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United States - Canadian Insolvencies: Reviewing Conflicting Legal Mechanisms, Challenges and Opportunities for Cross-Border Cooperation

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The economies of Canada and the United States are strongly linked in a relationship of mutual dependence. As of 2003, the North American Free Trade Agreement ("NAFTA") trade alliance produced more than $11 trillion worth of goods and services. In 1999, Canada bought more U.S. goods than all 15 countries of the European Union combined. From 1985-2000, U.S. merchandise exports to Canada tripled, with Canada being the lead foreign export market for U.S. goods since 1946. "In 2000, the United States sold $179 billion worth of goods to Canada [and] bought $234 billion worth of Canadian goods." The creation of NAFTA established North America as the world's largest free trade block, which now contains approximately 400 million people, second only to the European Union. Recent statistics demonstrated that in 2003, total imports and exports between Canada and the United States totaled $394 billion. Each of these statistics demonstrates the enormous economic bonds between Canada and the United States.

Despite the clear mutual economic reliance and strongly linked economies, and the significant negative economic implications of international liquidations, both countries have not created a formalized, cohesive system for contending with cross-border insolvencies. Part I of this paper analyzes and contrasts existing insolvency mechanisms in the United States and Canada, focusing upon the Companies' Creditors Arrangement Act (the "CCAA") and its differences (and similarities) with Chapter 11 of the U.S. Bankruptcy Code (the "Code" or "Bankruptcy Code"). Additionally, the paper reviews the concept (and effectiveness) of insolvency protocols, with discussion of the judicial recognition of cross-border insolvency orders, the CCAA's concepts of "fairness" and "reasonableness" and the guiding principles of comity, universality and territoriality. Part II analyzes the insolvency of Olympia & York Developments, demonstrating the great financial impacts of cross-border insolvencies, the need for

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3 Id.

4 Id.

creativity from both the judiciary and practitioners and the spirit of cooperation between the U.S. and Canadian legal systems. The Olympia and York line of cases serves as a model to demonstrate how an insolvency is treated under Chapter II and the CCAA insolvency regimes through the development of a protocol (particularly in the context of real estate developer insolvencies) and how cooperation fostered through protocols encourages innovations, flexibility and speedy resolutions. Part III reviews the guidance available to courts in developing protocols, including the International Bar Association Concordat, the American Law Institute’s Transnational Insolvency Project and the United Nations Commission on International Trade Law (“UNCITRAL”)’s Model Act. In addition to discussing the Canadian judiciary’s review of jurisdiction and choice of law issues in recent cross-border cases (and, in particular, the recognition of foreign judgments), the paper concludes by analyzing the sustainability of cross-border insolvency cooperation between Canada and the United States, considering the economic implications of cross-border insolvencies and the challenges facing such judicial cooperation.

1. The CCAA and the Advent of Protocols

The CCAA was enacted in 1934 to allow corporate reorganizations during the global economic depression of the 1930’s. The CCAA fulfilled gaps in Canada’s Bankruptcy Act when corporate liquidations resulted from corporate insolvencies, as “large Canadian corporations found that their outstanding bonds had no contractual provisions for amending their terms in times of financial difficulties.” The CCAA addressed this issue, allowing corporations to restructure their debt. In response to concerns that the CCAA was being abused, a 1953 amendment restricted its use so that the debtor corporation must both hold an outstanding issue of bonds and have a trustee to represent the interest of the bondholders. With these requirements, the CCAA then fell out of favor as an insolvency vehicle for about thirty years. The CCAA was then resurrected to respond to the enormous restructuring needs of corporations during the Canadian recession of the late 1980’s and early 1990’s. For example, between 1980 and 1995, the number of Canadian business bankruptcies increased from 6,595 to 13,258.

In addition, “[d]uring the first nine months in 1990, there were 37,000 bankruptcies (consumer and business) in Canada, up 37% from 1989... [with] CAN $2.2 billion in

7 Sean Dargan, The Emergence of Mechanisms for Cross-Border Insolvencies in Canadian Law, 17 CONN. J. INT’L L. 107, 111 (2001). The Bankruptcy Act, amended in 1992 and now known as the Bankruptcy and Insolvency Act (“BIA”) is viewed as a means for small and medium-sized business debtors who cannot meet the CAN $5 million threshold required by the CCAA. See Modernization, supra note 6, at 9. See also Bankruptcy and Insolvency Act, R.S.C., ch. B-3, Sect. 269 (2004). The BIA (which is written in great detail, as compared to the sparsely worded CCAA) does not recognize many aspects of Chapter 11, most notably that the filer need not make a showing of insolvency for admission to bankruptcy.
8 Dargan, supra note 7, at 111.
9 See Modernization, supra note 6, at 6.
10 See id.
11 See id. at 5 n.38.
liabilities…left behind by 8,200 companies.” The Bankruptcy Act’s inflexibility with respect to corporate insolvencies caused a resurgence of interest in the CCAA. Recognizing the implications of this Canadian recession, courts adapted the CCAA as a “Canadian equivalent” to Chapter 11 of the U.S. Bankruptcy Code 13 to rescue financially troubled corporations through: (i) allowing “instant” bonds and trust deeds to be created, (ii) broadly interpreting Section 11 of the CCAA to allow courts sole discretion to issue stays or orders restraining secured and unsecured creditors and (iii) recognizing an implied power in the CCAA to implement by any means Parliament’s “intention to create a rescue culture” for distressed companies. 14

Courts are “given great discretion in handling CCAA proceedings,” 15 as most clearly evidenced by the court’s authority to originate stay orders to allow a reorganizing business to continue operating while a plan of reorganization is worked out. 16 If an insolvent debtor reaches the CCAA filing threshold of CAN $5 million in outstanding claims, “the company may commence a CCAA proceeding in the province of its chief place of business or…in any province where the debtor has assets.” 17 Proceedings commence usually with a court application, normally without notice or limited notice to creditors, 18 while the court must be satisfied that effective measures have been taken to protect creditors. 19 Several factors are considered by a court when reviewing a CCAA application, including: (i) the “causes of the debtor’s financial problems,” (ii) “existence of a coherent plan,” (iii) available sources of funding, (iv) “the ability and readiness of principals to provide substantial support for restructuring,” (v) the “competence of existing management or prospect for new competent management,” (vi) the “confidence in management” and (vii) the “impact on restructuring on employees.” 20

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14 See Modernization, supra note 6, at 7.
15 Dargan, supra note 7, at 112.
16 See id. In Meridian Developments v. Toronto-Dominion Bank, [1984] 52 C.B.R. 109 (Q.B.), “Wachowich J. stated that the purpose of the stay power in s. 11 of the CCAA was to maintain the status quo, to give the debtor company breathing space to develop its restructuring plan, and to prevent creditors from trying to obtain an advantage over other creditors.” See Douglas S. Nishimura. The Companies’ Creditors Arrangement Act and the Petroleum Industry: The Blue Range Resource Corporation Proceedings, 39 ALTA. L. REV. 35, 43 (2001).
17 See Dargan, supra note 7, at 113.
19 Id.
The “stay” and plan of arrangement must follow the broad requirements under the CCAA, which allows a considerable amount of judicial discretion. Under the CCAA, a judicially imposed stay does not require the agreement of all creditors to the amendment of their contracts. The initial stay of proceedings is effective for a period of, typically, 30 to 60 days... [which may] be extended... [if] the court is satisfied that constructive negotiations are taking place between the corporation and its creditors.

In addition, apart from the general stay, the court will normally prohibit suppliers and other parties in contracts with the corporation from terminating their arrangements without the court’s permission.

To be successful, a CCAA plan of arrangement must be accepted by all of the classes of creditors to which the plan has been proposed and additionally accepted by the court. Within classes of creditors, the plan must be accepted by 50% of the voting creditors present, representing at least 75% of the claims in that class. While the plan is drafted, the court may appoint a “monitor” to oversee the company’s financial affairs and report upon any deterioration in such affairs during the stay period.

The court need not sanction the plan even if it has been approved by the required majority of creditors. It is a purely discretionary exercise, and the court may find that the plan is not economically feasible or is not in the best interests of all the creditors. The court must be satisfied that: (i) all statutory requirements have been complied with, (ii) that there has not been any preference payments or transfers of assets to creditors, (iii) that creditors have been properly classified for voting purposes and (iv) that voting procedures were properly followed.

“The stay over secured creditors was not available under the old Bankruptcy Act and the CCAA therefore allows more “elbow room” for restructuring.” The lack of comprehensive rules and judicial flexibility, as evidenced by the court’s broad power to issue stays and review plans, are thus viewed by many as the advantages of the CCAA, rewarding creativity, particularly as the CCAA does not define the conditions of the plan of arrangement.

21 See Wilson, supra note 18.
22 Ultimately, “[a]ny party or shareholder who objects to the orders or decisions made under the CCAA may apply for leave to appeal under Section 13. This right of appeal is not automatic.” See Nishimura, supra note 16, at 42.
24 See Besant, supra note 20.
25 Id.
26 Id.
27 Id. (Practitioners have argued that the manner by which creditors are divided into classes for purposes of voting on plans of arrangement or compromises are too broad and thus inadequate. Conversely, other practitioners view a lack of “hard and fast” rules regarding such class creation as a positive feature, allowing broad flexibility in structuring successful organizations.)
28 See Nishimura, supra note 16 at 42.
29 Wilson, supra note 18.
30 CCAA, supra note 6.
The CCAA allows courts broad flexibility, as evidenced by the CCAA's guiding principles of fairness and flexibility. In sanctioning a plan under the CCAA, the court "weigh[s] the equities or balance[s] the relative degrees of prejudice that would flow from granting or refusing the requested relief." \(^3\) Justice Blair has noted the need for flexibility under the BIA and CCAA, stating that "Clearly, it would be undesirable for the general working of the bankruptcy and insolvency regime...for some party to escape the scrutiny (and if found wanting, the rectification) of a preference review merely through a technical device." \(^2\) Similarly, Justice Blair held that a court reviewing a CCAA matter must act reasonably, meaning that the court exercise "its discretion so that justice would be done to all parties." \(^3\) The expansive view of fairness, flexibility and reasonableness is thus viewed by many practitioners as a key asset of the CCAA.\(^3\)

"In 1997, Parliament's Bill C-5 added cross-border provisions to the BIA and the CCAA, reflecting Parliament's willingness to address cross-border bankruptcies and insolvencies." \(^3\) \(\text{[T]he cross-border provisions had [arguably] already been read into the CCAA by judges who approved [ad hoc solutions with U.S. courts, known as] protocols.}\) \(^3\) For example, Section 18.6(2) of the CCAA confirms the concept of cross-border cooperation through protocols, giving courts the power to "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 [the CCAA] with any foreign proceeding." \(^3\) Under Section 18.6(3) of the CCAA, these orders may be made "on such terms and conditions as the court considers appropriate in the

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\(^3\) See Re Olympia & York Developments. (1995) 34 C.B.R. 93. Justice Blair noted that a plan must be "fair and reasonable," stating: "That the ultimate expression of the court’s responsibility in sanctioning a plan should find itself telescoped into those two words is not surprising. "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the [CCAA]. "Fairness" is the quintessential expression of the court’s equitable jurisdiction – although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity – and "reasonableness" is what lends objectivity to the process. ...If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced – or "reasonable" – manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it – technical and procedural compliance with the Act aside – the plan should be sanctioned if it is "fair and reasonable." See id. at 508-509.

\(^2\) Id. at 101. (emphasis added).

\(^3\) Id.

\(^3\) See Leonard, Bruce and Justice J.M. Farley. "Insolvency Reorganization Practice and Procedure in Canada." Lecture, Osgoode Hall Professional Development Centre Business LLM Program, February 10, 2004 (hereafter, the “Insolvency Lecture”). Although the lecturers noted flexibility was essential to the CCAA’s success, it was also suggested that the need to appoint (and maintain) an able judiciary, well-versed in commercial law issues, was crucial to the CCAA’s effectiveness. Dargan. supra note 7. at 116.

\(^6\) Dargan. supra note 7. at 116.

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Finally, the CCAA’s Section 18.6(6) provides that the court may “seek the aid and assistance of a court, tribunal or other authority in a foreign proceeding by order or letter of request or otherwise as the court considers appropriate.”

Despite many similarities, Chapter 11 and the CCAA have striking differences. Overall, the CCAA has been identified as being “like Chapter 11, without rules.” Unlike the CCA, the debtor’s insolvency is not a precondition to a debtor’s voluntary proceedings under the Chapter 11 of the Bankruptcy Code. Additionally, while Chapter 11 has detailed procedures and rules applicable to all reorganizations, CCAA reorganizations proceed in an arguably case-by-case fashion, with the rules created as the reorganization proceeds. “Under the Bankruptcy Code, once a [Chapter] 11 petition is filed, [Section] 362 [of the Code] automatically...imposes a broad stay of proceedings against the debtor.” Some commentators have also asserted that Canadian insolvency law recognizes, with few exceptions, the inviolability of “freely negotiated” contractual relationships between creditors and debtors, as compared to Chapter 11, which encourages debtor rehabilitation by: (i) recognizing the interests of all stakeholders in an insolvency (e.g. unsecured creditors, employees and equity holders) and (ii) having such interests prevail over the contractual rights of secured creditors. Additionally, Section 304 of the Bankruptcy Code “readily grants ancillary proceedings, grants a stay, and authorizes the turnover of assets to the foreign representative.” The Code also reasserts local supremacy “through six factors that must be taken into account when exercising the grant of ancillary powers.” As comity is one such factor, Section 304 of the Code can allow “full cooperation with foreign proceedings.” The “international perspective” of Section 304(c) may be misleading; for example, a foreign proceeding must result in a distribution substantially in accordance with the Code. Finally, one of the most overt differences between the U.S. and Canadian insolvency regimes is the lack of an organized bankruptcy court in Canada. Although a U.S.-style bankruptcy court system does not exist in Canada, the Toronto Superior Court has a “commercial list,” representing an informal court division comprised of five or six judges versed in commercial law who hear complex commercial and corporate litigation, including CCAA proceedings.

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38 Id.
39 Id.
40 See Insolvency Lecture, supra note 34.
42 Yoine Goldstein, et. al., Olympia & York: Navigating Uncharted Waters, in CASE STUDIES IN RECENT CANADIAN INSOLVENCY REORGANIZATIONS 154 (Jacob S. Ziegel ed., 1997).
43 See Besant, supra note 20.
44 Id.
45 Id. The author details with specificity how U.S. courts have readily granted stays and transferred rights to foreign representatives.
46 Id.
A. The Advent of Protocols: Universalism, Territoriality & Comity

Despite amendments to the CCAA, the needs of large insolvent corporations with cross-border assets often remained unfulfilled. Canadian and U.S. courts, recognizing that void, provided solutions on a case-by-case basis, known as protocols, "usually involving cases where debtors [simultaneously] file for protection under Chapter 11 in the United States and the CCAA in Canada." As protocols have no prescribed format, they are intended to address issues unique to each case. Protocols may be amended to reflect changed conditions, at the approval of both courts involved. Additionally, "[p]rotocols typically deal with co-ordination of: [(i)] court hearings in the two or more jurisdictions, [(ii)] procedures dealing with the financing or sale of assets, [(iii)] recoveries for the benefit or creditors generally and equality of treatment among the general body of unsecured creditors, [(iv)] claims filing processes, and, ultimately, [(v)] plans in different jurisdictions." Protocols are "effective only upon their adoption and approval by each of the [c]ourts involved in accordance with the local law and practice of each local jurisdiction." The trend of recent decisions suggests that protocols are being widely accepted, if not encouraged, by U.S. Courts. Perhaps the greatest of debates regarding the use and recognition of protocols concerns the tension between universality and territoriality principles. The "territoriality" principle provides that insolvency proceedings (and the effects of such proceedings) are limited to the state where the insolvency proceedings are opened. Critics of the territoriality principle

48 Justice J.M. Farley, et al. Cooperation and Coordination in Cross-Border Insolvency Cases, University of British Columbia Faculty of Law: First Annual Insolvency Review Conference, February 6, 2004, available at: www.amercol.org/images/coordination%20of%20cross-border%20insolvencies3.doc (last visited March 15, 2005). at 3. See also Dargan, supra note 7. 49 See Dargan, supra note 7, at 119. citing Anne Nielson et al., The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies, 70 Am. Bankr. L.J. 533, 557 (1996). 50 See Dargan, supra note 7, at 120. 51 See Farley, supra note 48, at 9. 52 Id. 53 Id. 54 "[R]ecently, there has been authoritative United States appellate level recognition of the importance of coordination of international insolvency proceedings. See Farley, supra note 48, at 11. For example, U.S. courts have explicitly noted the need for international cooperation, stating:

“We strongly recommend, in a situation such as this, that an actual dialog occur or be attempted between the courts of the different jurisdictions in an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws. ... Even if cooperation could not be achieved, it would be valuable to communicate regarding the policies animating a certain law so as to be better able to perform a choice-of-law analysis. While not required by our case precedent or any principle of law, we urge that, in a situation such as this, communication from one court to the other regarding cooperation or the drafting of a protocol could be advantageous to the orderly administration of justice.” Farley, supra note 48, at 11, citing to Stonington Partners v. Lernout & Hauspie Speech Products N.V., 310 F. 3d 118 (3d. Cir. 2002). 55 See Dargan, supra note 7, at 119; See also In Holt Cargo Systems Inc. v. ABC Containerine N.V., [2001] 30 C.B.R. (4th) 6, 14 (Adherence to the so-called “Grab Rule” in which each national court
principle note the impracticability of its isolationist nature, given that, as global economies internationalize, the need to encourage foreign investment becomes necessary. Foreign investors, in turn, are concerned that they may seek discrimination in a court adhering to territorial principles. Alternatively, “universality” theory holds that all assets and claims must be administered in one single forum, out of interests of fairness and equality among creditors. A major criticism of universality is that nations are hesitant to voluntarily surrender their territorial sovereignty and adopt an expansive universality approach. For example, despite the legal, cultural and linguistic ties between the U.S. and Canada, which share (with the exception of Quebec and Louisiana) a common law tradition, a bankruptcy treaty has yet to be ratified between both countries.

The principle of comity is the “middle ground” between broad universalism and isolated territoriality, which justifies the enactment of a protocol. For example, in Maxwell Communication Corporation, the U.S. Bankruptcy Court for the Southern District of New York and the English Court of Appeal, using the concept of comity as the basis, created the first cross-border insolvency protocol. The Maxwell court noted that:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

The principle of comity as a means to justify a protocol has been attacked recently in Holt. In that case, Justice Binnie held that Canada follows a “plurality approach,” “which recognizes that different jurisdictions may have a legitimate and concurrent interest in the conduct of an international bankruptcy, and that the interests asserted in Canadian courts may, but not necessarily must, be subordinated...to a foreign bankruptcy regime. The general approach reflects a desire for coordination rather than subordination.”

The court, citing to Treco also stated that, under the territoriality principle, “the court in each jurisdiction where the debtor has assets distributes the assets in that jurisdiction pursuant to local rules.” In Re Treco, 240 F3d 148. 153 (U.S. C.A. 2nd Cir. 2001).

56 See Nielson, supra note 49, at 534. The Holt court, once again citing Treco, stated that under the universality approach “a primary insolvency is instituted in the debtor’s domiciliary country, and ancillary courts in other jurisdictions—typically in jurisdictions where the debtor has assets—defer to the foreign proceeding and in effect collaborate to facilitate the centralized liquidation of the debtor’s estate according to the rules of the debtor’s home country.” See Holt, supra note 55.


58 See id. at 816. See also R. v. Zingrae, (1981) 2 S.C.R. 392, 401 (SCC) (Dickson, J. held that the “Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect.”)

59 See Holt, supra note 55.
The recent (and highly controversial) *Holt* opinion questions the Canadian recognition of foreign judgments based upon principles of comity. In *Holt*, competing claims were made to a ship by: (i) its bankruptcy trustee appointed in a Belgian proceeding and (ii) American creditors asserting an *in rem* maritime lien. The Quebec Superior Court (sitting in bankruptcy) recognized the Belgium bankruptcy order, subject to the rights of any secured creditor under Canadian law. The Federal Court, which was dealing with the maritime lien claim, refused to give effect to the Quebec court’s orders and refused to stay the lien proceedings. While the Supreme Court of Canada “ruled that the Belgian bankruptcy was certainly not irrelevant to the Federal Court proceedings, it...[would not] justify interfering with the Federal Court’s maritime proceedings.” The Supreme Court of Canada found that Canadian courts must “exercise their discretion to stay or not to stay domestic proceedings according to all of the relevant facts and considerations of a particular case.” Despite the recognition of comity, the *Holt* court emphasized that Canadian bankruptcy court authority is derived from Canadian law. The Court held that when Canada was called upon to lend assistance to foreign bankruptcy courts, “Canadian law requires our courts to consider as one of the relevant circumstances the juridical advantage which those disadvantaged by deferral to the foreign court would enjoy in a Canadian court.” Justice Binnie “rejected the idea that ‘international coordination’ necessitates the rubber stamping of orders made by the foreign bankruptcy court.” *Holt* clearly expresses a view that comity cannot affect what a court considers as a decision based in (and settled upon) Canadian law.

In a spirited criticism of the Court’s decision, Justice Farley has questioned “why the Belgian court’s order was not entitled to respect and recognition.” Justice Farley argued that: (i) the facts supported the recognition of Belgian jurisdiction, as “[t]he debtor was incorporated in Belgium, had its head office in Belgium and carried on business there...[(ii)] Belgian bankruptcy law [was not] misguided [or] oppressive [so] that it would be against Canadian public policy to recognize Belgian bankruptcy proceedings in Canada... [and (iii)] a Canadian court would have fully expected a foreign court to recognize a Canadian bankruptcy order issued with respect to a Canadian debtor incorporated and carrying on business in Canada.”

The recognition by Canadian courts of cross-border insolvency orders under principles of comity has prompted significant debate and study. For example, Canadian courts have been criticized for recognizing “[C]hapter 11 proceedings initiated in the United States against a Canadian affiliate as part of a corporate group filing in the United States where the Canadian affiliate: [(i)] ha[d] not been found insolvent in Canada, [(ii)] was incorporated under Canadian law, and [(iii)] ha[d] its principle operations in Canada.” Additionally, the logic of enforcing a stay of proceedings issued by a U.S. bankruptcy court in Canada against a Canadian based non-debtor affiliate has been

62 Id. at 580-581.
63 Id. at 594. (emphasis in original).
64 Id. at 601.
66 Id. at 24-25.
67 See Ziegel, *supra* note 41, at 459.
reviewed with skepticism. In *Singer*, the Registrar of Bankruptcy refused to recognize proceedings in New York against the Canadian subsidiary as part of a group filing.

Alternatively, in *Babcock*, Justice Farley considered whether to extend recognition in Ontario to a stay of proceedings order issued in Louisiana, which was issued in response to Babcock & Wilcox ("BW") Canada’s U.S. parent company and U.S. based affiliates. The stay was sought (and granted) even though BW Canada, a Canadian incorporated (and solvent) entity, was not party to U.S. proceedings, and not involved in any Canadian bankruptcy proceedings. Justice Farley issued the requested stay order against potential Canadian tort claimants and recognized the Chapter 11 proceedings. He subsequently defended his decision, stating:

"The stay in *Babcock & Wilcox* has now been in place for over three years as the proceedings have evolved to an anticipated practical resolution in the U.S. Interestingly, no affected Canadian creditor has challenged, objected to or questioned the Canadian order in the interim. It would seem that this lack of creditor involvement may be taken as a form of practical approval by those concerned for a common sense solution to a cross-border problem which maximized the potential for value and minimized the difficulties and costs. The decision in *Re Babcock & Wilcox (Canada) Inc.* is perhaps the clearest and most unambiguous statement to date of the extent to which Canadian courts will cooperate with the courts of other countries in cross-border and multinational reorganizations."**

Opponents have attacked this proposition, questioning the logic of following a U.S. order in the interests of comity while seemingly disregarding strong factual considerations which questioned the appropriateness of following a foreign order against a domestic, solvent entity. A Canadian company affected by a U.S. order was also reviewed in *GS Telecommunications Inc.*. In that case, Chapter 11 proceedings were recognized in the United States by the parent company and its affiliates. The Canadian court issued "a restraining order under the CCAA against proceedings against the group in Canada, [even though] the parent company was incorporated and presumably had its chief executive office in Canada." Critics have questioned whether extending comity to broadly recognize Chapter 11 proceedings ultimately adversely affects solvent Canadian corporations (and the Canadian economy), while also jeopardizing the reputation, relevance and appropriate recognition of Canadian law.

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68 Justice Farley has questioned the *Singer* decision, citing that: (i) the foreign representatives in *Singer* had positive responses to requests from the United States Bankruptcy Court from over 100 countries (excluding Canada) and (ii) aside from *Holt*, no other recent examples exist of a Canadian court refusing to cooperate or assist with a foreign administration. See *Farley*, supra note 44.


70 See *Farley*, supra note 48, at 22. Compare with *Ziegel*, supra note 41, at 460.


72 See *Ziegel*, supra note 41, at 460-461.
Justice Farley's decision in Babcock has prompted further discussion as to whether courts should recognize proceedings based upon comity, at the peril of domestic legal considerations. Comity and compliance with Section 18.6 of the CCAA apparently guided the judgment in Babcock, although Justice Farley cited in that case several factors to assist Canadian courts in responding to a foreign court's request for assistance, including the location of the debtor's principle operations, undertakings, assets and stakeholders and the substantive and procedural law to be applied so that undue prejudice does not occur. Critics viewed Justice Farley's decision as representing a "major expansion of accepted comity doctrines." and that Section 18.6 of the CCAA was included to "emphasize Canada's sovereignty...added at the urging of Canadian banks who were concerned that U.S. bankruptcy courts might attempt to exert their long-arm jurisdiction to reach Canadian based assets that were held by the banks as security for loans extended in Canada." Conversely, Justice Farley did not share the view that Section 18.6 (2) required concurrent "foreign proceedings." Babcock has raised serious Canadian constitutional questions, including whether foreign legislation extends to insolvent debtors if the debtor's insolvency is not a precondition of the foreign court's jurisdiction, as is the case under Section 303 of the Bankruptcy Code.

II: Olympia and York: Innovation through Necessity

The magnitude and complexity of the Olympia and York insolvency precipitated the development, and re-examination, of measures dealing with U.S. - Canadian cross-border insolvencies. The Olympia & York chain of cases serves as a model of the divergent approaches and innovations under the CCAA and Chapter 11 of the Bankruptcy Code, and reveals the enormous value of cross-border cooperation. Olympia and York Developments Ltd. ("OYD") was the parent of a family of companies (collectively, "O&Y"), operating primarily in the U.S., Canada and the United Kingdom. OYD held the three most prestigious office addresses in Toronto - First Canadian Place, Scotia Plaza and Exchange Tower - as well as such premier sites as Esso Plaza and Shell Center in Calgary, Alberta, the Esplanade Laurier and C. D. Howe buildings of Ottawa, and the City Center Building of Edmonton, Alberta. In addition, O&Y held controlling interests in Gulf Resources Limited and Abitibi-Price Inc., and a majority in the U.S. railroad conglomerate of Santa Fe Pacific Railroad.
The U.S. portfolio of the Reichmann family was vast, as O&Y bought much of the real estate portfolio of developers Percy and Harold Uris during a recession in 1977, the first step in establishing itself as the largest commercial landlord in New York.80 As evidence of its size, Olympia & York U.S.A. had about $5 billion in debt in 1995.81 At its apex, Olympia & York U.S.A. held approximately “18 million square feet of space in New York City anchored by the World Financial Center at Battery Park City in lower Manhattan.”82 Olympia & York U.S.A. owned a number of other prime Manhattan properties, such as 165 Broadway, 237 and 245 Park Avenue, 320 Park Avenue, 55 Water Street and 1290 Avenue of the Americas. Additionally, the U.S. concern held a prime, undeveloped 9.02 acre site in downtown Miami known as the Miami One Site, assessed in 1998 at $29 million.83

In addition to an over-expansion in inflationary times, O&Y’s troubles stemmed from an ambitious office development in London’s Canary Wharf, which siphoned off $6 billion while yielding only minor returns.84 Income streams were drying up from investments, as evidenced by the bankruptcy of Drexel Burnham Lambert, a principal tenant of Olympia & York U.S.A.’s 39-story, million-square-foot office building located on 60 Broad Street in New York, which was encumbered by a $160 million mortgage.85 O&Y’s financial downfall was also credited to a decision from lenders to reduce a needed financing by $150 million which required a security interest on O&Y’s remaining unencumbered Canadian real estate interests, effectively prohibiting future financings.86 The privately held and secretly-run enterprise, which grew out of a Toronto tile company in the late 1950’s, held $20 billion in real estate assets at its apex; in 1993, it owed $6.7 billion on its Canadian office towers alone.87

The complex structure of O&Y wrecked havoc for creditors,88 and created countless court proceedings.89 In particular, the assets (and loan draw-downs) of the

81 Id.
85 Mervyn Rothstein, Commercial Real Estate; Dividing an Office Tower to Get the Most From It, N.Y. Times, April 7, 1999, at B8.
86 See Goldstein. supra note 42. at 153.
87 See Olympia & York Liquidation Plan Advances. supra note 84.
88 Olympia’s lenders in Canada and the United States were many of the world’s leading financial institutions, including Citicorp, Canadian Imperial Bank, Sanwa Bank, Nomura Ltd., J. P. Morgan, First National Bank of Chicago, the Hong Kong and Shanghai Bank and Credit Suisse of Switzerland. Allen R. Myerson, Lenders Split On Backing O. & Y. Plan, N.Y. Times, October 29, 1992, at D4. see also Steven Prokesch, 3 Named to Administer Olympia London Project; U.S Empire in Trouble, N.Y. Times, May 29, 1992, at A11. Apollo Real Estate Investment Fund L.P., O&Y’s largest single creditor, held more than $400 million face amount of its debt. See Gilpin. supra note 80.
89 The recent O&Y Developments v. O&Y Realty, 28 C.B.R. 4th, 294, 306 (2001), which was heard nearly a decade after the initial proceedings commenced, reviewed a series of complex asset transfers among the O & Y companies, particularly involving assets of the U.S. affiliates. The case involved creditors claiming that OYD was owed at best $39 million by its affiliate, Olympia & York.
revenues and loans for all of the O&Y companies were centralized to meet the obligations of all the companies (with the exception of its U.S. real estate assets, operated and managed in New York City by Olympia & York U.S.A.). The aggregate debt of the twenty-nine O&Y group of applicants amounted to CAN $13.5 billion in 1992. Concurrent filings in the United States and Canada occurred, as the debtor sought (and obtained) the benefit of Chapter 11’s automatic stay, given the possibility existed that the Canadian filing and request for stay would be contested. The concurrent and voluntary proceedings were commenced under Chapter 11 for the five U.S. companies in May, 1992. OYD owned approximately 80% of the five U.S. insolvency applicants (which were all indirect owners of the U.S. assets). The resulting stay prevented U.S. creditors from reaching the Canadian parent, while Canadian creditors were barred from acquiring immediate control of the U.S. restructuring process.

Courts immediately recognized the far-reaching implications of the insolvency, while simultaneously confronted the conflicting provisions of the CCAA and Chapter 11. Shortly after the filing of claims, Justice Blair of the Ontario Court of Justice issued an expansive emergency order. The order acknowledged the importance of cross-border cooperation, with differences in the Canadian and U.S. legal systems demonstrating the potential for widely-different, inconsistent and perhaps devastating results if judicial cooperation could not occur. For example, Canadian law did not recognize the concepts embodied in Section 1108 of the Bankruptcy Code, which allowed the debtor to operate its business during the reorganization period in a “normal” fashion. Specifically, Sections 364(a)-(d), 503(b) and 507(b) of the Bankruptcy Code permitted, among other things, the following: (i) that the debtor could receive unsecured credit in the ordinary course of business without having received prior court approval, (ii) court authorization for all administrative expenses through imposing a lien on unencumbered property or a junior lien on estate property subject to a prior lien and (iii) upon the court’s permission, the debtor could obtain credit by granting a super priority lien or lien of equal rank with existing liens on property of the estate provided that the existing security interests were adequately protected. As evidence of the spirit of comity, companion orders were commonplace during the O&Y insolvency, with the Ontario courts issuing more than

SF Holdings Corporation, but that OYD and its creditors took $611 million of that affiliate’s assets as security for OYD’s indebtedness, both direct and through its guarantees.

90 See Goldstein, supra note 42, at 151.

91 Note that the parties did not attempt to seek recognition of the Canadian proceedings under Section 304 of the U.S. Bankruptcy Code, under which, as noted previously, a “foreign representative” may commence ancillary proceedings, as that provision requires appointment of a monitor (which the Canadian applicants did not intend) and the existence of a trustee (which does not exist under a CCAA filing). See Goldstein, supra note 42, at 156.

92 See id. at 155.

93 The order held: (i) that O&Y retain possession of its properties and carry on business (to the extent that no security of the lenders would be impaired); (ii) the applicants were not to make capital or interest payments owing to lenders during the stay period; (iii) contemplated creditors’ committees to represent the various types of creditors; (iv) appointed an “information officer: empowered to gain access to the financial records of the applicants and respond to reasonable requests from creditors and (v) allowed the payment of trade creditors for amounts owed as of the date of the filing. See id. at 157. Note that under Section 362(a) of the Code, the payment of pre-petition trade debt, unlike Canadian law, was stayed as this Section provided for a stay in the collection, assessment or recovery of any pre-petition trade debt.

94 See Goldstein, supra note 42, at 160.
seventy orders. Provisions were included in the orders seeking cross-border recognitions, which were routinely followed. For example, O&Y was allowed, via companion orders, to sell its interests in Santa Fe Pacific Corporation and Santa Fe Energy Resources, Inc. for net proceeds in excess of $500 million.

Prior to the O&Y insolvency, conventional Canadian restructuring generally required the involvement of a lender or group of lenders who would continue to fund the necessary expenses for the restructuring. The cross-border implications of the O&Y insolvency necessitated a reform of how such funding would occur. The hesitancy of Canadian secured creditors to use the proceeds of a sale of inventory, collection of receivables or cash flow from rental receipts for restructuring purposes if they were encumbered with existing security interests created a crucial restructuring issue. O&Y did not have a singular lender (which would have assisted such restructuring). Additionally, further complicating matters, O&Y did have a centralized cash management system, and therefore creditors who held security on specific assets were denied the ability to segregate revenues to ensure that such rents would not be pooled to pay the expenses for other buildings.

In order to address how general administrative and restructuring ("GAR") costs would be paid, the courts decided to: (i) apply cash flow from secured assets, such as rentals from real property and dividends from securities, to cover the costs of managing the encumbered asset and to pay a management fee to cover all GAR costs and (ii) approve the sale of unencumbered assets to generate further revenues to fund GAR costs. As an additional innovation applied in subsequent real estate insolvencies, the Canadian court imposed a security interest on the unencumbered assets running in favor of the secured creditors who overfunded the GAR costs. The debtor companies were thus allowed to finance themselves during the court-supervised restructuring process.

The concept of insolvency protocols was refined in the O&Y restructuring. For example, the O&Y courts issued a protocol adopting a territorial theory of professional engagement and fee determination which was crucial, as, unlike Chapter 11, the CCAA broadly provided for the payment of professional fees. The Canadian and U.S. courts compromised, as professionals rendering services in either Canada or the U.S. would be bound by that country's professional rules; provided, however, that each court did not surrender, or abandon, its jurisdiction in respect of professional engagements and the payment of professional fees. "The U.S. Court relied on Section 105(a) of the Bankruptcy Code to justify this cooperation, which provides that a Bankruptcy Court may issue an order, process or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code." "U.S. Courts have broadly determined that this Section enables courts to do whatever is necessary to aid its jurisdiction, and that it has

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95 An example of intent to encourage judicial cooperation is evidenced by the following provision contained in the Ontario orders: "THIS COURT SEEKS AND REQUESTS the aid and recognition of any Court or administrative body in any province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America to act in aid of and to complementary to this Court in carrying out the terms of this Order." Babcock & Wilcox Canada Ltd., 5 B.L.R. (3d) 75.
96 See id. at 162-163.
97 See id.
98 See Goldstein, supra note 42. at 166.
authority to use its equitable powers to assure the orderly conduct of the reorganization proceedings."

Finally, the Canadian court gave great reliance to the fairness of the proceedings. Upon sanctioning the reorganization plan, Justice Blair noted that the plan should be "fair and reasonable" stating that: "'Fairness' is the quintessential expression of the court’s equitable jurisdiction – although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity – and 'reasonableness' is what lends objectivity to the process." In addition, sanctioning the protocol for the corporate governance of O&Y’s U.S. operations and the Canadian parents of those operations based upon issues of comity and cooperation, Justice Blair noted:

Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts – sometimes substantive, sometimes procedural between the jurisdictions. The Courts of the various jurisdictions should seek to co-operate amongst themselves, in my view, in facilitating the transborder resolution of such disputes as a whole, where they can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international cooperation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.

The concept of fairness, now a routine precept of CCAA orders, and approval of plans, was reexamined and strengthened through the O&Y insolvencies. O&Y’s insolvency prompted a serious reconsideration of cross border cooperation, specifically in the context of real estate developer insolvencies, which have enormous economic implications. The import of O&Y’s organized approach to contending with such an insolvency is best evidenced by viewing several reorganizations which occurred prior to the O&Y decisions. For example, a significant Canadian real estate developer, the Campeau Corporation, restructured its assets in the 1980’s following huge losses suffered by its U.S. subsidiaries, the Federated Department Stores, Inc. and Allied Store Corporation. At one point, Campeau’s debt exceeded $10 billion. During the 1990 insolvency proceedings, Campeau’s successor in interest, Camdev, only succeeded its financially troubled parent after extensive, lengthy and costly restructuring proceedings. Another case of an insolvent developer which would have benefited from the innovations of the O&Y cases was Northland Properties, a major western Canadian developer which once owned nineteen hotels, several major office buildings and prime

99 See id. at 166.
vacant land in Vancouver, Calgary, Oregon and California. At the height of its success, Northland employed over 1,000 employees, and subsequently became indebted to over 2,100 creditors. In 1988, Northland claimed insolvency, following a period of interest rates exceeding 20% and negative equity approaching CAN $100 million. Despite the amicable relationship between the Canadian reviewing justice and opposing counsel noted by one commentator, the cross-border implications of the case caused considerable, costly restructuring delays. The lessons of O&Y evidence a cooperative spirit and the realization that drawing out an insolvency would damage existing resources and undermine the salvaging of any credible assets. The expansive O&Y framework of cross-border cooperation allows a speedy, efficient reorganization to the insolvency of real estate developers whose assets significantly affect the Canadian and U.S. economies.

III: The Concordat, Model Law and the American Law Institute Guidelines

In contending with U.S. and Canadian insolvencies, courts and practitioners have significant guidance available in addressing the reorganizations and developing protocols, including the International Bar Association Concordat, the American Law Institute's Transnational Insolvency Project and United Nations Commission on International Trade Law (UNCITRAL)'s Model Act.

The Cross-Border Insolvency Concordat (the "Concordat") provides guidelines for cross-border insolvencies and reorganizations which the parties or the courts could adopt as practical solutions, tailored to fit the particular circumstances. The Concordat is based upon the universalist theory, as evidenced by Principle 4(A) of the Concordat, which noted that if more than one plenary forum exists, "each forum should coordinate with each other, subject in appropriate cases to a government protocol." The Concordat is not intended to be used as, or as a substitute for, a treaty or statute, or a rigid set of rules; rather, the Concordat is a practical interim measure until treaties and/or statutes are adopted by commercial nations. Serving as a guide to practitioners in harmonizing cross-border insolvencies, the Concordat could be implemented by court orders or formal agreements between official representatives, or informal arrangements, depending upon the rules and practices of the particular forum involved. The Concordat actually originated out of the common insolvency community conclusion that

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104 The Concordat was formally adopted by the Council of the Section on Business Law of the International Bar Association as its Twelfth Biennial Meeting in Paris in September 1995 and, subsequently, by the full Council of the International Bar Association itself at its meeting in Madrid in May, 1996. See Farley, supra note 48, at 6.
105 See Nielson, supra note 49, at 534. It has been suggested that the Concordat provides a framework for national, ancillary proceedings to counterbalance the universal proceedings offensive to many Canadians and Americans. See Dargan, supra note 7, at 126.
107 See Introduction to the Committee J Cross-Border Insolvency Concordat, cited in Farley, supra note 48, at 42.
108 Id.
cross-border insolvencies and reorganizations would rarely be dealt with effectively through international treaties.\(^{109}\)

The Model Law on Cross-Border Insolvencies was approved by the UNCITRAL in 1997, and, although not dealing with choice of law issues, focuses upon the recognition of foreign insolvency proceedings and the protections of assets of foreign estates.\(^{110}\) The Model Law deals with: (i) access by the foreign representative to the local insolvency courts, (ii) recognition of the status of the foreign representatives if the prescribed prerequisites are met, (iii) assistance to the foreign representatives by granting orders for the stay of proceedings against locally based assets of the foreign estate and (iv) cooperation between the courts of the recognizing state and the foreign state.\(^{111}\) The Model Law contemplates a high level of cooperation between courts in cross-border cases. Under Article 26, domestic courts are directed to cooperate “to the maximum extent possible” with foreign courts and foreign insolvency representatives. Article 25 provides that the courts may communicate directly with each other and request information or assistance from the foreign court or from the foreign insolvency representative. Cooperation under Article 27 of the Model Law may consist of appointing someone to act on the direction of the court, communicating information by any means considered appropriate by the court and co-coordinating the administration of the debtor’s assets and affairs in both jurisdictions. Finally, Article 30 provides that courts may approve or implement agreements concerning the co-ordination of concurrent proceedings involving the same debtor.

Several differences currently exist between the Model Law and the Canadian insolvency principles found under Section 18.6 of the CCAA. For example, the Model Law differentiates between foreign “main proceedings” (where the foreign representative is entitled as of right to assistance of the domestic court) and foreign “non-main proceedings” (where such assistance is discretionary).\(^{112}\) Additional provisions of the Model Law which appear to either contradict the CCAA, or are in themselves inconsistent or unclear, have raised concerns among practitioners and academics, including: (i) the definition of “foreign proceeding” under the Model Law makes it uncertain as to whether the foreign debtor must be insolvent, (ii) corporate group status is not addressed, (iii) the stay of proceedings is limited to the proceedings against the debtor or the debtor’s property and (iv) the Model Law indirectly addresses the implications arising when the court balances the interests of local creditors with the need

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\(^{109}\) See Besant, supra note 20.

\(^{110}\) The UNCITRAL Model Law was being formulated at the time of Canada’s 1997 amendments to the CCAA and BIA. See Farley, supra note 48, at 9-10. Many of the significant concepts of the Model Law are therefore present in the existing CCAA legislation, although not expressed in the language of the Model Law. See id. at 9-10. See also lecture of Ronald Cuming, “Canadian Commercial Law Influences Abroad,” at Osgoode Hall Professional Development Centre Business Law Program, March 31, 2004 (raising questions whether the Model Law will ever be adopted given recent revisions to the BIA and CCAA): see also Ziegel, supra note 41, at 484 (noting that the Model Law, despite its many comprehensive provisions, does not define the term “debtor”).

\(^{111}\) See Ziegel, supra note 41, at 484.

\(^{112}\) If the foreign proceeding is recognized as a main proceeding, the Model Law provides for an automatic stay of proceedings by creditors against the debtor’s assets and the suspension of the right to transfer, encumber or otherwise dispose of the debtor’s assets. See Farley, supra note 48, at 12. The scope and terms of the stay of proceedings are subject to the normal requirements of domestic law. Id.
to promote cooperation with other insolvency jurisdictions. Proponents of the Model Law must recognize these inconsistencies, and prepare for potential conflicts (and court challenges) in Canadian legal proceedings attacking differences between domestic law and the Model Law’s provisions.

The Model Law’s proponents have warned against the insistence by parties to international agreements that the interests of domestic creditors and investors prevail over their foreign counterparts in any circumstances, as such a view evaporates the legitimacy of international agreements. In addition, the Model Law provides that foreign proceedings can be modified if inconsistent with domestic proceedings. Commentators point out that the Model Law therefore ensures the fair treatment of domestic creditors, as its Article 29(b)(i) specifically provides that “if a domestic proceeding is commenced after an application for recognition of the foreign proceeding, the domestic court must review the relief sought by the foreign representative and must modify that relief if it is inconsistent with the domestic proceedings.” In the United States, the Model Law was passed by both Houses of Congress but has not yet been enacted. In Canada, the Model Law has been studied by the Senate Banking, Trade and Commerce Committee, with adoption recommended with limited consideration.

One additional source of guidance for crafting protocols is the American Law Institute (“ALI”)’s Transnational Insolvency Project, assembled to harmonize insolvency law in the three NAFTA members, the United States, Canada and Mexico. Unlike the Model Law, the ALI Project’s Guidelines recognize the importance of corporate groups in international insolvencies and single them out for separate discussion. Additionally, the Guidelines, as opposed to the Model Law, find that “it should be permissible to file bankruptcy for a subsidiary in the same jurisdiction as the parent’s bankruptcy, and to have either procedural or substantive consolidation under applicable law, absent a proceeding involving the subsidiary in the country of its main interests.” The Introduction to the Guidelines notes that they were “[l]ntended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved.” Seventeen guidelines were developed, with the goals of flexibility and achieving “efficient and just resolutions” to be applied “only in a manner that is consistent with local procedures and local ethical requirements.”

The Guidelines mandate that local domestic rules, practices and ethics must be fully observed, while intending to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the

113 See Ziegel, supra note 41. at 489-491.
114 See Farley, supra note 48. at 13.
115 See id. at 15.
116 See American Law Institute, Transnational Insolvency Project, Principles of Cooperation in Transnational Insolvency Cases among the Members of the North American Free Trade Agreement (Tentative Draft, April 14, 2000) cited in Ziegel, supra note 41. at 462. The Guidelines Applicable to Court Communications in Cross-Border Cases (the “Guidelines”) were reviewed by the reporters and advisors in each of the three NAFTA countries and approved by the membership of the American Law Institute at its Annual Meeting on May 16, 2000.
117 See Ziegel, supra note 41. at 493.
118 See Guidelines. Introduction.
jurisdictions involved. Court communications, which permit rapid cooperation in a developing insolvency case, are encouraged, as such speedy cooperation also ensures due process. The concept of court-to-court communications is viewed under the Guidelines as a linking of two concurrent court hearings, all conducted in accordance with proper systems and procedures. The only change from a purely domestic hearing is the technological link to the other court. One major issue regarding the practicality of the Guidelines is whether a party's participation in arguments or submissions being made in a hearing in the other country constitutes an attornment to the jurisdiction of the other court. The Guidelines attempt to anticipate that difficulty by indicating that such participation will not constitute an attornment to the jurisdiction of the other court unless the party who participates in the hearing in the other court is actually seeking relief from that court. This is consistent with Article 10 of the Model Law, which indicates that an application by a foreign representative does not subject the foreign representative or the foreign assets or the affairs of the debtor to the jurisdiction of the domestic court for any purpose other than the actual application.

IV: Conclusion

A. Foreign Judgments and Jurisdictional Matters

Canadian courts scrutinize choice of law and general jurisdictional issues (particularly with respect to the enforcement of foreign judgments) in the context of cross-border insolvencies, analyzing which court has the sufficient connections to hear the aspect of the insolvency by weighing factual considerations of the case and ultimately considering the implications of international comity. For example, in Olympia & York Ltd., the bankruptcy administrator moved for authorization that the Canadian affiliates of OYD involved in the U.S. Chapter 11 proceedings pay for management fees, services and expenses paid for by OYD in efforts related to the U.S. restructuring process. The Canadian affiliates opposed the motion, stating that the U.S. Bankruptcy Court, where proceedings were pending under the Bankruptcy Code, had jurisdiction. The court

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119 Farley, supra note 48, at 30.
120 See id.
121 Id.
122 Id. at 31.
123 Id.
124 Id.
125 Many commentators have discussed the specific need to ascertain where an insolvency must be filed to ensure its effective review. For example, a judicial theorist has proposed that in the absence of effective treaty or convention arrangements, the choice in a multinational or cross-border insolvency or reorganization reflects either a primary/secondary jurisdiction structure or a concurrent/parallel proceedings structure. See Farley, supra note 48, at 3. In concept, a primary/secondary jurisdiction model would involve a filing in the primary jurisdiction where the debtor's central operations are located and subsequent secondary filings in jurisdictions where other assets are located. Id. In the concurrent/parallel jurisdiction model, the reorganizing business would file full proceedings in both the jurisdiction where its central operations are located and in other jurisdictions where key assets are located. Id. Finally, a genuine primary/secondary model, the secondary jurisdiction would defer in major respects to the primary jurisdiction, (perhaps) to the point of turning over assets for administration in the primary jurisdiction. Id.
reviewed the principle of *forum non conveniens*, which analyzes whether there is another forum that is clearly more appropriate for the adjudication questioned (and thus displaces the chosen forum), and whether injustice would occur if a stay was imposed. The court considered that "real and substantial factual connections" lied with the U.S. Bankruptcy Court and not the Canadian courts. The factual considerations included: (i) the buildings and real estate all lied in the United States, (ii) the ownership chain involved U.S. limited partnerships and corporations and (iii) the majority of valuation witnesses regarding the U.S. restructuring were in New York. Justice Blair further held that:

"A CCAA proceeding, by its very nature – particularly in complex multi-national insolvency situations involving assets in various jurisdictions – is a veritable Pandora’s Box of matters which, in themselves, would amount to substantial actions or applications. They find their way under the rubric of the CCAA umbrella because of the all-embracing reach of the proceedings in relation to the activities of the debtor company."[29] Justice Blair has stated that “In the context of multi-jurisdictional insolvencies the courts of different jurisdictions should strive – to the extent they can within the parameters of their own fundamental precepts of justice – to ensure that matters are adjudicated in the proper forum with the closest connection to the subject matter. Principles of international comity, included in those incorporated in the *forum non conveniens* test, provide the touchstones to assist them in doing so.”[30] The “closest connection” thus incorporates principles of comity in addition to the unique factual considerations of each case.

Although the principles of international comity are reviewed in determining the proper judicial forum, Canadian courts will also strongly consider whether forum shopping has occurred.[31] The Canadian courts have also carefully construed forum selection clauses in contracts, while also reviewing the totality of factual connections to Canada or an outside jurisdiction, particularly in considering whether to recognize a foreign judgment.[32] In the recent controversial case of Beals,[33] the Supreme Court of

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[127] Id. at 115.
[128] Id. at 116-117.
[129] Id. at 117.
[130] Id. at 118.
[131] In *Holt*, the court held that a natural forum is the one to which the action has the most real and substantial connection. Relevant circumstances not only include public policy issues, but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where they carry on their business, the convenience and expense of litigating in one forum or another, and the discouragement of forum shopping. The Court held that “In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.” *Holt*, supra fn. 55, at 36.

[132] The extent to which parties to debt actions have recourse to chose their own laws is demonstrated in *Canadian Red Cross Soc.*, (2002) 35 C.B.R. (4th) 43, 46, holding that a plan of compromise and arrangement is a contract, sanctioned by the court, and thus subject to principles of contractual interpretation. In that case, the plan retroactively applied a contractual provision that Ontario law applied to all Canada-wide claims related to HIV blood treatments.
Canada held that a judgment set forth in Florida must be enforced in Ontario, as a significant connection existed between the cause of action and the foreign court. The appellants, a husband and wife with apparently little business savvy, entered into a real estate transaction in Florida when they bought and sold vacant land. Following a dispute, the appellants were sued in Florida in 1986, but did not personally appear, leading to a default judgment against them. The Florida jury awarded $210,000 in monetary damages, and $50,000 in punitive damages. Adhering to questionable legal advice from their attorney (who advised that a foreign judgment was unenforceable in Ontario), the appellants never requested that their judgments be set aside, or appealed; by the time of the hearing in 1998, the value of the foreign judgment grew to CAN $800,000.00. The Supreme Court of Canada found that a “real and substantial connection” existed between the subject matter of the action, the jurisdiction and the defendants, which were necessary in the enforcement and recognition of foreign judgments. The Court reviewed the “significant” ties to Florida (most notably, the disputed land), when recognizing the judgment. The Court did hold that, even if a “real and substantial connection” existed, a foreign judgment would not be recognized in instances of: (i) fraud, (ii) where “natural justice” was jeopardized (e.g. the fairness of the foreign procedure and due process, but not the merits of the case) and (iii) when public policy called for such non-recognition (e.g. preventing enforcement of foreign judgments contrary to Canadian concepts of justice). In Beals, the Court specifically found: (i) the absence of fraud, (ii) natural justice was not affected, as the appellants were fully informed of the Florida proceedings (having received both due process and notice of the financial implications if they lost the case, even if by a default) and (iii) the finding of large monetary damages by the Florida courts did not violate public policy.

B. The Future of Cross-Border Cooperation

The necessity for cross-border cooperation with respect to insolvencies must balance issues of state sovereignty, with the realization that failing to expedite and economically handle major insolvencies has enormous financial implications. Without international guidelines in globalized and technically advanced economies, disaster follows. For example, in the context of an insolvency, the use of different court officials (and guidelines) adhering to local rules (and under pressure from local creditors) would create vastly different results, with receivables only collected in the account debtor’s jurisdiction and not released to other courts or creditors. Without guidance, insolvencies lead to lost opportunities, as businesses with established goodwill, if shut down, cause the loss of valuable assets. Such a liquidation does not maximize value for the creditors of a company, or its shareholders. If anything, an insolvent (but viable) business should be explored to conserve resources.

Despite recent Canadian decisions in Singer and Holt, which question the future of Canadian court recognition and assistance in cross-border protocols, the tide of U.S. resistance to recognize Canadian proceedings has turned. The U.S. Bankruptcy

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134 See Farley, supra note 48, at 2.
135 See id. at 3.
136 The spirit of cross-border cooperation reached its lowest point in In re Toga Mfg. Ltd., 28 B.R. 165 (Bankr. E.D. Mich. 1983). In Toga, the U.S. Court denied a Canadian bankruptcy trustee’s
Courts have assisted Canadian reorganizations involving debtors with operations and assets in the United States, including where Canadian-based debtors with substantial operations (and creditors) in the United States commenced reorganization proceedings under the CCAA.\(^{137}\) U.S. Bankruptcy Courts have frequently aided Canadian reorganization proceedings by restraining creditors in the United States from taking proceedings against the debtors' U.S. assets.\(^{138}\) The U.S. courts in these cases have usually considered these applications to be non-controversial, and injunctions have been routinely granted to restrain U.S.-based creditors from pursuing their remedies against the debtors' U.S.-based assets.\(^{139}\)

Despite the best efforts of the Concordat, the Model Law and the Guidelines, a comprehensive, mature bankruptcy treaty may be an ideal for all of the NAFTA nations. While the Model Law's statutory recognition of a foreign representative has been beneficial to parties involved in cross-border insolvencies, the Model Law has been described as "simply an idealistic attempt at facial coordination."\(^{140}\) Although the Concordat has provided a firm model for U.S. and Canadian cross-border insolvency protocols, allowing efficiently customized protocols for given scenarios, while counterbalancing universalist proceedings repugnant to Canadians and Americans, the question remains whether courts will continue to have the time and financial resources for creative protocols. The internationalization of business in a climate where insolvencies are becoming more frequent in an arguably declining international economy poses serious issues. Courts may be hesitant to prescribe universality principles which, as opponents would argue, undermine a state's sovereignty. Conversely, states seeking foreign investment may resist isolationist territoriality principles, which frighten foreign investors concerned that they face discrimination in a framework favoring domestic creditors. In addition, U.S. courts have yet to hear a challenge to the ability of courts to create "informal treaties" through protocols, a power which is violative of the U.S. Constitution. Finally, commentators have challenged whether recognizing the precepts of comity should include adopting foreign orders even remotely contradictory to domestic laws.

The lone attempt at codifying a definitive approach to contending with U.S.-Canadian cross-border insolvencies, the unratified United States of America-Canada Bankruptcy Treaty of 1979, failed as it was viewed as a threat to sovereignty by mandating a single proceeding in one venue and the application of one jurisdiction's law in a foreign court.\(^{141}\) It is difficult to imagine that the proposed treaty was politically

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\(^{137}\) See Farley, supra note 48, at 26.

\(^{138}\) Id. at 26-27.

\(^{139}\) Id. Justice Farley has compiled a list of several ancillary orders which have been granted by U.S. bankruptcy courts assisting several important Canadian reorganizations, including: Canada 3000 Inc. (Case No. 01-43656 (KM), C.D. Calif., November 9, 2001). Air Canada (Case No. 03-11971 (PCB), S.D.N.Y., April 3, 2003). Ivaco Inc. (Case No. 03-65608-R, E.D. Mich., September 17, 2003). Re Canadian Airlines International Limited (Bankr. Hawaii: March 2000). Re Euro United Corporation (Bankr. W.D.N.Y., January 2000), and, most recently, Stelco Inc. (Case Nos. 42401, 42402, and 42403, E.D. Mich., January 29, 2004).

\(^{140}\) See id. at 125.

\(^{141}\) See id. at 116.
unpopular because of its underlying and basic concept: "[t]here shall be a single administration of the estate of the debtor."\textsuperscript{142} Under the 1979 proposed treaty, even ancillary proceedings in the nation where the minority of assets were held were prohibited from using local law, meaning that U.S. and Canadian creditors may have had to surrender their rights to a court in a foreign jurisdiction.\textsuperscript{143} Creating a treaty which recognizes state sovereignty and formalizes the spirit of cooperation envisioned in successful cross-border protocols makes economic sense and will not challenge long-held concepts of state sovereignty.

\textsuperscript{142} See Toga at 170, cited in Dargan. \textit{supra} note 7, at 116.
\textsuperscript{143} See Dargan, \textit{supra} note 7, at 116.
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

BIBLIOGRAPHY

A. Cases


GS Telecommunications Inc., (Unreported. May 18, 2000, Ont, S.C.J., File no. 00-CL3752)


In Re Treco, 240 F3d 148, 153 (U.S. C.A. 2nd Cir. 2001)


B. Statutes


Companies' Creditors Arrangement Act, R.S.C., ch. C-36, Section 18.6 (2004)

C. Treatises, Lectures, Periodicals & Websites

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW


Cuming, Ronald, “Canadian Commercial Law Influences Abroad,” at Osgoode Hall Professional Development Centre Business Law Program, March 31, 2004


Farnsworth, Clyde H., *Olympia May Yield Real Estate*, N.Y. Times, November 20, 1992, at D1


Leonard, Bruce and Justice J.M. Farley, Insolvency Lecture, at Osgoode Hall Professional Development Centre Business Law Program, February 10, 2004


Rothstein, Mervyn, *Commercial Real Estate: Dividing an Office Tower to Get the Most From It*, N.Y. Times, April 7, 1999, at B8


U.S. Customs and Border Protection Bulletin 04-03 citing to U.S. Census Bureau Official Statistics.

