadian Court.

A similar approach was used in *Microbiz Corp. v. Classic Software Systems Inc.*,<sup>12</sup> which concerned a New Jersey corporation that operated in the US, with no Ontario assets. A US Bankruptcy Court approved the company's plan of reorganization. Because the company's Canadian distributor commenced action against the company in Ontario, the company sought to stay those proceedings. Justice Lederman of the Ontario Court

granted a corresponding stay of proceedings and recognized the US Bankruptcy Court's approval of the debtor's plan of reorganization, on the basis that the US Bankruptcy Court had a real and substantial connection to the proceedings and the Canadian creditors had participated in and recognized the US Bankruptcy Court's jurisdiction over the US proceedings by filing proofs of claim.<sup>13</sup>

Another example of a successful cross-border restructuring involving proceedings under section 18.6 of the CCAA is *Re Core-Mark*. In this case, the Delaware company, which had significant operations in Canada, and its parent had commenced Chapter 11 proceedings in the US, and applied for an order under section 18.6 of the CCAA in order to protect its Canadian assets. The Supreme Court of British Columbia recognized the US bankruptcy proceedings as a "foreign proceeding", and stayed all actions against the Company. The British Columbia Court also approved the US claims bar process for Canadian creditors but preserved the statutory rights and remedies of provincial governments. Both courts ordered that the filing of a proof of claim by a Canadian creditor would not be considered to amount to submission to the jurisdiction of the US court. In addition, a single voting process, which included Canadian creditors, and a single plan of arrangement was approved by the Canadian Court.

According to one commentary, the Canadian court's willingness to accommodate the US proceedings in *Re Core-Mark* can be attributed to the facts that the Canadian proceedings were truly ancillary to the main US proceedings, equal treatment was given to Canadian and US creditors in the single claims process, a comprehensive and global restructuring plan was proposed and ample notice was given to the Canadian Court and to Canadian creditors of US developments.<sup>14</sup>

**(ii) Part XIII of the BIA**

Part XIII of the BIA contains similar, although more detailed, provisions in respect of "debtors" involved in "foreign proceedings". In order to qualify for relief under Part XIII of the BIA, the entity must be insolvent and have property in Canada.<sup>15</sup> As proof of

insolvency, a certified copy of the order of the foreign court will be accepted.<sup>16</sup> As under the CCAA, the courts, in making an order under Part XIII of the BIA, have some discretion to grant the relief that they consider appropriate to coordinate proceedings under the BIA with any foreign proceeding.<sup>17</sup> The BIA explicitly provides that foreign stays of proceedings will not apply to creditors residing or carrying on business in Canada, unless a stay order is issued in Canadian proceedings.<sup>18</sup>

In recognizing “foreign proceedings”, the courts have interpreted comity as coordination among jurisdictions rather than the unquestioning acceptance and implementation of the decisions of a foreign court by the reciprocating jurisdiction. Canadian courts are generally reluctant to surrender jurisdiction over restructuring proceedings and will usually require that the Canadian restructuring system be invoked, even if in an ancillary role. It is essential for a debtor subject to Chapter 11 proceedings to involve the Canadian courts early in any cross-border restructuring process in order to ensure that the debtor or its subsidiaries are able to maximize the benefit of commencing corresponding proceedings either under section 18.6 of the CCAA or Part XIII of the BIA.

## **Procedural Harmonization**

In situations where concurrent restructuring proceedings are filed in Canada and the US, the US Bankruptcy and Canadian Courts have often adopted guidelines and protocols in order to harmonize their activities, create more efficient procedures during the course of cross-border restructurings and achieve consistent treatment of stakeholders in each jurisdiction. Cross-border protocols and guidelines are extremely useful in multi-jurisdictional restructurings where a significant degree of cross-border interaction is required.

### **(a) Court-to-Court Guidelines**

A number of Canadian courts have adopted the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the “Guidelines”), as prepared by The

American Law Institute and adopted by The International Insolvency Institute for use in certain cases, provided that adequate notice has been given to the affected parties. The Guidelines are intended to encourage and facilitate cooperation in multi-jurisdictional restructuring proceedings; however, they are “not intended to alter or change the domestic rules or procedures that are applicable in any country and are not intended to affect or curtail the substantive rights of any party in proceedings before the courts.”<sup>19</sup>

The Guidelines promote transparent communication between courts to enhance coordination and harmonization of cross-border proceedings and thereby promote consistency and efficiency in the respective court processes. The Guidelines permit courts of different jurisdictions to communicate with each another and with the insolvency administrators of other jurisdictions, through the transmission of materials or participation by telephone or video conferencing, provided that advance notice is given to counsel for all affected parties. The Guidelines also provide assistance with respect to conducting joint hearings among participating courts.<sup>20</sup>

The Guidelines are not intended to be static, but are to be adapted by the courts over time in order to suit the circumstances of each cross-border restructuring and to reflect the growing experience of the international insolvency community.<sup>21</sup> The Guidelines were successfully used in connection with the cross-border protocols approved by the US Bankruptcy and Ontario Courts in the cross-border restructuring proceedings of *Mosaic Group Inc.*<sup>22</sup> and *Archibald Candy Corporation.*<sup>23</sup>

## **(b) Cross-Border Protocols**

While the Guidelines essentially deal with the mechanics of cross-border communications between courts, cross-border protocols which have been adopted and approved by the US Bankruptcy and Canadian Courts are usually tailored to a particular cross-border restructuring proceeding. They are intended to be adapted by the respective courts in order to harmonize, coordinate and reduce the duplication of activities as well as to promote the orderly and effective administration of the respective restructuring

proceedings. Protocols are only effective once approved by each of the courts involved in the restructuring proceedings in question.

The protocols used by the US Bankruptcy and Ontario Courts in the *Mosaic*, *Archibald Candy* and *PSINet Ltd.*<sup>24</sup> restructuring proceedings were instrumental in contributing to the success of the cross-border sales process adopted in each of those proceedings. While the terms of the protocols were tailored to each particular restructuring proceeding, there were several common provisions. One key element was that the use of the protocol would not in any way diminish the independence and jurisdiction of each court over its own proceedings. This provision is critical in preserving the independence and integrity of the respective restructuring processes in each country affected by a cross-border restructuring proceeding and accordingly, promotes cooperation and respect for comity as between the courts and all stakeholders.

Generally, cross-border protocols also grant standing to the major participants in each proceeding in the corresponding proceedings initiated in the other country, and also permit the courts to hold joint hearings, which will now most often conform with the Guidelines. Also, protocols can provide for the use, by the Canadian courts, of non-traditional restructuring mechanisms such as stalking horse bids. For instance, in the *PSINet* restructuring, the protocol facilitated the stalking horse bid process used to sell the company's assets, and required joint hearings of the US Bankruptcy Court and the Ontario court for: (i) approval of the sale of the Canadian assets through a stalking horse bid process; and (ii) distribution of the resulting sale proceeds.<sup>25</sup>

The cross-border protocol which was approved by the US Bankruptcy and Ontario Court in *Mosaic* specifically addressed the following issues:

- recognition that the monitor appointed in the CCAA proceedings was subject to the sole jurisdiction of the Ontario Court, and that the estate representatives appointed in the US reorganization proceedings were subject to the sole jurisdiction of the US Bankruptcy court;

- recognition that the monitor was entitled to the same protection in the US reorganization proceedings as in the CCAA proceedings; and
- reciprocal recognition by the US Bankruptcy Court and Ontario Court of the stay of proceedings in each of the CCAA and Chapter 11 proceedings with the corresponding agreement to enforce each stay of proceeding, in each respective jurisdiction.<sup>26</sup>

## **The Use of Stalking Horse Bidding Processes in Cross-Border Restructurings**

The increased acceptance by the Ontario Courts of stalking horse bidding processes in the sales of assets of debtor companies in CCAA proceedings demonstrates the extent to which cross-border proceedings can be harmonized. Long a fixture in Chapter 11 proceedings, the stalking horse bidding process has recently become more common in Canada, in the context of Canada-US restructuring proceedings. In a stalking horse bidding process, a potential purchaser enters into an agreement with the debtor, establishing a floor price against which later competing bids are compared, and providing for a break-up fee for the stalking horse bidder, if a higher bid is ultimately accepted. The process is designed to obtain the best possible price for the debtor's assets, usually through an auction.

The keys to the acceptance of a stalking horse bidding process by the Ontario Courts in any particular case appear to be: (i) the early involvement of the Canadian courts in the process; (ii) the use of cross-border protocols to facilitate harmonization of proceedings in each jurisdiction; and (iii) the use of processes that address the concerns of the Canadian courts regarding fairness to stakeholders.

In the recent cases of *Heller Financial Inc. v. Recoton Canada Ltd.*<sup>27</sup> and *Delano Technology Corporation*<sup>28</sup>, the Ontario Court emphasized the importance of obtaining the Court's cooperation early in the process, and of addressing its fairness concerns. In

*Recoton*, when the Ontario Court's approval was sought for a stalking horse bidding process that had been developed and approved in the debtor's US proceedings, the Ontario Court made it clear that it will not simply "rubber-stamp" US sale processes. The Ontario Court did approve the sale, but was critical of the fact that its approval was sought only after the US sale was a *fait accompli*. Similarly, in *Delano*, the Ontario Court was asked at the eleventh hour and without proper notice to Canadian creditors to approve a stalking horse auction process that had been developed and approved in a US restructuring proceeding. Although it approved the auction process to avoid duplicating proceedings, the Ontario Court criticized the process and required extensive advertising and notice to Canadian creditors before recognizing and approving the sale.<sup>29</sup>

The lessons of *Recoton* and *Delano* appear to have been taken to heart in the restructuring of Archibald Candy Corp. ("Archibald") and its Canadian subsidiary, Archibald Candy (Canada) Corporation ("Archibald Canada") in which a stalking horse bidding process was used successfully. Archibald filed for protection under Chapter 11 and obtained an order under section 18.6 of the CCAA recognizing the Chapter 11 stay. Since components of the Laura Secord business located in Canada were owned by both the US and Canadian companies, in order to sell this business (which had already been marketed extensively in the US), the debtors applied to the Ontario Court for the appointment of an interim receiver pursuant to section 47.1 of the BIA.

The interim receiver was appointed by the Ontario Court to review the US marketing process and bidding procedure for the Laura Secord business, including its fairness and transparency.<sup>30</sup> On the basis of the interim receiver's findings that the marketing process and bidding procedures were fairly designed to achieve the highest possible realization and that the break-up fee was not excessive,<sup>31</sup> the Ontario Court approved the stalking horse bidding process, and in a joint hearing with the US Bankruptcy Court, authorized Archibald Canada to enter into a purchase agreement with a stalking horse bidder and approved the bidding process and break-up fee provided for in the agreement.<sup>32</sup> Additional rounds of bidding were conducted at the auction and Gordon Brothers Group, LLC was selected as purchaser, with a bid 30% higher than the stalking horse bid.<sup>33</sup>

Similarly, in the cross-border restructuring of Mosaic, the early involvement of the Ontario Court, a cross-border protocol approved by both courts, and a focus on the fairness of the process itself led to the successful stalking horse sale of the debtor's assets. In *Mosaic*, an independent bidding process was used to select the stalking horse bidder, as well as the ultimate purchaser. Use of a preliminary bidding process ensured that the stalking horse bidder was selected in a competitive way that satisfied the Ontario Court's concerns regarding the fairness of the sale process, and use of a protocol ensured that the proceedings were conducted in a coordinated and efficient fashion. In the end, both courts approved the auction process and the sale.<sup>34</sup>

## **Legislative Developments**

In June 2005, Bill C-55<sup>35</sup> was introduced in the House of Commons. Bill C-55 includes a number of significant amendments to the BIA and CCAA, including changes with respect to cross-border insolvencies. These amendments are largely adopted from the United Nations Commission on International Trade Law (UNCITRAL) Model Law (which was recently adopted by the US) and are intended to facilitate international cooperation in trans-border insolvencies by authorizing courts to cooperate with one another, restricting the scope of local proceedings when foreign proceedings have been commenced and by granting local relief to foreign representatives.<sup>36</sup> A copy of the relevant portions of Bill C-55 is attached as Schedule "A" to this paper. The following is a brief overview of the key amendments concerning cross-border insolvencies.

### **(a) Cross-Border Provisions Under the CCAA**

#### **(i) Recognition Orders**

Bill C-55 repeals section 18.6 of the CCAA and replaces this section with a new regime based on the Model Law. Under Bill C-55, a foreign representative may apply to the court for recognition of a foreign proceeding. This proceeding is commenced, as under section 18.6 of the CCAA, by filing an originating application and a supporting affidavit.

Such an application will not submit the foreign representative to the jurisdiction of the court for any purpose other than costs. If the court is satisfied that the applicant is a foreign representative, and that the application relates to a foreign proceeding, the court must make an order recognizing the foreign proceeding (“Recognition Order”) as a main or non-main foreign proceeding.<sup>37</sup> A foreign main proceeding is a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests, and a foreign non-main proceeding means any other foreign proceeding.<sup>38</sup>

***(ii) Additional Relief***

If a Recognition Order is made in respect of a foreign main proceeding and if CCAA proceedings have not been commenced in respect of the company at the time of the Recognition Order, the court shall make an order, subject to any terms and conditions it deems appropriate, staying proceedings against the debtor company and prohibiting the debtor company from disposing of its property in Canada outside the ordinary course of its business.<sup>39</sup> In addition, the court may make any order it considers appropriate in connection with a foreign main or non-main proceeding, if it is satisfied that such order is necessary for the protection of the debtor company’s property or the interests of a creditor or creditors.<sup>40</sup> These orders must be consistent with any other order made under the CCAA and cannot preclude the debtor company from commencing or continuing CCAA proceedings.<sup>41</sup> The amendments also allow a foreign representative to commence CCAA proceedings as if the foreign representative were a creditor of the debtor company, or the debtor company if the foreign proceeding has received court recognition.<sup>42</sup>

***(iii) Cooperation with Foreign Representatives and Courts***

The amendments expressly direct the courts, and any other party who exercises a power or duty under the CCAA, to fully cooperate with a foreign representative and the relevant foreign court, once a Recognition Order is made.<sup>43</sup> Foreign representatives are also charged with informing the court of significant developments in the foreign proceeding, and publishing prescribed information in one or more newspapers.

**(iv) *Multiple Proceedings***

The amendments address the possibility of multiple proceedings, and provide that if CCAA proceedings are commenced after a Recognition Order has been made, the court must review any stay orders made under the international insolvency provisions and, if inconsistent with orders made in the domestic CCAA proceedings, amend or revoke them.<sup>44</sup>

**(v) *Dividend Calculation***

The amendments also provide that any dividends received by a creditor in a foreign proceeding must be taken into account in the distribution of dividends to the company's creditors in Canada, as must the value of any property of the debtor company that the creditor acquires outside Canada, due to a provable claim or a transfer of the debtor's property which would be preferential or a transfer at undervalue in Canada. In addition, a creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor with a claim of equal rank has received a dividend of equivalent value to the transfer or distribution under the foreign proceeding.<sup>45</sup>

**(b) *Cross-Border Provisions Under the BIA***

**(i) *Automatic Stay of Proceedings***

Bill C-55 repeals part XIII of the BIA, and replaces it with a regime similar to the proposed CCAA provisions discussed above. However, unlike under the CCAA, where stays of proceedings in cross-border insolvencies are court-ordered, the proposed amendments to the BIA automatically stay proceedings and restrict the debtor's ability to dispose of its assets, on recognition of a foreign proceeding as a foreign main proceeding.<sup>46</sup> This approach is consistent with the proposal regime under the BIA, which provides the court with less discretion in the insolvency process than the CCAA.

**(ii) Orders**

The amendments do permit the bankruptcy court to grant any order it considers appropriate on application of the foreign representative, if the Court is satisfied that it is necessary for the protection of the debtor's property or the interests of creditors or creditors, including appointing a receiver over all or part of the debtor's property in Canada, entrusting the administration or realization of the debtor's Canadian property to the foreign representative or other designated person, or in the case of a non-main foreign proceeding, ordering a stay of proceedings.<sup>47</sup>

**(c) General**

With respect to both the BIA and CCAA, Bill C-55 continues to reinforce the independent jurisdiction of Canadian courts by providing that they are not required to make any order inconsistent with Canadian law, nor are they required to enforce any orders made by a foreign court. However, the amendments impose a positive obligation on courts and participants in multi-jurisdictional insolvencies to cooperate with foreign representatives and foreign courts.

The proposed amendments to the CCAA and BIA will, if passed, continue the trend of increased harmonization of proceedings in multi-jurisdictional insolvencies. However, the future of these amendments is uncertain at this stage, as Bill C-55 has only had its first reading in the House of Commons.

## **Conclusion**

Recent examples of Canadian/US restructuring proceedings confirm that Canadian courts are willing to cooperate with their US counterparts in order to facilitate integrated cross-border restructuring proceedings so long as the independence and integrity of the Canadian restructuring process is respected. Provided that the concerns of the Canadian courts with respect to procedural fairness and integrity of the restructuring process itself are addressed, and involvement of the Canadian court is sought at an early stage in the

restructuring process, cross-border proceedings have and should continue to be conducted in a cooperative and efficient manner. This trend toward increased harmonization of proceedings and cooperation between courts is further demonstrated by the proposed amendments to the provisions of the BIA and CCAA dealing with foreign insolvency proceedings contained in Bill C-55. Recent successful cross-border restructurings also demonstrate that the trend toward cooperation and mutual respect for each country's procedural and substantive restructuring regimes administered by the US Bankruptcy and corresponding Canadian courts will ensure that cross-border restructuring proceedings will lead to enhanced maximizations for all stakeholders.

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<sup>1</sup> R.S.C. 1985, c. C-36.

<sup>2</sup> R.S.C. 1985, c. B-3.

<sup>3</sup> *Supra* note 1, s. 18.6(1).

<sup>4</sup> (2000), 18 C.B.R. (4<sup>th</sup>) 157 (Ont. S.C.J.).

<sup>5</sup> *Ibid.* at 167-68.

<sup>6</sup> *Ibid.* at 165.

<sup>7</sup> (2001), 26 C.B.R. (4<sup>th</sup>) 45 (Ont. S.C.J.).

<sup>8</sup> *Ibid.* at 48.

<sup>9</sup> *Ibid.* at 47.

<sup>10</sup> *Re Noma Co.*, 2004 CarswellOnt 5033 (Ont. S.C.J. [Commercial List]).

<sup>11</sup> *Re United Airlines Inc.* (2003), 43 C.B.R. (4<sup>th</sup>) 284 (Ont. Sup. Ct. [Commercial List]).

<sup>12</sup> (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.).

<sup>13</sup> *Ibid.* at 41.

<sup>14</sup> Jay A. Carfagnini *et al.* "A Model for Canadian Cross-Border Insolvency" *The Bankruptcy Strategist* (April 2005) 1.

<sup>15</sup> *Supra* note 2, s. 267.

<sup>16</sup> *Ibid.*, s. 268(1).

<sup>17</sup> *Ibid.*, s. 268(3).

<sup>18</sup> *Ibid.*, s. 269.

<sup>19</sup> The American Law Institute, *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*, Judicial Preface at ix.

<sup>20</sup> *Ibid.*, Guidelines 6-9 at p. 4-8.

<sup>21</sup> *Ibid.*, Introduction at 1-2.

<sup>22</sup> *Re Mosaic Group Inc.*, Court File No. 02-CL-4816 (Ont. S.C.J.).

<sup>23</sup> *Re Archibald Candy Corp. et. al.*, Court File Nos. 04-CL-5308, 04-CL-5461 (Ont. S.C.J.).

<sup>24</sup> *PSINet, Ltd. et. al.*, Court File No. 01-CL-4155 (Ont. S.C.J.).

<sup>25</sup> *Ibid.*, (Order of Mr. Justice Farley dated July 10, 2001, Schedule A, “Insolvency Protocol Governing Cross-border Matters and Issues relating to the Plenary Reorganization Proceedings of the above debtors and applicants” at para. 9).

<sup>26</sup> *Supra* note 22 (Initial Order of the Honourable Mr. Justice Farley made December 17, 2002, Schedule B at paras. 13-21).

<sup>27</sup> Court File No. 03-CL-5005 (Ont. S.C.J.).

<sup>28</sup> Court File No. 03-CL-4962 (Ont. S.C.J.).

<sup>29</sup> Frederick L. Myers, L. Joseph Latham & Kathryn Wells, “US-Canada Insolvency Proceedings – Canadian Courts Showing Greater Reluctance to Rubber Stamp U.S. Decisions When Canadian Interests at Stake” (2003) *Commercial Litigation* 502 at 503.

<sup>30</sup> *Supra* note 23 (Order of Mr. Justice Farley dated June 22, 2004) at para. 3.

<sup>31</sup> *Ibid.* (First Report of RSM Richter Inc., dated June 22, 2004) at paras. 5.5 and 6.

<sup>32</sup> *Ibid.* (Order of Mr. Justice Farley, dated June 29, 2004) at paras. 2-3.

<sup>33</sup> *Ibid.* (Fourth Report of RSM Richter Inc., dated July 23, 2004) at paras. 5.3, 6.

<sup>34</sup> David F.W. Cohen & David S. Kolesar, “Canadian Perspective on the Chapter 11 Stalking Horse Bid Process” (2004) 21 *Nat’l Insolv. Rev.* 25 at 32.

<sup>35</sup> Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Sess., 38th Parl., 2005 (introduced into the House of Commons 3 June 2005).

<sup>36</sup> Government of Canada Backgrounder, “Government Announces Reform of the BIA and CCAA” at 8.

<sup>37</sup> *Supra* note 35, s. 47.

<sup>38</sup> *Ibid.*, 45(1).

<sup>39</sup> *Ibid.*, s. 48(1).

<sup>40</sup> *Ibid.*, s. 49(1).

<sup>41</sup> *Ibid.*, ss. 48(2), 48(4), 49(2) and 49(3).

<sup>42</sup> *Ibid.*, s. 51.

<sup>43</sup> *Ibid.*, s. 52.

<sup>44</sup> *Ibid.*, s. 54.

<sup>45</sup> *Ibid.*, s. 60.

<sup>46</sup> *Ibid.*, s. 271.

<sup>47</sup> *Ibid.*, s. 272.

## **APPENDIX I**

### **Bill C-55 Amendments to the Bankruptcy and Insolvency Act**

#### **PART XIII: CROSS-BORDER INSOLVENCIES**

##### **PURPOSE**

Purpose

267. 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 debtors;

(d) the protection and the maximization of the value of debtors' property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

#### INTERPRETATION

Definitions

**268.** (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 has the centre of the debtor’s main interests.

“foreign non-main proceeding”  
« secondaire »

“foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding.

“foreign proceeding”  
« instances étrangères »

“foreign proceeding” means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor’s collective interests generally under any law relating to bankruptcy or insolvency in which a debtor’s property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

“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 in respect of a debtor, to

(a) administer the debtor’s property or affairs for the purpose of reorganization or liquidation; or

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

Centre of debtor’s main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor’s registered office and, in the case of a debtor who is an individual, the debtor’s ordinary place of residence are deemed to be the centre of the debtor’s main interests.

RECOGNITION OF FOREIGN PROCEEDING

Application for recognition of a foreign proceeding

269. (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 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.

Order recognizing foreign proceeding

270. (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.

Effects of recognition of a foreign main proceeding

271. (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,

(a) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;

(b) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and

(c) if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

When subsection (1) does not apply

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

Exceptions

(3) The prohibitions in paragraphs (1)(a) and (b) are subject to the exceptions specified by the court in the order recognizing the foreign proceeding that would apply in Canada had the foreign proceeding taken place in Canada under this Act.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the commencement or the continuation of proceedings under this Act, the Companies' Creditors Arrangement Act or the Winding-up and Restructuring Act in respect of the debtor.

Orders

272. (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'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, imposing the prohibitions referred to in paragraphs 271(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;

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

(c) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and

(d) appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,

(i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and

(ii) to take any other action that the court considers appropriate.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor 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 *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.

Terms and conditions of orders

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

Commencement or continuation of proceedings

**274.** If an order recognizing a foreign proceeding is made, the foreign representative may commence or continue any proceedings under sections 43, 46 to 47.1 and 49 and subsections 50(1) and 50.4(1) in respect of a debtor as if the foreign representative were a creditor of the debtor, or the debtor, as the case may be.

#### OBLIGATIONS

Cooperation — court

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

Obligations of foreign  
representative

276. 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 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.

#### MULTIPLE PROCEEDINGS

Concurrent proceedings

277. If any proceedings under this Act in respect of a debtor are commenced at any time after an order recognizing the foreign proceeding is made,

(a) the court shall review any order made under section 272 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; and

(b) if the foreign proceeding is a foreign main proceeding, the court shall make an order terminating the application of the prohibitions in paragraphs 271(1)(a) to (c) if the court determines that those prohibitions are inconsistent with any similar prohibitions imposed in the proceedings under this Act.

Multiple foreign proceedings

**278.** (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor, an order recognizing a foreign main proceeding is made in respect of the debtor, the court shall review any order made under section 272 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, an order recognizing another foreign non-main proceeding is made in respect of the debtor, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 272 in respect of the first recognized proceeding and amend or revoke that order if it considers it appropriate.

#### MISCELLANEOUS PROVISIONS

Authorization to act as representative of proceeding under this Act

**279.** 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.

Foreign representative status

**280.** 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 court order.

Foreign proceeding appeal

**281.** 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.

Presumption of insolvency

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

Credit for recovery in other jurisdictions

**283.** (1) If a bankruptcy order, a proposal or an assignment is made in respect of a debtor under this Act, the following shall be taken into account in the distribution of dividends to the debtor'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 debtor; and

(b) the value of any property of the debtor 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 the transfer 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.

Court not prevented from applying certain rules

**284.** (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.

Court not compelled to give effect to certain orders

(2) Nothing in this Part requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

## **Bill C-55 Amendments to the Companies' Creditors Arrangement Act**

### 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.

#### 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.

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.

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.

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.

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.

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.

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.

#### 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.

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.

#### 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.

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.

#### 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.

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.

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.

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.

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.

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.

Court not compelled to give effect to certain orders

(2) Nothing in this Part requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.