Canada

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1. Introduction

As a result of the continued growth of global commercial enterprises and the seamless integration of commerce across international borders, corporations often possess, manage or control assets and maintain subsidiaries in a number of countries. Accordingly, there has been a steady increase in the number of multinational corporate restructurings. In response to this, countries, non-governmental organisations and multinational organisations are doing their best to provide guidance and standards to facilitate cross-border cooperation and to ensure a fair and efficient multilateral insolvency procedure. In 1997 UNCITRAL released its Model Law on Cross-Border Insolvency, following which the UN General Assembly recommended that all member states:

> *review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and, in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency.*[1]

Canadian insolvency legislation was amended on 18 September 2009, to adopt many of the principles set out in the Model Law. Pursuant to these amendments, a new Part IV was added to the Companies' Creditors Arrangement Act (RSC 1985, c C-35, as amended), in respect of cross-border insolvencies.

This chapter begins with a discussion of the background of international insolvency provisions in Canadian law. This is followed by a comparative analysis of the articles of the Model Law and the current cross-border insolvency provisions of the Companies' Creditors Arrangement Act, a brief discussion on the status of Canadian jurisprudence in respect of such provisions, and finally a discussion of the procedures that have been implemented in Canada to supplement the current statutory provisions.

2. International insolvency provisions in Canadian law

Although statutory provisions that facilitate and coordinate cross-border insolvencies were developed mostly in the 1990s, recommendations to provide Canadian courts with clearer guidelines for the resolution of international insolvency problems were being made as early as 1970.[2]

1 The UNCITRAL Model Law on Cross-Border Insolvency (A/RES/52/158, 52nd Sess (1998)).
2 Jacob Ziegel, "Corporate Groups and Canada-U.S. Crossborder Insolvencies: Contrasting Judicial Visions" (2001) 25 CBR (4th) 161 at 169.

Canada has seen a massive increase in cross-border trade since then, with the United States as its largest trading partner. In 2015, Canada's two-way trade of goods and services with the United States was over $690 billion, with over $2.4 billion worth of goods and services crossing the Canadian-US border on a daily basis, or over $1.6 million a minute.[3] Given the importance of trade between the two economies, the insolvency of a major commercial entity in either nation will usually have an impact on business across the border. As stated by Justice Farley of the Ontario Superior Court of Justice, "it is difficult to imagine a major corporate insolvency that would not involve some cross-border ramifications".[4] Recognising this, there has been a concerted effort by insolvency practitioners in Canada to facilitate and harmonise cross-border insolvencies.

Before 1997 there were no detailed statutory provisions to provide guidance; therefore, judges had to rely on their inherent judicial discretion to provide a framework for cross-border insolvencies. While this proved to be generally effective, it depended on the experience of counsel and the courts in dealing with thorny, complex issues rather than relying on statutory guidance. Consequently, the Bankruptcy and Insolvency Advisory Committee established the Working Group on International Insolvencies in 1993 in the context of an expansive review of Canadian bankruptcy and insolvency legislation. The committee met at length in an attempt to craft changes to the Companies' Creditors Arrangement Act that would enhance Canada's ability to deal effectively with multinational insolvency proceedings. The proposals submitted to the committee were rejected on the basis that the degree of deference proposed for foreign insolvency proceedings was untenable.[5]

Following this rejection, an *ad hoc* committee was convened to prepare a new set of proposals, which eventually formed the basis of the 1997 amendments.[6] These were designed to establish an equitable balance between local and foreign creditors and permit Canadian courts to facilitate multinational insolvencies. The former Section 18.6 of the Companies' Creditors Arrangement Act was added to provide a mechanism to allow foreign representatives or other interested persons to file ancillary proceedings and obtain the benefit of a court-supervised stay of proceedings. However, the amendments preceded the release of the Model Law and contained a provision that required insolvency law to be reviewed after five years.

In anticipation of this, a joint task force formed of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals was established in 2002 to provide input on insolvency law reforms. With regard to international insolvencies, the Joint Task Force proposed that the government retain the existing provisions, albeit with a few minor amendments.[7] It recognised that the

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3 Government of Canada, online: http://can-am.gc.ca/relations/commercial_relations_commerciales.aspx?lang=eng.

4 Justice JM Farley, "The International Scene: A Judicial Perspective on International Cooperation in Insolvency Cases", March 1998 ABI Jnl 59 at 59.

5 *Supra*, footnote 2 at 169.

6 The authors gratefully acknowledge the assistance of R Gordon Marantz QC, in connection with the historical perspective of developments leading to the 1997 amendments.

7 The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals Joint Task Force on Business Law Reform Report, 15 March 2002, Schedule B at p50.

vast majority of Canada's cross-border proceedings involved the United States, and reasoned that both countries have complementary reorganisation-based insolvency cultures that "facilitate the operation of the lending markets in Canada by establishing a reasonable level of assurance that Canadian laws will be applied to truly Canadian financing transactions".[8]

From May to October 2003, the Senate Standing Committee on Banking, Commerce and Trade conducted public hearings and accepted written submissions from a variety of stakeholders in an attempt to determine whether the current regime adequately addressed the needs of stakeholders. The witnesses before the committee provided a variety of opinions regarding whether the Model Law should be adopted and, if so, the extent to which it should be revised to meet Canada's particular needs. In its report, the committee recommended that the Companies' Creditors Arrangement Act be amended to incorporate the Model Law.[9]

Although the Model Law itself accepts the possibility that nations may amend or modify its articles during adoption, the committee took the position that this flexibility should be exercised cautiously to ensure a harmonised international approach.[10]

In June 2005 the Joint Task Force prepared a supplemental report in response to the committee's report.[11] This made the following recommendations:

(a) … if the Model Law is adopted, the applicable statutory provisions should include a reciprocity requirement that it will only apply with respect to a foreign insolvency proceeding if the applicable foreign jurisdiction has adopted the Model Law;

(b) As an alternative… if the Model Law is adopted, the applicable statutory provisions should not be proclaimed in force unless and until the Model Law is adopted and is in force in the United States.

(c) … any adoption of the Model Law [should] include a provision granting Canadian courts the discretion to determine, depending upon the circumstances of a case, that dual full insolvency proceedings with respect to the same debtor are appropriate;

(d) … in ancillary proceedings, if the Model Law is adopted, the court would have the discretion to appoint a creditors committee as a condition of recognising the foreign proceeding, taking into consideration all the circumstances of the case, on such terms as the court may determine.[12]

Crucially, the Joint Task Force recommended that reciprocity be required for the application of the Model Law's provisions. This was because if a cross-border insolvency were to occur within a country that had not adopted the Model Law, Canadian creditors could potentially be disadvantaged if the foreign jurisdiction were restrictive.

In response to the committee's recommendations and the introduction of a

8 *Ibid.*

9 Canada, Standing Senate Committee on Banking, Commerce and Trade, "Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act" November 2003 (Chair: Richard H Kroft) at 117.

10 *Ibid* at 113.

11 The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals Joint Task Face on Business Law Reform Supplemental Report, 30 June 2005.

12 *Ibid* at pp12–13.

number of private members' bills proposing amendments to the distribution and priority scheme in bankruptcy and insolvency legislation, in June 2005 the Canadian government tabled Bill C-55.[13] This set out numerous amendments to Canada's insolvency legislation, as well as international insolvency provisions that substantially adopted many of the principles set out in the Model Law.

Bill C-55 received royal assent on 25 November 2005, becoming SC 2005, c 47[14] (Chapter 47), and was rushed through before the dissolution of the 38th Parliament. Because of this, the Senate Standing Committee requested and received from the federal government assurances that Chapter 47 would not be proclaimed into force before 30 June 2006, so that it would have the chance to review the legislation. Following the committee's review, certain additions and amendments to Chapter 47 were set out in Bill C-12, known as SC 2007, c 36[15] (Chapter 36), which received royal assent on 14 December 2007. Of the Chapter 36 changes, a small number were in respect of the international insolvency provisions set out in Chapter 47. The amendments to the Companies' Creditors Arrangement Act provided for in Chapter 47 and Chapter 36 came into force on 18 September 2009.

3. The Companies' Creditors Arrangement Act

The Companies' Creditors Arrangement Act is a powerful restructuring tool for corporations in financial difficulty. It is designed to provide a means for insolvent corporations to reorganise their affairs as an alternative to bankruptcy and continue operations for the benefit of multiple stakeholders, including shareholders, creditors, employees and customers. The act applies to debtors where the debts, and the debts of affiliated debtor companies, exceed $5 million. A foreign corporation with assets located in or that is doing business in Canada can also file for protection under the act. It is sufficient to have minimal assets in Canada to comply.

Proceedings are commenced by a court application for an initial order that grants a stay of proceedings, appoints a court officer (called a monitor) and makes various other determinations and rulings. The court order contains a 'comeback' provision, which allows affected persons to seek amendments or variations. Following this, the debtor may attempt to prepare and present a plan of compromise or arrangement to its creditors. If this plan is acceptable to the court and to the statutory majority of the various classes of creditors (ie, two-thirds in dollar amount and 50% of the number of creditors voting in each class), then the debtor will be entitled to implement the plan. The plan sets out the arrangements for restructuring the relationship between the debtor and its creditors. With certain minor exceptions, the plan's contents are not prescribed by statute and are limited only by the requirement that it address the concerns of the affected creditors. For a large enterprise with many

13 Bill C-55, an Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, 1st Sess, 38th Parl, 2005 (as passed by the House of Commons, 21 November 2005).

14 An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, SC 2005, c 47.

15 An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada, 2005, SC 2007, c 36.

subsidiaries, in certain circumstances it is possible to restructure the corporate group on a partial or fully consolidated basis.

4. The Model Law and Part IV of the Companies' Creditors Arrangement Act

Unlike multilateral conventions, model laws need not be ratified because they are merely models to be considered by states during the drafting of their own legislation. As a result, states may modify or exclude certain provisions as they see fit. A consequence of this flexibility is that the degree of harmonisation between countries, which was a primary aim of the Model Law, may suffer. As a result, the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency[16] suggested that states make few changes to the Model Law during the implementation process.[17]

Section 131 of Chapter 47, as amended by Chapter 36, amended the Companies' Creditors Arrangement Act to include Sections 44 to 61 relating to cross-border insolvencies. Although these provisions are not a direct copy of those of the Model Law, it is clear that the Model Law has significantly influenced the amendments to the act.[18]

The following article-by-article analysis begins with a review of the provisions contained in the Model Law, followed by commentary regarding the similarities and differences between these provisions and those of the act, which came into force on 18 September 2009.[19]

This is an extract from the chapter 'Canada' by Steven Golick, Patrick Riesterer and Marc Wasserman in Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law, Fourth Edition, *published by Globe Law and Business.*

16 The UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment was published in 1997 (Guide to Enactment). While a revised Guide to Enactment was published in 2013 (Revised Guide), a Canadian court considering the legislative history to Part IV of the Companies' Creditors Arrangement Act would look to the 1997 Guide to Enactment to understand Parliament's legislative intent. Subsequent working papers and the revised Guide to Enactment may be considered by a Canadian court, but are likely to have less significance. We note that the Guide to Enactment was cited by the Ontario Superior Court of Justice (Commercial List) in *Hartford Computer Hardware Inc* (2012 ONSC 964 at paras 17–18) but that the Revised Guide was cited by the British Columbia Court of Appeal in *Worldspan Marine Inc* (2014 BCCA 419 beginning at para 52).

17 Guide to Enactment, supra footnote 16 at para 12; Revised Guide, *supra* footnote 16 at para 20.

18 It is somewhat difficult to compare the act's provisions with those of the Model Law as there is no consistent ordering between the two. However, as many of the concepts of the Model Law have been adopted in the act, the discussion herein has been ordered in the order set out in the Model Law for ease of reference.

19 This chapter was updated as of December 2016.