Insolvency Along the NAFTA Highways: What You Need to Know

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The relationship between Canada and the United States is one of the closest and most extensive in the world. With the equivalent of $1.6 billion in bilateral trade every day[3], it is no surprise that a large number of US companies have subsidiary operations and assets located in Canada. Despite numerous socio-economic similarities between both countries and legal regimes both anchored in the tradition of common law, there are a number of legal differences that have the potential to significantly impact US companies doing business in Canada. These differences are of particular importance in the area of cross-border insolvencies where time frames are often compressed and counsel have limited time to address international intricacies. US corporations who become insolvent and file for protection in the United States often overlook the impact on their Canadian assets and operations. This can lead to some nasty surprises.

The following paper aims to provide an overview of the Canadian insolvency process while highlighting important differences between the US and Canadian insolvency regimes and identifying current legislative initiatives which could significantly impact the insolvency proceedings of US corporations doing business in Canada.

Basic legislative structure of Canadian insolvency law

In Canada, two statutory regimes have been developed to deal with insolvency law: the *Companies' Creditors Arrangement Act* ("CCAA") and the *Bankruptcy and Insolvency Act* ("BIA"). The CCAA is generally considered as the Canadian equivalent to Chapter 11 of the Bankruptcy Code. This being said, it must be noted that despite some similarities between Chapter 11 and the CCAA, there remain a host of differences in legislative approach and practice. These include the fact that in Canada:

a) A new estate is not created upon a formal filing.

b) There is no concept of adequate protection. Instead, the court is guided by balancing the prejudice to the parties involved.

[3] Government of Canada, "The Canada – U.S. trade and investment partnership" available online at http://geo.international.gc.ca/can-am/Washington/trade_and_investment/trade_partnership-en/asp

c) There is no authority for the creation of creditors' committees and the use of unsecured or equity committees is extremely limited.

d) Pre-filing security is not restricted from encumbering after-acquired property.

e) There is no provision which provide for the subordination, or cramming down, of damage claims of equity holders.

f) There are no provisions (with some restricted exceptions) for the acceptance, rejection or assignment of executory contracts

The absence of a detailed statutory framework means that the CCAA gives both the supervising court and the debtor tremendous flexibility in conducting the restructuring proceedings. In contrast to the US Bankruptcy Code, the CCAA only has 22 sections and is driven largely by case law, allowing judges great discretion. Thus the CCAA is the legislation of choice used in larger cross-border restructurings.

The provisions of the BIA on the other hand, which are akin to Chapter 7 of the U.S. Bankruptcy Code, relate more specifically to liquidations. The BIA, being a much more structured piece of legislation, is typically used for less complicated liquidations/restructurings where it would not be economical to utilize the CCAA. Both the CCAA and the BIA contain provisions dealing with the recognition of foreign proceedings.

Depending on the circumstances, a US company which has filed for Chapter 11 protection has three options available to it in deciding how to deal with its Canadian operations and assets; ancillary CCAA proceedings, full CCAA proceedings, or a BIA proceeding.

Typically, the first choice of a debtor would be to commence ancillary proceedings under section 18.6 of the CCAA. This option is often favored as the process is usually less costly and more expeditious than a full CCAA proceeding. Orders are typically obtained in the US proceeding and then brought to Canada to be sanctioned by the Canadian court. Although the Canadian court will not rubber stamp US orders, it will typically grant significant deference in the name of international comity.

In certain circumstances, such as when a US company has significant operations and assets in Canada, the company needs to consider initiating a full CCAA proceeding. This is due to the fact that Canadian Courts have refused to grant recognition of the US proceeding under section 18.6 of the CCAA on the basis that Canada is not truly "ancillary" to the insolvency proceeding. If, as is the case in most filings, time is of the essence, it might be necessary to seek full CCAA protection to ensure that the matter is not bounced by the Canadian judge.

Lastly, the company can choose to file a notice of intention for a proposal under the BIA. Under the BIA, a negotiation process would take place between the company and its creditors in an attempt to reorganize the corporation's finances.

The following sections will focus on the option of ancillary proceedings by providing an overview of the CCAA, the process under section 18.6 of the CCAA and then analyze how this process is expected to change subject to legislative changes currently underway in Canada.

The CCAA

In a full CCAA proceeding the debtor is typically granted an expansive first day order (the "Initial Order") which provides it with significant protection and the ability to restructure its business.

The model Initial Order which has been developed by the insolvency bar in conjunction with the bench provides a broad stay against all creditors. This stay not only restricts creditors from enforcing their rights against the debtor for pre-filing debts, but compels suppliers to continue to provide goods and services in accordance with their ordinary terms.

In addition, although there is no statutory authority to do so, the Court typically sets up priming changes for professional fees and directors' liabilities. In many cases, again without statutory authority, the Court will grant debtor in possession ("DIP") financing. In Canada there is no concept of adequate protection so the test is only a balancing of prejudices. If the debtor can show that it will suffer more prejudice than the first secured creditor if DIP financing is allowed, the Court will grant this relief.

The Initial Order also appoints a monitor to oversee the restructuring of the debtor. This is typically an accounting firm whose responsibility is to monitor the debtor and report back to the Court and the creditors. The monitor is appointed as a Court officer and as a result has significant influence with the Court to recommend the direction in which the proceeding should go.

Under the CCAA the debtor makes a proposal to its creditors to compromise their indebtedness. Although there is no concept of cram down in Canada, this is typically overcome by forcing all creditors with an economic interest in the proceeding into one class. In order for a proposal to pass it must be approved by a majority of the creditors who represent at least 2/3 of the claims.

After the proposal has been approved by the creditors it must be sanctioned by the Court. In sanctioning the proposal, in addition to ensuring that the debtor has complied with all of its legal requirements under the CCAA, it will assess whether the proposal is "fair and reasonable". This is a very qualitative test, but the threshold is very low and it is extremely unusual for a Court to find that a proposal is not fair and reasonable.

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 assets, the debtor may seek a stay order in Canada pursuant to section 18.6 of the CCAA. Rather than initiating concurrent proceedings in Canada and the US, section 18.6 allows the insolvent US company to file in its "home" jurisdiction and simply have those proceedings recognized and approved by the Canadian court. Canadian courts have the authority to formally recognize foreign orders and to provide assistance to a foreign representative[4] in a foreign proceeding,[5]

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[4] "foreign representative" means a person, other than a debtor, holding office under the law of a jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee in bankruptcy, liquidator or other administrator appointed by the court. R.S.C. 1985, c. C-36, s. 18.6(1).

[5] "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally. R.S.C. 1985, c. C-36, s. 18.6(1).

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

It is important to establish an actual connection between the foreign proceedings and the Canadian operations or assets. Generally, a debtor who has filed a Chapter 11 proceeding in the US with operations and/or assets in Canada complies with the definition.

Canadian courts have for the most part, in the proper circumstances, recognized the principle of comity when a foreign proceeding has been initiated. This means that the Canadian courts have been willing to accede their position to the foreign courts. In *Re Matlack Inc.*, the Court stated that, "the Court's recognition of a foreign proceeding should depend on whether there is a real and substantial connection between the matter and the jurisdiction"[6] and that the connection should be based on "considerations of order, predictability and fairness rather than on a mechanical analysis of connections between the matter and the jurisdiction."[7] In this case, granting the stay ensured creditors in Canada could not seize assets ahead of creditors in the US. This was done under the principle of comity because the Canadian court felt that this would ensure all the stakeholders were treated equitably.

One of the benefits of seeking protection under the CCAA is that it grants Canadian courts broad powers to make an order "on such terms and conditions as the court considers appropriate in the circumstances."[8] Canadian courts have the power to adapt the foreign order and can apply foreign rules to the Canadian operations and assets in an extremely flexible manner. Section 18.6(4) of the CCAA explicitly provides that:

> Nothing in this section prevents the court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.[9]

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[6] (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J.) at para 5.

[7] *Ibid*. at para 5.

[8] *CCAA* s. 18.6(3).

[9] *CCAA* s. 18.6(4).

Therefore, the only caveat to the recognition of foreign orders by the Canadian courts is that the order must be consistent with Canada's laws.

In *Re Babcock & Wilcox Canada Ltd.* ("Babcock"), a case where the Canadian court was asked to recognize a Chapter 11 proceeding initiated by a US parent company to stay related claims against the Canadian subsidiary, the Canadian Court pointed out that the definition of foreign proceedings contains no specific requirement that the Canadian entity also be insolvent. The Canadian court stated that s. 18.6(4) leaves open an option for a solvent Canadian company to seek assistance and protection in regards to foreign proceedings against its parent company. Section 18.6(4) provides for ancillary relief to the Canadian operations and assets upon the application of a "foreign representative" or an "interested party".[10] This decision allows for a Canadian subsidiary to fall within the definition of an interested party, thereby allowing it to apply directly for the commencement of an ancillary proceeding.

In Babcock, the Canadian Court also set out some factors to provide guidance as to how s. 18.6 of the CCAA should be applied. It held that:

- Comity and cooperation between courts should be encouraged;
- The foreign legislation should be respected in any analysis unless there is a radical divergence from Canadian law;
- Stakeholders should be treated equitably, and where reasonably possible, common stakeholders should be treated equally;
- Reorganizations should be as one global unit and therefore one jurisdiction should be encouraged to assume principal authority over the reorganization;
- The role of the courts will vary depending on the location of a company's principal operations and assets, the location of stakeholders, the ability of the laws in each jurisdiction to address the main issues**,** any undue prejudice and any other factors appropriate in the circumstances;

[10] (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J.) at para13-14.

- If one country has an ancillary role, then the court in that jurisdiction should be kept informed of any developments and the shareholders in that jurisdiction should be provided with equal access; and

- All affected stakeholders, regardless of jurisdiction should receive notice of the order and have an opportunity to return to court to review and potentially change it.

The case of *Re Core-Mark International Inc*. ("Core-Mark") is an example of s. 18.6 successfully harmonizing US-Canada insolvency proceedings. Core-Mark, a Delaware company, filed for Chapter 11 protection in the United States, simultaneously with its parent company, Fleming Companies, Inc. The immediate concern for Core-Mark was the protection of its assets and a quick emergence from bankruptcy. At the time of its Chapter 11 filing, Core-Mark had significant operations in Canada.

Among Core-Mark's initial concerns were protecting its Canadian assets. The company had relationships with major suppliers who threatened to take Cash on Delivery payments for new products and apply those payments to old debt. There was also concern that US creditors would take action against Core-Mark's assets in Canada, which would frustrate the ability of the company to reorganize in the US. Therefore, shortly after its US filing, Core-Mark filed an application under section 18.6 of the CCAA in Canada and was granted ancillary relief, including a stay of proceedings. The Canadian court recognized that:

- The majority of the business was conducted in the US so the Canadian proceedings should be ancillary;

- The US claims process would treat Canadian residents equally;

- The US reorganization included the Canadian operations and intended to reorganize as a global unit;

- The Canadian court received adequate notice of the US proceedings; and

- The Canadian creditors received notice of Core-Mark's intentions.

During the proceedings, all orders in the US bankruptcy that had a significant impact on the Canadian creditors were disclosed to the Canadian creditors, and the more significant orders were recognized by the Canadian Court. For example, the Canadian Court was asked to, and did, adopt the US claims process and bar date. This is a good example of how a Chapter 11 proceeding successfully utilized s.18.6 of the CCAA for the benefit of all stakeholders.

BIA Restructuring Provisions

The BIA contains provisions allowing a debtor to make a proposal to its creditors. A proposal may be made by an insolvent person (which includes a partnership or corporation), a receiver in respect of an insolvent person's property, a bankrupt or a trustee of the estate of a bankrupt. Most frequently, it is an insolvent person who makes the proposal, in an effort to reach a compromise with its creditors and avoid bankruptcy. A proposal made in respect of a corporation may, in addition to compromising that corporation's debts, include compromises of claims against directors of the corporation, which relate to the obligations of the corporation for which the directors are by law liable in their capacity as directors (as opposed to claims relating to contractual rights of creditors arising from contracts with a director, claims based on allegations of misrepresentations made by directors to creditors or claims of wrongful or oppressive conduct by directors).

A proposal must be made to all unsecured creditors and may also be made to secured creditors. To initiate the proposal process, the insolvent person either files a notice of intention to make a proposal ("NOI") or files the proposal itself. The filing of a NOI effects a thirty day stay of proceedings against all creditors (including secured creditors), without the necessity of a court order, during which time the debtor can continue to operate its business and negotiate with its creditors in order to prepare a proposal acceptable to all parties. In addition, during the stay period no person is permitted to terminate, amend or accelerate any payment under any contract with the debtor by reason only that the debtor is insolvent or has filed a notice of intention. Also, any provision of a security agreement that provides that the debtor ceases to have rights to use or deal with the collateral on the debtor's insolvency, default or filing of a NOI will not have any force or effect until the proposal has been fully performed or the debtor becomes bankrupt.

Notwithstanding the stay, however, a secured lender is not thereby obligated to continue to extend additional credit or make fresh advances to the debtor.

In certain circumstances, the remedies of secured creditors will not be stayed. Secured creditors who have delivered to the debtor a NOI to enforce security more than ten days prior to the debtor's filing of the NOI or the proposal itself will not be stayed, nor will secured creditors who have taken possession of their collateral for the purpose of realization. Secured creditors to whom a proposal has not been made will also not be stayed.

Within ten days after filing the NOI, the debtor must file with the Official Receiver a cash flow statement, together with a statement with respect thereto signed by the trustee. If no notice of intention is filed, these statements are filed simultaneously with the proposal. Failure to comply with these requirements will cause the debtor to be deemed to have made an assignment in bankruptcy.

At the insolvent company's request, extensions to the stay period may be granted by the court in increments of up to 45 days, to a maximum of five months after the initial 30-day period. If a proposal is not filed prior to the expiration of the stay period, the debtor is deemed to have made an assignment in bankruptcy. Extensions are allowed only in circumstances where the debtor convinces the court that the extra time is necessary and that, within that time, the debtor will be able to produce a viable proposal. In addition, the debtor must demonstrate that it is acting in good faith and with due diligence and that no creditor would be significantly prejudiced by the extension.

Creditors have a right to apply for an order lifting the stay if, among other things, a debtor has not acted in good faith or with due diligence, if the debtor is not likely to be able to make a viable proposal or if the creditors as a whole would be significantly prejudiced by the continuation of the stay. A creditor is also entitled to apply for an order that the stay does not apply in respect of that creditor if it is likely to be materially prejudiced by the operation of the stay or there are other equitable grounds to lift the stay.

Filing a proposal extends the stay period, as against all unsecured creditors and those secured creditors to whom the proposal has been made, for at least an additional 21 days. Within

this 21 day period, the proposal trustee must call a meeting of the debtor's creditors. The creditors vote by class on the proposal. Specific guidelines for the classification of secured creditors are contained in the BIA. Under the BIA, each class of unsecured creditors must vote for acceptance of the proposal by a majority in number and two-thirds in value, for the proposal to be deemed accepted by the creditors. Dissenting creditors within a class that votes to accept the proposal are bound by the proposal. Where a proposal has been accepted by unsecured creditors but a class of secured creditors does not approve the proposal by the statutory majority, the creditors in that class are not bound by the proposal and are free to exercise their remedies.

A debtor whose unsecured creditors refuse to approve its proposal is deemed to be bankrupt. If the proposal is accepted by the unsecured creditors, the trustee must apply to the court for approval of the accepted proposal. At this hearing, the court will hear submissions from interested parties, including any dissenting creditor. The court will refuse to approve the proposal if it is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors. If the court refuses to approve the proposal, the debtor is automatically deemed to be bankrupt.

Advantages of Filing Main Proceeding in Canada

In certain circumstances it may be possible for a US based debtor to file a Main Proceedings (under Chapter 15) in Canada and commence an ancillary case under sections 1504 and 1509(a) of the Bankruptcy Code.

A good example of this is *Re MuscleTech Research and Development Inc*., a Canadian corporation and its affiliates ("MuscleTech") were facing numerous product liabilities and consumer lawsuits relating to the diet supplement, ephedrine, as well as certain prohormone products alleged to build muscles. The cross-border CCAA/Chapter 15 cases involving MuscleTech have produced a number of interesting decisions that are pertinent to other cross-border restructuring cases.

In January 2006, MuscleTech commenced a proceeding under the CCAA before the Ontario Superior Court of Justice (the "Canadian Court"). The initial CCAA order contained a stay of proceedings against MuscleTech and certain related and unrelated non-debtor defendants, including retailers who had sold the impugned products (the "Non-debtor Parties"). The

Bankruptcy Court for the Southern District of New York (the "US Court") recognized the Canadian proceeding as the main proceeding and granted a stay of proceedings in favour of MuscleTech and the Non-debtor Parties.

MuscleTech subsequently requested that the US Court recognize and enforce a claims resolution order that had been made by the Canadian Court requiring all claims against MuscleTech to be proved in the Canadian proceeding. Certain creditors with product liability claims objected. They asserted that the Canadian order was manifestly contrary to public policy, as provided in section 1506 of the Bankruptcy Code, because the Canadian claims process denied them their constitutional right to a jury trial. The US Court held that the public policy exception should be narrowly interpreted and found the proposed Canadian claims process to be fair and impartial.[11]

This is a good example of how a Canadian filing can be used to the advantage differences in law in US and Canada. Another good example is the very limited availability of punitive damages in Canada as compared to the US. If a debtor was trying to reduce its exposure to punitive damages claims in an insolvency proceeding it might very well choose to file in Canada rather than the US.

In addition, as noted above, the benefits of operating the main proceeding under the CCAA include the fact that it has very few provisions and, as a result, very few restrictions on what a debtor can do in order to restructure its business. This allows creative counsel to come up with new mechanisms to assist their clients. In addition, given the lack of restrictions, CCAA proceedings typically entail fewer appearances and, as a result, the fees involved in the proceedings are generally less than those in a US proceeding.

[11] Order of Judge Rakoff, 04 MD 1598, 06 Civ. 538 (S.D.N.Y.)

The Effect of Proposed Amendments

In June 2005, legislation was introduced to revise the CCAA and the BIA.[12] The amendments have been passed by Parliament however the majority of the provisions, including those relating to ancillary proceedings have yet to be enacted and declared in force. Since the amendments were first published, Parliament has introduced further amendments into legislature which aim to modify and provide additional technical guidance on the functioning of the original amendments. It is expected that all of the amendments will be enacted and declared in force within the coming months.

In several respects the amendments are similar in concept to provisions of the Bankruptcy Code. They will:

a) provide statutory authority for debtors in- possession lending and priming liens (but without introducing the adequate protection and other safeguards provided by section 364 of the Bankruptcy Code);

b) provide statutory mechanisms to terminate and assign many executory contracts, including protections for licencees (similar to that provided by section 365(n) of the Bankruptcy Code);

c) provide federal jurisdiction to make vesting orders that transfer title in the debtor's property free and clear of liens, claims and encumbrances as can be done under section 363 of the Bankruptcy Code;

d) result in the creation of public creditors' lists in CCAA cases; and

e) provide protection for lessors of aircraft objects (similar that provided by section 1110 of the Bankruptcy Code).

[12] 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, lst Session, 38th Parl., 2005.

In addition, the amendments incorporate the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency. The adoption of the Model Law will afford foreign representatives greater rights and powers regarding the possession and distribution of a debtor's assets than they currently have. This legislation is similar to, but not the same as, the action taken in the US in adopting the Model Law.

As per the Model Law, the proposed amendments permit a foreign representative to apply to the court for recognition of a foreign proceeding.[13] Following recognition, the foreign representative may commence or continue proceedings under the BIA or CCAA, as applicable, as if the foreign representative were a creditor of the debtor or the debtor itself.[14] There is no express requirement that foreign creditors have the same rights regarding the commencement of and participation in Canadian insolvency proceedings as Canadian creditors.

The recognition order would specify whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding and adopt the definition of foreign main proceeding as a foreign proceeding in a jurisdiction where the debtor has the "centre of the debtor's main interests". Like the Model Law, the proposed amendments provide that, in the absence of proof to the contrary, a debtor's registered office is deemed to be the centre of the debtor's main interests. A foreign non-main proceeding is defined simply as a foreign proceeding other than a foreign main proceeding, and unlike the Model Law, there is no requirement that the debtor have an "establishment" in the foreign jurisdiction for that proceeding to be considered a foreign non-main proceeding.

The proposed amendments provide for the automatic stay of proceedings and a "freeze" on transfers of the debtor's property upon recognition of a foreign main proceeding, subject to exceptions specified by the court. While the proposed amendments to the BIA provide that this relief takes effect upon recognition, the proposed amendments to the CCAA require that the court make an order providing this relief upon recognition "subject to any terms and conditions it

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[13] 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, cls. 122 and 131 (First reading: June 3, 2005) amending s. 269 of the BIA and s.46(1) of the CCAA [Bill C-55].

[14] I*bid* at cls. 122 and 131amending s. 274 of the BIA and s.51 of the CCAA.

considers appropriate". The proposed amendments to the BIA also provide that the automatic relief is subject to the exceptions specified by the court in the recognition order that would apply in Canada had the proceeding taken place under the BIA. In the case of the proposed amendments to the CCAA, the proposed amendments provide that the order providing automatic relief must be consistent with any order that may be made under the CCAA.

Following recognition of a foreign proceeding, discretionary relief substantially similar to that provided for in the Model Law may be granted by the court where necessary for the protection of the debtor's property or interests of creditors. The discretionary relief includes a stay of proceedings and execution against the debtor's assets, suspending transfers or disposal of the debtor's assets, and, in the case of the proposed amendments to the BIA, entrusting the administration or realization of the assets of the debtor located in Canada to the foreign representative and appointing a trustee or receiver of all or any party of the debtor's property in Canada with authority to take possession of the debtor's property and take any action that the court considers appropriate. There is no provision for interim relief from the time of filing of the application until the application is decided and there is no requirement that in granting or denying relief, the court must be satisfied that the interests of creditors and other interested persons, including the debtor, are adequately protected. The granting of relief would not preclude the commencement or continuation of proceedings under the BIA or the CCAA.

The paramountcy of domestic proceedings in certain circumstances is preserved by the fact that the automatic relief prescribed upon recognition of a foreign main proceeding does not apply if proceedings under the BIA or CCAA have already been commenced in respect of the debtor. Furthermore, if domestic proceedings are commenced after recognition of a foreign proceeding, the relief granted by the court in connection with the foreign proceeding must be consistent with any order made in the domestic proceeding. The proposed amendments reflect the Model Law provisions with respect to multiple foreign proceedings requiring relief granted in respect of a non-main foreign proceeding to be modified or terminated if the court determines it to be inconsistent with orders granted in respect of a foreign main proceeding.

Differences in Canadian version of UNCITRAL model

While several Model Law provisions are substantially reflected in the proposed amendments, the amendments do not include certain restrictions imposed by the Model Law upon domestic proceedings. Unlike the Model Law, a domestic proceeding may be commenced after recognition of a foreign main proceeding even if the debtor has no assets in Canada. Moreover, the restrictions on the effects of such domestic proceedings are not reflected in the proposed amendments. Lastly, the proposed amendments do not adopt the Model Law requirement that a domestic court be satisfied that the relief it grants to a representative of a foreign non-main proceeding relates to assets that, under the domestic laws, should be administered in the foreign non-main proceeding.[15]

Although article 5 of the Model Law authorizes a designated administrator to act in a foreign proceeding in a foreign jurisdiction, the amendments are considerably broader granting Canadian courts the discretion to authorize any person or body to act as a representative for the purpose of having them recognized in a jurisdiction outside of Canada.

Although the proposed amendments do not include the public policy exception prescribed by the Model Law, the amendments do preserve existing safety valves that provide that (i) nothing in the amended statute would require the Canadian courts to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court, and (ii) nothing prevents the Canadian courts, on the application of a foreign representative, or any other interested person, from applying legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with Canadian insolvency legislation.

[15] U.N. Doc. A/RES/52/158 (1997) [Model Law] at Article 21(3) and Article 29(3).

Section 18.6 of the *Companies' Creditors Arrangement Act*

18.6 (1) In this section,

"foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;

"foreign representative" means a person, other than a debtor, holding office under the law of a jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee in bankruptcy, liquidator or other administrator appointed by the court.

(2) The court may, in respect of a debtor company, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

(3) An order of the court under this section may be made on such terms and conditions as the court considers appropriate in the circumstances.

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

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

(6) The court may seek the aid and assistance of a court, tribunal or other authority in a foreign proceeding by order or written request or otherwise as the court considers appropriate.

(7) An application to the court by a foreign representative under this section 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 section conditional on the compliance by the foreign representative with any other order of the court.

(8) Where a compromise or arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency shall be converted to Canadian currency as of the date of the first application made in respect of the company under section 10 unless otherwise provided in the proposed compromise or arrangement.