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Cross-Border Insolvencies

Comparison between Chapter 15 of U.S. Bankruptcy Code, and Part IV of *Companies' Creditors Arrangement Act*

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I. The Statutory Framework: Common Features

Part IV of the *Companies' Creditors Arrangement Act*[1] and Chapter 15 of the U.S. Bankruptcy Code have adopted the UNCITRAL Model Law with certain modifications.

Both statutes

- facilitate the recognition of foreign insolvency proceedings;
- distinguish between foreign main and non-main proceedings;
- recognize a foreign main proceeding on the basis of the debtor's centre of main interest (COMI);
- provide for an automatic stay with respect to foreign main proceedings and a discretionary stay with respect to foreign non-main proceedings;
- accord discretionary powers to the courts to grant any appropriate relief subject to such terms and conditions the court may consider necessary;
- provide for a public policy exception to relief otherwise available;
- require consistency between foreign proceedings and domestic insolvency proceedings instituted under the CCAA / U.S. Bankruptcy Code;
- enable the foreign representative of the debtor to commence domestic proceedings under the CCAA / U.S. Bankruptcy Code;
- provide for consistency between multiple foreign proceedings; and
- mandate rules of coordination between the domestic court and other insolvency authorities on the one hand and the foreign representative and the foreign court on the other.

II. Key Distinctions

1. Distinguishing between Foreign Main Proceeding and Foreign Non-Main Proceeding

Foreign Main Proceeding

Both Chapter 15 of the U.S. Bankruptcy Code and Part IV of the CCAA distinguish between a foreign main proceeding and a foreign non-main proceeding.

Both statutes require that the foreign main proceeding take place in a jurisdiction where the debtor has the centre of its main interest (COMI).

The determination of COMI is deferred to the court under both statutes, subject to a rebuttable presumption that the debtor's registered office is its COMI.

Foreign Non-main Proceeding

Part IV of the CCAA defines a foreign-non main proceeding more broadly than Chapter 15 of the U.S. Bankruptcy Code.

Chapter 15 of the U.S. Bankruptcy Code, adopting the language of the UNCITRAL Model Law, requires that the debtor have an establishment in the foreign jurisdiction in question before a foreign proceeding that is not a foreign main proceeding can be recognized as a foreign non-main proceeding.

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[1] R.S.C. 1985, c. C-36 (CCAA).

Establishment is defined as a place of operations where the debtor carries out a non-transitory economic activity.

Part IV of the CCAA does not contain a requirement of establishment. Rather, the provisions relating to foreign proceedings are such that any proceeding qualifying as a foreign proceeding must necessarily be either a foreign main proceeding or a foreign non-main proceeding.

What Do the Differences Imply?

If a foreign proceeding is not a foreign main proceeding and if the debtor has no establishment in the foreign jurisdiction, a U.S. bankruptcy court will deny recognition since the proceeding is neither main nor non-main (see e.g. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*[2]).

A Canadian court, however, will necessarily recognize such a proceeding as a foreign non-main proceeding, since any proceeding that satisfies the definition of a foreign proceeding in the CCAA and is not a foreign main proceeding is deemed to be a foreign non-main proceeding. The court will then exercise its discretion to determine whether any relief is warranted.

The practical implication of this difference is that Canadian courts over time may arguably recognize more foreign proceedings than U.S. courts.

2. Recognition and Relief

Section 47 of the CCAA and § 1517(a) of the U.S. Bankruptcy Code provide for a mandatory recognition of a foreign proceeding (whether main or non-main) once the statutory definitions are met.

Under s. 48(1) of the CCAA, if the recognized foreign proceeding is a foreign main proceeding, the court ***shall*** make an order staying all actions against the debtor company. If the recognized foreign proceeding is a foreign non-main proceeding, the court has discretion under s. 49(1) of the CCAA to grant a discretionary stay, in addition to any other relief it considers appropriate.

Chapter 15 of the U.S. Bankruptcy Code mirrors these provisions. In particular, § 1520 provides that upon recognition of a foreign proceeding that is a foreign main proceeding, § 362, among other provisions, applies; § 362 is the automatic stay; § 1521(a) of the U.S. Bankruptcy Code, similar to s. 49 of the CCAA, also enables the court to grant a discretionary stay in relation to a foreign non-main proceeding.

3. Foreign Main Proceeding: Automatic Stay and Other Relief

Part IV, CCAA

Section 48 provides that on the making of a recognition order in relation to a foreign main proceeding, the court *shall*, subject to any terms and conditions that it considers appropriate, make an order

- staying all proceedings against the debtor company under the *Bankruptcy and Insolvency Act* and the *Winding-up and Restructuring Act*;
- restraining further proceedings and prohibiting commencement of any action, suit or proceeding against the debtor company; and
- prohibiting the debtor company from disposing, outside the ordinary course of its business, of its property in Canada.

[2] 347 BR 122 (Bkrtcy SDNY 2007), aff'd 389 BR 325 (SDNY 2008).

Chapter 15, U.S. Bankruptcy Code

Section 1520 provides that upon recognition of a foreign main proceeding, the following protections of the U.S. Bankruptcy Code apply with respect to the debtor and its property that is within the territorial jurisdiction of the United States:

- § 362 (automatic stay);
- § 361 (adequate protection).

Section 1520 also enables the foreign representative (unless the court orders otherwise)

- to operate the debtor's business;
- to exercise the rights and powers of a trustee as they are provided under § 363 (use, sale or lease of property), § 549 (post-petition transactions: avoidance by trustee), and § 552 (exemptions).

Inapplicability of the Automatic Stay

Both s. 48(3) of the CCAA and § 1529(1)(B) of the U.S. Bankruptcy Code provide that the automatic stay provisions with respect to foreign main proceedings do not apply if a domestic CCAA/U.S. Bankruptcy Code proceeding has been commenced in respect of the debtor at the time the recognition order is made.

4. Discretionary Stay and Other Relief

Both Chapter 15 of the U.S. Bankruptcy Code and Part IV of the CCAA confer on the court a wide discretion to grant any relief that the court considers appropriate with respect to a foreign main or non-main proceeding.

Both statutes provide a non-exhaustive list of such orders.

Section 1522 of the U.S. Bankruptcy Code states that a discretionary order may be granted "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."

The language of s. 49 of the CCAA is slightly different and enables the court to make a discretionary order if it is satisfied that the order is "necessary for the protection of the debtor company's property or the interests of a creditor or creditors." The CCAA, thus, notably excludes the notion of adequate protection.

Significantly, under both statutes, only the foreign representative may apply for a discretionary order.

Consistent with the more summary nature of the CCAA, the non-exhaustive list of discretionary orders in the CCAA is much shorter than the list provided in Chapter 15.

Discretionary Orders: CCAA, s. 49

After a recognition order is made by the CCAA court, the court may make *any order that it considers appropriate*, including an order

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

Discretionary Orders: U.S. Bankruptcy Code, § 1521

The non-exhaustive list of discretionary orders available under § 1521 of the U.S. Bankruptcy Code is more detailed and includes orders

- staying the commencement or continuation of an individual action against the debtor and its assets;
- suspending the right to transfer, encumber or otherwise dispose of the debtor's assets;
- providing for the examination of witnesses or the taking of evidence;
- providing for the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

Section 1521 also enables the court to make an order entrusting the foreign representative or another person authorized by the court (including an examiner) to administer or realize all or part of the debtor's assets that are located in the United States or upon which the U.S. courts have jurisdiction.

The court may also grant any additional relief that may be available to a trustee, subject to some exceptions.

The court may not, however, enjoin criminal or regulatory proceedings in respect of the debtor.

5. Public Policy Exception

Chapter 15, U.S. Bankruptcy Code

Section 1506 enables the court to refuse to take an action under Chapter 15 if the action would be *manifestly* contrary to the public policy of the United States.

Part IV, CCAA

Section 61(2) enables a CCAA court to refuse to do anything that would be contrary to public policy. The Canadian provision notably omits the qualifier "manifestly."

UNCITRAL

UNCITRAL's Legislative Guide provides that the purpose of the expression "manifestly," used as a qualifier of the expression "public policy," is to emphasize that public policy exceptions should be interpreted restrictively and that the exception is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting state.

What Does the Omission Imply?

It remains to be seen whether the language in s. 61(2) of Part IV of the CCAA will be interpreted to imply less restrictive application of the public policy exception in Canada.

6. Other Exceptions

Terms and Conditions

Section 50 of the CCAA provides that any order under Part IV may be made on any terms and conditions that the court considers appropriate. Section 48(1) also enables the court to impose terms and conditions it considers appropriate in the order granting automatic stay in respect of a foreign main proceeding.

Section 1522(b) of the U.S. Bankruptcy Code mirrors these provisions.

Modifying or Terminating a Recognition Order

Section 1517(d) of the U.S. Bankruptcy Code enables the court, after giving due weight to possible prejudice to the parties, to modify or terminate a recognition order if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Part IV of the CCAA does not expressly empower the court to rescind a recognition order. However, it is possible that the court may include a comeback clause in the order granting the relief, by virtue of its

power to impose terms and conditions. The comeback clause will enable the interested parties to seek to modify the relief if it is later discovered that the grounds for granting it were lacking or have ceased to exist.

Modifying or Terminating a Discretionary Relief: Inconsistency with Domestic Proceedings

Section 54 of the CCAA provides that if a domestic proceeding under the CCAA in respect of a debtor company is commenced at any time *after* the recognition order is made, the court *shall* review any discretionary order made under s. 49 and amend or revoke it if the court determines that the s. 49 order is inconsistent with the order made in the domestic CCAA proceeding.

Section 1529(2)(A) of the U.S. Bankruptcy Code similarly provides that any relief in effect under § 1519 (provisional relief and stay) or § 1521 (discretionary relief and stay) shall be reviewed by the court and shall be modified or terminated if it is inconsistent with a relief granted in a domestic proceeding under another Chapter of the U.S. Bankruptcy Code that has commenced *after* the recognition order in respect of the foreign proceeding was made.

Modifying or Terminating an Automatic Stay: Inconsistency with Domestic Proceedings

Section 1529(2)(B) of the U.S. Bankruptcy Code provides that if the foreign proceeding is a foreign main proceeding, the applicable automatic stay and suspension shall be modified or terminated if inconsistent with a relief granted in the domestic proceeding.

Part IV of the CCAA does not contain a provision enabling the court to modify or terminate an automatic stay order in respect of a foreign main proceeding that is inconsistent with a domestic CCAA order. However, s. 48(2) provides that the order granting an automatic stay in respect of a foreign main proceeding must be consistent with any order that may be made under the CCAA.

7. Provisional Relief and Stay

Chapter 15, U.S. Bankruptcy Code

Section 1519 expressly empowers the court to grant an order providing for a provisional stay and other relief during the period intervening between the filing of a petition for recognition and the court's ruling on the petition.

A provisional order may be made in circumstances in which relief is urgently needed to protect the assets of the debtor or the interests of the creditors.

The court, in particular, may make an order

- staying execution against the debtor's assets;
- entrusting the foreign representative or another person authorized by the court (including an examiner) to administer or realize all or part of the debtor's assets that are located in the United States in order to protect and preserve the value of assets that are perishable, susceptible to devaluation or otherwise in jeopardy.

In addition, the court may make many of the discretionary orders that are available under § 1521 (see above).

Part IV, CCAA

The CCAA does not expressly confer on the court the power to grant a preliminary stay pending a recognition order.

However, it is likely that the court, in appropriate circumstances, may invoke its inherent jurisdiction or rely on provincial judicature statutes to grant such a stay.

For instance, s. 101 of the Ontario *Courts of Justice Act* enables the Ontario Superior Court of Justice to grant an interlocutory injunction or mandatory order where it is just or convenient to do so.

8. Additional Assistance

Chapter 15, U.S. Bankruptcy Code

Under § 1519, the court may provide additional assistance to the foreign representative, after considering whether it will reasonably assure

- just treatment of all holders of claims against or interests in the debtor's property;
- protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in the foreign proceeding;
- prevention of preferential or fraudulent dispositions of the debtor's property;
- distribution of proceeds of the debtor's property substantially in accordance with an order prescribed by the U.S. Bankruptcy Code; and
- a fresh start, if appropriate, for the individual subject to the foreign proceeding.

Part IV, CCAA

While the CCAA does not contain a provision with similar language, s. 61(1) provides as follows:

> **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.

9. Domestic Proceedings by the Foreign Representative

Chapter 15, U.S. Bankruptcy Code

Sections 1509, 1511, 1523 and 1524 provide that upon recognition, the foreign representative may do the following:

- commence an involuntary case under § 303;
- commence a voluntary case under § 301 or § 302, if the foreign proceeding is a foreign main proceeding;
- sue and be sued in a court in the United States;
- apply directly to a court in the United States for appropriate relief;
- intervene in any proceedings in a State or Federal court in which the debtor is a party;
- receive comity or cooperation on the part of the court;
- in a case concerning the debtor pending under another Chapter of the U.S. Bankruptcy Code, initiate actions to avoid acts detrimental to creditors pursuant to:
    - § 522 (exemptions);
    - § 544 (trustee as lien creditor and as successor to certain creditors and purchasers);
    - § 545 (statutory liens);

- § 547 (preferences);
- § 548 (fraudulent transfers and obligations);
- § 550 (liability of transferee of avoided transfer);
- § 553 (set-off); and
- § 724(a) (treatment of certain liens).

In addition, § 1512 provides that the foreign representative's power to sue in a U.S. court to collect or recover a claim from the debtor is not affected regardless of whether the court grants a recognition order.

Part IV, CCAA

Section 51 of the CCAA provides that upon the court's making a recognition order, the foreign representative may commence and continue proceedings under the CCAA in respect of a debtor company as if the foreign representative were the debtor company or a creditor of the debtor company, as the case may be.

10. Credit for Recovery in Other Jurisdictions

Part IV, CCAA

Section 60 provides that in making a compromise or an arrangement of a debtor company, the following factors will 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:

- 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
- 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 the CCAA, would be a preference over other creditors or a transfer at undervalue.

In addition, notwithstanding the foregoing, a creditor with a claim in the foreign proceeding is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank has received a dividend equivalent to the pro rata amount received by the creditor in the foreign proceeding.

Chapter 15, U.S. Bankruptcy Code

Section 1532 provides that a creditor who has received payment with respect to its claim in a foreign proceeding may not receive a payment for the same claim in a case under the Bankruptcy Code regarding the debtor, so long as the payment to other creditors of the same class is proportionately less than the payment the creditor has already received.

This provision, however, does not affect the rights related to secured claims or rights *in rem*.

Sections 1513 and 1514 also provide that foreign creditors have the same rights to commence and participate in a case under the Bankruptcy Code as domestic creditors, and to be given such notice to which domestic creditors are entitled.

III. Comi Under Part IV of the CCAA

Some Recent Cases

Re Gyro-Trac (U.S.A) Inc.[3]

Gyro-Trac (USA) Inc. was a manufacturer of crawler-mounted vehicles designed for use by the pulp and paper industry that, along with its subsidiaries, filed for bankruptcy protection in the United States. The debtor company then brought a motion seeking recognition of such foreign proceeding in Canada under the CCAA.

In determining COMI, the Court cited the following key guiding principles outlined by Scott A. Bomhof and Adam M. Slavens (in "Shifting Gears in Cross-border Insolvencies: From Comity to COMI"[4]):

1. The beginning assumption is that a debtor's COMI is located in the jurisdiction of the debtor's registered head office subject to proof or evidence (Chapter 15) to the contrary.
2. The burden of proving that the COMI is located in a jurisdiction other than the registered head office rests on those asserting the contrary, who must bring forth cogent proof; however, the court maintains the jurisdiction to determine that the debtor's COMI is in a jurisdiction other than the location of its registered head office, regardless of a lack of opposition, if the facts do not support a finding of COMI in such jurisdiction.
3. In the case of multinational corporate groups, each debtor's COMI should be decided on an individual legal entity basis.
4. The key issue in examining the factors that support a determination of COMI is whether such factors are both objective and ascertainable by third parties (especially creditors), with the aim of protecting parties' reasonable expectations.
5. In order to determine the location of a debtor's COMI, courts have focused on the following factors:
   (a) the location where the debtor conducts the administration of its interests on a regular basis;
   (b) whether creditors have relied upon legal or financial advice regarding the debtor's place of incorporation;
   (c) the jurisdiction in which the debtor is subject to controls and regulations;
   (d) whether the debtor has conducted its business from a location other than the jurisdiction of its registered head office;
   (e) where the debtor's employees were located;
   (f) the governing law of the debtor's key contracts;
   (g) the location where the board of directors' meetings were held;
   (h) the location of key decision makers with control over functions such as financial arrangements, purchasing policy, corporate strategy, branding, contract negotiations, staffing, and computer systems;
   (i) the jurisdiction where the debtor's primary assets are located; and
   (j) the jurisdiction where key stakeholders who would be affected by the proceeding are located.

After applying the above guiding principles to this case, the Court concluded that the debtor company's COMI was in South Carolina, notwithstanding the fact that Canadian subsidiaries had their head office in Quebec.

[3] (2010), 66 CBR (5th) 170 (Qc. Sup. Ct.), leave to appeal to Qc. CA refused, (2010), 66 CBR (5th) 159 (Qc. CA).
[4] (2008) 24 BFLR 1 at 59-60.

Re Probe Resources Ltd.[5]

Probe Resources Ltd. operated as an oil and natural gas explorer and producer near the Gulf of Mexico in Texas and Louisiana before filing for bankruptcy protection in the United States. The debtor company then brought an application seeking recognition of such foreign proceeding in Canada under the CCAA.

In determining COMI, the Court cited several secondary sources that outlined many of the key guiding principles examined by the Court in the Gyro-Trac case, including the following statement from Kevin P. McElcheran's text, *Commercial Insolvency in Canada:*[6]

> Case law decided under other statutes based on the Model Law, such as the European Union Insolvency Proceedings Regulation [footnote omitted] and Chapter 15 of the US Bankruptcy Code, provides guidance to Canadian courts in interpreting the meaning of COMI. European Union and American precedents suggest that COMI will be determined by reference to criteria that are objective and ascertainable by third parties. Such relevant factors include:
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> (1) the location of headquarters;
>
> (2) the location of those who manage the debtor's business;
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> (3) the location of primary assets and operations; and
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> (4) the location of majority of creditors.
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> In deciding whether the debtor has proven that its COMI is in the jurisdiction of the foreign proceeding, Canadian courts, as the US courts have done, may consider the connections between the debtor and the foreign jurisdiction comprehensively in order to give effect to the legitimate expectations of the debtor's constituents as to which substantive laws will apply to their relationship with the debtor.

Despite the fact that Probe was incorporated under the British Columbia *Business Corporations Act*, listed as a public company on the TSX Venture Exchange and had its registered office located in Vancouver, British Columbia, the Court found that the debtor company's COMI was in the United States. The Court in this case took into account the following facts: (1) Probe and its subsidiaries operated within Texas and Louisiana; (2) all of Probe's business operations were conducted through the U.S. subsidiaries; (3) the Probe corporate group's revenues were derived in the United States and all of its operating assets were located in the United States; (4) only nominal assets were located in Canada; (5) all of the operations of Probe Canada, other than administration and organization matters, were in the United States; (6) Probe's registered office in Vancouver was its counsel's law offices; (7) only one of the directors resided in British Columbia; (8) prior to their termination, Probe's Chief Executive Officer and Chairman resided in Texas; and (9) Probe's operations were heavily regulated, particularly by the United States Bureau of Ocean Energy Management, Regulation and Enforcement.

In rebutting the presumption that a debtor's COMI is located in the jurisdiction of the debtor's registered head office, the Court specifically noted that after looking objectively at the factors present in this case, the legitimate expectations of third parties dealing with the Probe corporate group would be that United States law would govern and that these are the stakeholders who stand to be materially affected by the restructuring proceedings in the United States.

[5] (2011), 79 CBR (5th) 148 (BC SC).
[6] 2d ed. (Markham, Ont.: LexisNexis Inc., 2011) at 376.

Tucker v. Aero Inventory (UK) Ltd.[7]

Aero Inventory (UK) Limited and Aero Inventory plc (together, the "Aero Companies") provided procurement and inventory management services to the aerospace industry prior to commencing administration proceedings in the High Court of Justice of England and Wales. An application seeking recognition of such foreign proceeding in Canada was subsequently brought under the CCAA.

In determining COMI, the Court noted that, in the absence of proof to the contrary, the Aero Companies' COMI would be Quebec, the location of its registered office. However, the Court concluded that the COMI was, in fact, the United Kingdom and cited the following facts: (1) the Aero Companies had global business interests that are managed and administered from their head office in the United Kingdom; (2) the Aero Companies had no premises, employees or physical presence in Canada; (3) business was conducted in Canada through a Canadian affiliate that provided services to the Aero Companies through a management agreement; and (4) Aero Inventory plc was publicly listed on the Alternative Investment Market of the London Stock Exchange.

Re Angiotech Pharmaceuticals Inc.[8]

Angiotech Pharmaceuticals Inc. was a specialty pharmaceutical and medical device company that filed for protection from its creditors under the CCAA. The debtor company subsequently filed under Chapter 15 of the U.S. Bankruptcy Code seeking recognition of the Canadian proceeding as a foreign main proceeding.

In determining COMI, the Court noted that courts in Canada consider the following factors:

1. the location where corporate decisions are made;
2. the location of employee administrations, including human resource functions;
3. the location of the company's marketing and communication functions;
4. whether the enterprise is managed on a consolidated basis;
5. the extent of integration of an enterprise's international operations;
6. the centre of an enterprise's corporate, banking, strategic and management functions;
7. the existence of shared management within entities and in an organization;
8. the location where cash management and accounting functions are overseen;
9. the location where pricing decisions and new business development initiatives are created; and
10. the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

In applying the above factors, the Court held that the debtor company's COMI was in British Columbia.

Re Massachusetts Elephant & Castle Group Inc.[9]

Massachusetts Elephant & Castle Group Inc. was an operator and franchisor of authentic, full-service British-style restaurant pubs in the United States and Canada that, along with its affiliates, filed for bankruptcy protection in the United States under Chapter 11 of the Bankruptcy Code. The debtor

[7] 2009 CarswellOnt 7007 (Ont. SCJ).
[8] (2011), 76 CBR (5th) 317 (BC SC).
[9] 2011 CarswellOnt 6610 (Ont. SCJ).

company then brought a motion seeking recognition of such foreign proceeding in Canada under the CCAA.

In interpreting COMI, the Court cited the following three factors as being most significant:

1. the location of the debtor's headquarters, head office functions or nerve centre;

2. the location of the debtor's management; and

3. the location that significant creditors recognize as being the centre of the company's operations.

The Court noted that while other factors (such as those cited in the *Angiotech* case) may be relevant in specific cases, it could very well be that they should be considered to be of secondary importance and only to the extent that they relate to or support the above three factors. The Court also noted that, in certain circumstances, it could be that some of the *Angiotech* factors or other factors might be considered to be more important than others; nevertheless, none is necessarily determinative. All of them could be considered, depending on the facts of the specific case.

In this case, the Court concluded that the COMI was in the United States, as the location of the debtor company's management and headquarters, head office functions or nerve centre was in Boston, Massachusetts. The Court also noted that GE Canada Equipment Financing GP, a significant creditor, did not oppose such finding.

IV. Limitations on Recognition: Public Policy and Inconsistency with the CCAA

Section 61(2) of the CCAA (and the corresponding provision[10] in the *Bankruptcy and Insolvency Act* (BIA)) contain the following public policy exception to recognition by Canadian courts of foreign proceedings and orders made in foreign proceedings:

> 61. (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

In addition, ss. 48(2) and 49(2) of the CCAA (and the corresponding provision[11] in the BIA) also contain express restrictions on recognition of foreign orders that are inconsistent with provisions of the relevant statute:

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

[10] 284. (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

[11] 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.
…
(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.
…

> ...
>
> 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
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> ...
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> (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.
>
> ...

There is a dearth of Canadian case law in this context regarding the interpretation of "consistent with any order that may be made under [the Act]" and "public policy". In addition, most of the limited case law on these restrictions pre-dates the amendments made to the CCAA and BIA in 2009.

1. Public Policy

(A) Cases Decided Under the Pre-Amendment Recognition Proceedings Legislation

In *Canadian Imperial Bank of Commerce v. ECE Group Ltd,*[12] the Court noted that Canadian courts have traditionally been strong supporters of recognition, on a comity basis, of foreign orders, but that the existence of comity has its limits. In this context, the Court cited *Hunt v. T & N plc,*[13] which adopted the following principle from *Westinghouse Electric Corp v. Duquesne Light Co:*[14]

> It is also fundamental that comity will not be exercised in violation of the public policy of the state to which the appeal [for assistance re comity] is made or at the expense of injustice to its citizens; and comity leaves to the court whose power is invoked the determination of the legality, propriety or rightfulness of its exercise: see generally *15A Corp. Jur. Sec., pp 391-7; Szaszy, International Civil Procedure (1967), pp 652-3.* (emphasis added)

In *Menegon v. Philip Services Corp,*[15] the Court was considering the fairness of a Plan of Compromise and Arrangement (the Canadian Plan) that was filed in proceedings commenced under the CCAA in respect of Philip Services Corp (Philip). A Plan of Reorganization (the U.S. Plan) was also filed in parallel proceedings (the U.S. Proceedings) commenced by Philip under the Bankruptcy Code. The Court in this case held that the Canadian Plan failed to comply with the procedural and statutory requirement of the CCAA regime in that it sought to exclude certain creditors from participation in its process by providing that their claims against Philip were to be governed by and treated in the U.S. Proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without affording those claimants any right to vote. The Court noted the following:

> The mere fact that a Canadian creditor's rights are to be dealt with and affected by single or parallel insolvency proceedings in the U.S. Bankruptcy Court — or that the reverse may be the case (U.S. creditor/Canadian Court) — is not necessarily sufficient, in itself, to undermine the fairness and reasonableness of a proposed Plan: see, for

[12] (2001), 23 CBR (4th) 92 (Ont. SCJ).
[13] (1992), [1993] 1 WWR 354 (BC SC).
[14] (1977), 16 OR (2d) 273 (Ont. HC).
[15] (1999), 11 CBR (4th) 262 (Ont. SCJ).

> example, *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (Alta. Q.B.); *Re Starcom Services Corp.,* Bankr. W.D. Wash., case no. M-98-60005, Nov. 20, 1998. In Canadian insolvency proceedings under the CCAA, however, it is the right to vote on the compromise or arrangement which the debtor company proposes to make with them which is the central counterpart, on the part of the creditors, to the debtors right to attempt to make that compromise or arrangement. In my view, having chosen to initiate and take advantage of the CCAA proceedings, Philip cannot now evade the implications and statutory requirements of those proceedings by seeking to carve out certain pesky — and potentially large — contingent claimants, and to require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan. All of this without the right to vote on the proposal.

In *Re Stanford International Bank Ltd,*[16] the Court was deciding whether or not to recognize a foreign judgment, appoint Antiguan liquidators as a foreign representative and grant them considerable powers within Canada under the BIA. The Court found that the Antiguan judgment in question explicitly deprived Canadian and foreign government and regulatory authorities of the benefits of cooperation from the Antiguan liquidators and that the motion did not merit the confidence of the Court because of the absence of good faith and respect for the Canadian public interest. Among other things, the Court pointed to the Antiguan liquidators' failure to disclose key information in obtaining an ex parte order that they had sought and called such omissions "blatant and inexcusable". Due to the conduct of the Antiguan liquidators, the Court dismissed the motion and, in so doing, cited the Supreme Court of Canada's decision in *Holt Cargo v. ABC Containerline,*[17] which held that Canadian courts must inquire as to whether the recognition of a foreign proceeding and lending assistance in relation thereto would cause an interested party to lose some juridical advantage that it would have had under Canadian law. The Court stated that in exercising its discretion, it was necessary to safeguard the interests of Canadian creditors and uphold the foundations of the Canadian judicial system.

(B) Cases Decided Under the Current Recognition Proceedings Legislation

In *Re Xerium Technologies Inc.,*[18] the Court was asked to grant recognition in Canada of a Plan of Reorganization under the Bankruptcy Code pursuant to Part IV of the CCAA. Upon reviewing the U.S. Plan, the Court determined that the provisions of the Plan were not inconsistent with the CCAA:

> I am satisfied that the provisions of the Plan are consistent with the purposes set out in s. 61(1) of the CCAA, which states:
>
> > 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.

In granting such order, the Court noted with approval the list of factors from *Re Babcock & Wilcox Canada Ltd.*[19] that Canadian courts should consider in cross-border proceedings. The Court in the Babcock case included the following guideline in its list of factors:

> Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency

[16] (2009), 65 CBR (5th) 33 (Qc. Sup. Ct.), aff'd (2009), 65 CBR (5th) 4 (Qc. CA).
[17] [2001] 3 SCR 907.
[18] (2010), 71 CBR (5th) 300 (Ont. SCJ).
[19] (2000), 18 CBR (4th) 157 (Ont. SCJ).

> law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.

2. Inconsistency with the CCAA

There is very little case law on the issue of when a foreign order will not be recognized as being inconsistent with the CCAA (or BIA). In the *Philip Services* case, which was decided before the CCAA was amended in 2009 to provide that an order recognizing a foreign order must be "consistent with any order that may be made under [the CCAA]," the Court made a finding that the proposed treatment of creditors under the U.S. Plan was inconsistent with the requirements of the CCAA. In that case, certain Canadian creditors argued that it was inappropriate for the Canadian Plan to be binding on them where it provided that their claims would be determined in accordance with the terms of the U.S. Plan and the Bankruptcy Code. The creditors argued that the proposed treatment was different from what they were entitled to under Canadian law, while at the same time depriving them of the right to vote on the Canadian Plan. The Court held the following:

> The rights of creditors under the CCAA cannot be compromised unless,
>
> > a) the creditor has been given a right to vote, in the appropriate class, on the proposed compromise;
> >
> > b) the creditor's vote is in accordance with a value ascribed to the claim by a Court approved procedure;
> >
> > c) the class in which the creditor has been appropriately placed has voted by a majority in number and two-thirds in value in favour of the compromise; and,
> >
> > d) the Court has sanctioned the compromise on the basis that it is fair and reasonable (with considerable deference being given by the Court in this regard to the votes of the creditors).
>
> *See CCAA, section 4,6 and 12; Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 510.*
>
> Here, for the reasons I have outlined, what Philip proposes is inconsistent with the foregoing.

The issue of whether relief requested by a foreign representative is "consistent with" other relief that may be granted under the CCAA was also considered in *Tucker Aero Inventory (UK) Ltd.*[20] In *Tucker*, the foreign proceeding involved administrative proceedings in England. The foreign representatives were joint administrators appointed in the administration proceedings. The foreign debtors had supplied parts to the airline industry, including a customer in Canada, and issues arose with respect to the contract with the Canadian customer. In the context of the proceedings under Part IV, the foreign representatives brought a motion for an order to temporarily lift the stay of proceedings granted in the recognition order to allow the foreign debtors to file assignments in bankruptcy under the BIA. The BIA filing would facilitate preference actions not otherwise available in Canada. The Canadian customer of the foreign debtor opposed the motion and argued that concurrent proceedings under Part IV of the CCAA and under the BIA were not consistent. In this context, the Court held that Part IV of the CCAA specifically contemplates a bankruptcy proceeding continuing during a Part IV proceeding and noted as follows:

> Counsel to Air Canada also raised the question as to how a bankruptcy is consistent with the Part IV application. It seems to me that Part IV contemplates the possibility of concurrent proceedings involving the BIA. Further, the possibility of concurrent BIA proceedings was contemplated by the parties as it is reflected in the orders of both Newbould J. and Cumming J.

[20] (2010), 65 CBR (5th) 314 (Ont. SCJ) [Commercial List].

> In the circumstances of this case, the use of the BIA in concurrent proceedings to Part IV is consistent with Canadian public policy.
>
> If counsel to Air Canada were to be successful in opposing the relief sought, the effect may very well be that a transaction that may be preferential in nature may escape review by a creditor representative. Such an outcome would be inconsistent with Canadian public policy.

In cases unrelated to insolvency matters, the Supreme Court of Canada has established a very high threshold for striking down legislation as being inconsistent with other provisions of a statute. For instance, in *Rodriguez v. British Columbia (Attorney General)*[21] and *Multiple Access Ltd v. McCutcheon*,[22] the Supreme Court of Canada held that the test to be applied is whether the subject legislation logically contradicts or expressly contradicts the other legislation. Presumably, the same standard would apply to determining whether a foreign order is "consistent with any order that may be made under [the CCAA]." An example of an order that would clearly be inconsistent with an order that may be made under the CCAA would be a foreign order that allowed the termination of collective agreements given that s. 32(9)(b) of the CCAA expressly prohibits the disclaimer or resiliation of collective agreements. On the other hand, a foreign order involving the classification of creditors in a manner that is not in conformity with the rules regarding classification of creditors in s. 22(2) of the CCAA would likely not violate ss. 48(2) or 49(2) of the CCAA since the provisions of s. 22(2) states that creditors "may" be classified in accordance with the enumerated factors.

V. CCAA Stays and Third-Party Releases in Favour of Non-Debtors: Overview of Case Law

1. Cases Extending the CCAA Stay to Corporate Non-Debtors

Campeau v. Olympia & York Developments Ltd.[23]

Facts: The plaintiffs brought an action against Olympia & York – a debtor company in favour of which a CCAA stay was granted – and against the National Bank of Canada – an arm's-length third party. On the motion of the Bank, the Court stayed the plaintiffs' action against both the debtor and the Bank, pending the disposition of the CCAA proceedings.

Reasons for extending the stay:

1. Blair J. (as he then was) noted that the court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process.

2. In the context of this case, the Court held that while there may not be great prejudice to the Bank if the action were to continue against it alone, the complex factual situation and the damages sought by the plaintiffs were common to claims against both the Bank and the CCAA debtor. The Court could not encourage the potential of two different inquiries at two different times into those same facts and damages.

Re Woodward's Ltd.[24]

Facts: Woodward's Ltd. was granted CCAA protection after it became insolvent. Retirement allowances owing to its former senior executives were overdue. In the subsequent application to extend the stay, the Court was asked to extend the stay to the company's bank, which had provided letters of credit securing the payment of the retirement allowances.

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[21] [1993] 3 SCR 519.
[22] [1982] 2 SCR 161.
[23] 1992 CarswellOnt 185 (Ont. Gen. Div.).
[24] 1993 CarswellBC 530 (BC SC [In Chambers]).

Reasons for extending the stay: The Court extended the stay in favour of the bank. Tysoe J . (as he then was) noted that the Court can impose stays of proceedings against third parties on the basis of its the inherent jurisdiction. The exercise of that jurisdiction must be important to the reorganization process. The Court must weigh the interests of the insolvent company against the interests of the parties who will be affected.

Re Canadian Airlines Corp.[25]

Facts: Canadian Airlines Corp. was granted CCAA protection. The noteholders sought to sell the shares of the debtor's solvent subsidiary that was not an applicant in the CCAA proceeding.

Reasons for extending the stay: The Court prohibited the noteholders from selling the shares of the subsidiary by relying in part on its inherent jurisdiction. Paperny J. (as she then was) referred to *Woodward's Ltd, Re*, above, and noted that in deciding whether to exercise its inherent jurisdiction, the Court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction.

Re Muscletech Research and Development Inc.[26]

Facts: Applicant companies were granted an initial CCAA order in an effort to achieve global resolution of a number of product liability actions brought against them and third parties in the United States.

Reasons for granting the stay: Farley J. held that it was logical and practical to stay litigation against third parties in circumstances in which the third parties were in essence derivative and related to the claims against the applicant debtor companies.

Re Muscletech Research and Development Inc.[27]

Facts: After the initial CCAA stay was granted (see above), some of the third parties agreed to provide funding to the settlement of actions and most plaintiffs in those actions agreed to settle their claims. Some of the plaintiffs, however, did not settle.

Reasons for extending the stay to third parties: On a subsequent motion by certain plaintiffs that did not settle, Ground J. held that the product liability actions relating to products that were formerly sold by one of the CCAA debtors were derivative of and inextricably linked to the liability of the debtors. The stay should therefore be extended to such third parties pending the sanction hearing.

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.[28]

Facts: After the Canadian market for asset-backed commercial paper (ABCP) experienced liquidity crisis, the parties – financial institutions, dealers and noteholders in the market for ABCP – put forward a plan of compromise and arrangement that included broad releases for certain claims against third-party banks and dealers. While the majority of noteholders voted in favour of the plan, a minority of noteholders opposed the sanction of the plan on the basis of the third-party releases.

Reasons for approving the third-party releases:

1. Blair J.A., writing for the Court of Appeal for Ontario, held that the CCAA, on a proper interpretation, permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the Court where those releases are reasonably connected to the proposed restructuring.

2. The Court based its interpretative approach on

[25] 2000 CarswellAlta 622 (Alta QB).
[26] 2006 CarswellOnt 264 (Ont. SCJ) [Commercial List].
[27] 2006 CarswellOnt 6230 (Ont. SCJ) [Commercial List].
[28] 2008 CarswellOnt 4811 (Ont. CA).

(a) the open-ended, flexible character of the CCAA;

(b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and

(c) the express statutory effect of the double-majority vote and court sanction that render the plan binding on all creditors, including those unwilling to accept certain portions of it.

3. Blair J.A. further explained as follows:

> The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy.

Re Grace Canada Inc.[29]

Facts: The U.S. parent of the applicant Grace Canada Inc. filed for Chapter 11 protection due to numerous product liability suits. Grace Canada commenced proceedings under the CCAA, seeking ancillary relief under the former s. 18.6, the pre-amendment provisions on cross-border insolvencies, to facilitate the U.S. proceedings in Canada. Grace reached a settlement with the representative counsel for claimants in several proposed class actions to be commenced in Canada. The minutes of settlement contained certain releases in favour of the Crown and Sealed Air – a spun-off Canadian subsidiary of the U.S. debtor.

Reasons for approving the third-party releases: Morawetz J. approved the release in favour of Sealed Air on the basis that it was necessary, fair and reasonable given Sealed Air's contribution to the settlement under the plan in excess of $500 million. The Court also held that the limited Crown releases were also necessary for the viability of the plan, and were fair and reasonable.

Re *Canwest Global Communications Corp.*[30]

Facts: The CCAA debtors were a group of related companies that were granted CCAA protection. After the creditors voted overwhelmingly in favour of a plan which included certain third-party releases, the CCAA debtors brought an application for an order sanctioning the plan. The Court approved the plan, including the third-party releases.

Reasons for approving the third-party releases:

Pepall J. noted as follows:

> In the Metcalfe decision [above], Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.
>
> In this case, the releases are broad… . Fraud, wilful misconduct and gross negligence are excluded. … The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under

[29] 2008 CarswellOnt 6284 (Ont. SCJ) [Commercial List].
[30] 2010 CarswellOnt 5510 (Ont. SCJ) [Commercial List].

> the circumstances, I am prepared to sanction the Plan containing these releases.

Re Nortel Networks Corp.[31]

Facts: Nortel was an insolvent telecommunications company that obtained CCAA protection. It continued to provide pension and other benefits to its current, former and retired employees on a discretionary basis. Nortel negotiated a settlement agreement with the Monitor appointed under the CCAA, the representatives of the employees and the union in respect of the employee claims. The settlement agreement released, inter alia, Nortel's advisors, successors, directors and officers from all future claims regarding pension plans and some other claims.

Reasons for approving the third-party releases:

1. Morawetz J. held that a settlement agreement that contains third-party releases is fair and reasonable where the releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

2. In this case, the Court was satisfied that the releases were necessary and connected to a resolution of claims against the applicants. Morawetz J. was of the view that the releases benefited creditors generally as they reduced the risk of litigation against the applicants and their directors, protected the applicants against potential contribution claims and indemnity claims by certain parties and reduced the risk of delay caused by potentially complex litigation. Further, the Court was satisfied that the releases were not overly broad or offensive to public policy.

2. Cases Extending the CCAA Stay to Partnerships and Limited Partnerships that Otherwise do not qualify to file under the CCAA

Re Lehndorff General Partner Ltd.[32]

Facts: The Court granted CCAA protection to the applicants and extended the stay of proceedings to all actions taken or that might be taken on account of the applicants' interest in three limited partnerships, whether as limited partner, general partner or as registered titleholder to certain of their assets as bare trustee and nominee. The applicant Lehndorff General Partner Ltd. was the sole general partner of each limited partnership.

Reasons for granting the stay:

1. Farley J. held that the Court has inherent jurisdiction to extend the CCAA stay to a party that is not a "company" and "debtor company" as defined in CCAA (such as a limited partnership).

2. Farley J. further noted that the power of the Court to stay proceedings under the CCAA should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and, in particular, to enable the continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay that affects not only the company, secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of a plan and thereby the continuance of the company.

Re Calpine Canada Energy Limited[33]

Facts: The CCAA initial order included a stay of proceedings against the corporate Calpine entities that were CCAA debtors and also against two partnerships and one limited partnership.

[31] 2010 CarswellOnt 1754 (Ont. SCJ) [Commercial List].
[32] 1993 CarswellOnt 183 (Ont. Gen. Div.) [Commercial List].
[33] 2006 CarswellAlta 446 (Alta. QB).

Reasons for granting the stay: Romaine J. relied on inherent jurisdiction to grant a stay of proceedings against partnerships where it is just and convenient to do so on the basis of "the extremely complex corporate and debt structure of the Calpine group, the cross-border nature of these proceedings, and the evidence I have heard so far in the proceedings of the value of partnership assets, that irreparable harm may accrue to the Calpine group if the stay is not granted."

Re Papiers Gaspesia Inc.[34]

Facts: The CCAA initial order granted protection to both the general partner, Papiers Gaspesia Inc., and the limited partnership, Papiers Gaspesia. The general partner sought a fifth extension of the initial order on the basis that the Monitor appointed under the CCAA was considering a potential investor, which would allow for the restructuring of the limited partnership. Two creditors opposed this extension, on the ground, inter alia, that the CCAA could not extend protection to a limited partnership.

Reasons for granting the stay: Chaput J. relied on *Lehndorff*, above, in extending the stay to the limited partnership, holding that a viable rearrangement could not be achieved if the stay applied only to the general partner because the two were so intimately intertwined and also in order to give a chance to a proposed restructuring of the limited partnership.

Re Smurfit-Stone Container Canada Inc.[35]

Facts: A CCAA initial order was granted and extended to a partnership and a limited partnership.

Reasons for granting the stay: Pepall J. cited *Lehndorff*, above, and noted that the "operations of the partnerships are integral and closely interrelated with that of the Applicants and in my view the request is appropriate in the circumstances outlined."

Re Forest & Marine Financial Corp. [36]

Facts: The CCAA initial order extended the stay to Forest & Marine Financial Limited Partnership, a limited partnership. Its general partner, Forest & Marine Financial Corp., was a CCAA debtor. A secured creditor appealed to the B.C. Court of Appeal. The secured creditor argued that the limited partnership was not entitled to invoke the CCAA, and instead, must seek an insolvency remedy under section 85(1) of the *Bankruptcy and Insolvency Act*, which provides that when a general partner becomes bankrupt, the property of the partnership vests in the trustee in bankruptcy.

Reasons for granting the stay: The B.C. Court of Appeal held that because the general partner was the entity which had a debtor-creditor relationship with the creditors and owned all of the assets of the limited partnership, it was unnecessary in substantive terms for the limited partnership to be included in the CCAA order and the stay. However, there was procedural assistance in extending the stay to the limited partnership, which made it appropriate to do so.

The extension of the stay to the limited partnership was based on the general partner being a CCAA applicant.

Re Canwest Global Communications Corp.[37]

Facts: The CCAA initial order granted protection to several related corporate entities, and extended the stay to three partnerships.

[34] 2004 CarswellQue 9078 (Que. SC).
[35] 2009 CarswellOnt 391 (Ont. SCJ) [Commercial List].
[36] 2009 CarswellBC 1738 (BC CA).
[37] 2009 CarswellOnt 6184 (Ont. SCJ) [Commercial List].

Reasons for granting the stay:

1. Pepall J. noted that the partnerships carried on operations that were integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships were so intertwined with those of the CCAA debtors that irreparable harm would ensue if the requested stay were not granted.

2. *Lehndorff, Smurfit* and *Calpine*, above, were cited as authorities for exercising the Court's inherent jurisdiction to extend the CCAA stay to partnerships.

Re White Birch Paper Holding Co.[38]

Facts: The Court granted CCAA protection to the applicants and extended the stay to three limited partnerships.

Reasons for granting the stay:

Mongeon J. explained as follows:

> Although the CCAA does not deal with this issue specifically, I am prepared to exercise my discretion and to rely on the Court's inherent jurisdiction to grant a stay of proceedings against the partnerships, given that the structure of the WB Group is such that it would be impossible to proceed otherwise.

Re Priszm Income Fund[39]

Facts: CCAA protection was granted to the applicants and was extended to Priszm Limited Partnership. The general partner was a CCAA debtor.

Reasons for granting the stay: Morawetz J. cited *Lehndorff* and *Canwest*, above, and held as follows: "The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies."

[38] 2010 CarswellQue 1780 (Que. SC).
[39] 2011 CarswellOnt 2258 (Ont. SCJ) [Commercial List].