

CLARIFYING COMI: LOCATING A DEBTOR'S CENTRE OF MAIN INTERESTS

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On July 6, 2012, in *Lightsquared LP (Re)*,^[1] the Ontario Superior Court of Justice (the "Ontario Court"), released reasons that clarify the criteria for the identification of the centre of main interest ("COMI") of an applicant seeking recognition of foreign insolvency proceedings as "Foreign Main Proceedings" pursuant to Section 46 of the *Companies' Creditors Arrangement Act* ("CCAA").^[2]

Part IV of the CCAA, a relatively new legal framework (September 2009), is modeled on the UNCITRAL Model Law on Cross-Border Insolvency and provides a regime for dealing with cross-border insolvencies in Canada. On an application seeking recognition of foreign insolvency proceedings, the court must determine if the proceeding is a "foreign proceeding" and if the applicant is a "foreign representative," as defined by the CCAA. If the court is satisfied as to these two questions, the court is required to recognize the foreign proceeding. The court must then determine whether the proceeding is a foreign *main* proceeding or a foreign *non-main* proceeding. This is an important determination, as designation as a foreign main proceeding triggers certain automatic relief under the CCAA, including a stay of proceedings. However, there is no specific test set out in the CCAA to determine when a foreign proceeding should be adjudged a *main* or a *non-main* proceeding. Instead, the CCAA provides that a foreign *main* proceeding is a proceeding in a jurisdiction outside of Canada where the debtor company has its COMI.

Applying the criteria previously defined in other decisions of the same court and further refining those criteria, the Ontario Court granted a motion by Lightsquared LP ("LSLP") recognizing the proceedings commenced before the United States Bankruptcy Court for the Southern District of New York (the "U.S. Court") as Foreign Main Proceedings, declaring LSLP as Foreign Representative, approving the appointment of Alvarez and Marsal Canada Inc. as Information Officer, granting a super priority administration charge, and recognizing certain first day orders granted by the U.S. Court.

background

On May 14, 2012, LSLP and certain of its affiliates (collectively the "Chapter 11 Debtors") instituted reorganization proceedings by each filing a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code.

On May 15, 2012, the Chapter 11 Debtors obtained an interim stay of proceedings in Canada pursuant to an Order of the Ontario Court.

The Chapter 11 Debtors are building a fourth generation long-term evolution open wireless broadband network that incorporates satellite coverage throughout North America and offers users, wherever located, the speed, value and reliability of universal connectivity.

Three of the Chapter 11 Debtors are Canadian entities, two incorporated pursuant to the laws of Ontario (SkyTerra Holdings (Canada) Inc. ("SkyTerra Holdings") and SkyTerra (Canada) Inc. ("SkyTerra Canada")) and one incorporated pursuant to the laws of Nova Scotia (Lightsquared Corp. ("LC") and together with SkyTerra Holdings and SkyTerra Canada, the "Canadian Debtors"). These companies are all wholly-owned, directly or indirectly, by LSLP.

The operations of the Canadian Debtors are limited to the following:

- SkyTerra Canada holds certain regulated assets as per the relevant Canadian legislation, such as the MSAT - 1 satellite; certain licenses and contracts with LSLP and third parties. The company has no third party customers or employees and is dependent on LSLP for the funding of its operations.
- SkyTerra Holdings holds the shares of SkyTerra Canada and has no operations.
- LC was created for the distribution of the group's services to Canadian customers and as such holds certain licenses and authorizations in addition to having assets and employees (43) to run its operations. The company is dependent on LSLP for the funding of its operations.

All of the registered offices of the Canadian Debtors are in Canada.

decision

As noted above, Section 45 (1) of the CCAA defines a "foreign main proceeding" as a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests".

Section 45 (2) of the CCAA provides that for the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the COMI. Therefore, in order to allow the U.S. proceedings to be recognized as foreign main proceedings for the Canadian Debtors, LSLP had to refute the presumption set out in Section 45 (2) of the CCAA.

The Ontario Court identified three main criteria that are relevant to the location of an applicant's COMI:

1. the location is readily ascertainable by creditors;
2. the location is one in which the debtor's principal assets or operations are found; and
3. the location is where the management of the debtor takes place.

These criteria were developed by the Ontario Court in previous decisions, including *Re Massachusetts Elephant & Castle Group Inc.*^[3]

The Ontario Court further noted that the CCAA does not allow for consideration of corporate groups, and clarified that the above-mentioned analysis is to be carried out on an entity-by-entity basis.

The Ontario Court held that, on some occasions most of the factors would lead to a single jurisdiction whereas in other cases there could be conflicts between the factors. In those cases, one must weigh the different factors to determine the COMI.

In the *Lightsquared* decision, the Ontario Court took into account the following factors:

- the corporate and other major decision-making centers were located in New York and Virginia;
- the senior executives of the American and Canadian entities were residents of the U.S.;
- the majority of the management of the Chapter 11 Debtors, including the Canadian Debtors, were shared;
- the operations of the Chapter 11 Debtors, including the Canadian Debtors, were mainly carried on in the U.S. As such, the majority of administration employees were based in the U.S., human resource functions were performed from the U.S., marketing, communication, pricing, business development decisions were made in the U.S., accounts payable and treasury functions were all managed from the U.S.; and
- the Chapter 11 Debtors, including the Canadian Debtors, shared a cash-management system overseen by employees in the U.S.

commentary

With this decision, the Ontario Court further refines and clarifies the criteria for the identification of the COMI.

Though the COMI analysis is centered around three main criteria, it is clear from this decision and previous jurisprudence that a multitude of factors come into play, factors which can occasionally point towards different jurisdictions. Although the identification of the COMI will never be clear cut, decisions such as the *Re Massachusetts Elephant & Castle Group Inc.* and the *Lightsquared LP (Re)* provide a strong legal framework for insolvency professionals to navigate international insolvency proceedings.

In the end, the review is designed to determine that the location of the proceeding corresponds to where the debtor's true seat or principal place of business is and with the reasonable expectations of those who dealt with the enterprise prior to commencement of the proceedings.

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[1] *Lightsquared LP (Re)*, 2012 ONSC 2994.

[2] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36.

[3] *Re Massachusetts Elephant & Castle Group Inc.*, 2011 ONSC 4201.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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