Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

APPLICANTS

FACTUM OF THE FOREIGN REPRESENTATIVE

(Motion re Authorization to Pursue section 36.1 Claims in Adversary Proceeding)

April 21, 2022

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TO: SERVICE LIST

PART I -OVERVIEW

1. On March 9, 2021, the Applicants obtained protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") pursuant to an initial order (as amended on March 19, 2021 and on May 26, 2021, the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**"). The Initial Order extended the benefits of its protections and authorizations to the partnerships listed on Schedule "A" (collectively, the "**Just Energy Entities**"). FTI Consulting Canada Inc. ("**FTI**") was appointed by the CCAA Court to act as monitor (the "**Monitor**").

2. Just Energy Group Inc. ("**Just Energy**") was appointed in the Initial Order as the foreign representative ("**Foreign Representative**") in connection with the proposed recognition of the CCAA proceeding under Chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Texas (the "**U.S. Bankruptcy Court**"). This CCAA proceeding was formally recognized by the U.S. Bankruptcy Court on April 2, 2021 (the "**Chapter 15 Cases**").

3. In November 2021, the Foreign Representative, together with Just Energy Texas LP, Fulcrum Retail Energy LLC and Hudson Energy Services LLC (collectively, the "**Plaintiffs**") commenced an adversary proceeding against the Electricity Reliability Council of Texas ("**ERCOT**") and the Texas Public Utilities Commission ("**PUCT**") (the "**Adversary Proceeding**")[1] in the U.S. Bankruptcy Court challenging approximately USD$274 million paid under protest by or on behalf of the Just Energy Entities in respect of invoice obligations (the "**Invoices**") incurred with respect to ERCOT and payments made (collectively, the "**Transfers**")

[1] Bearing Case No. no. 21-04399 (MI).

for electricity purchases by the Just Energy Entities in connection with the winter storm event (the "**Winter Storm**") that occurred in Texas in February 2021.

4. The Plaintiffs filed an amended complaint in the Adversary Proceeding (the "**First Amended Complaint**") in February 2022, which challenges, among other things, the Transfers as void pursuant to section 36.1 of the CCAA, which incorporates by reference sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**") relating to transfers at undervalue ("**TUVs**") and preferences (collectively, the "**Section 36.1 Claims**").

5. In its motion to dismiss the First Amended Complaint and in an attempt to halt the Adversary Proceeding on a technicality, ERCOT asserted that the Foreign Representative does not have standing to pursue the Section 36.1 Claims. Since this question raises matters of Canadian law, the Honourable David R. Jones of the U.S. Bankruptcy Court requested that the Foreign Representative seek direction from the CCAA Court with respect to the question of who is the proper party to advance the Section 36.1 Claims. This motion is being brought accordingly.

6. ERCOT argued that, based on the wording of section 36.1 of the CCAA, only the Monitor has standing to assert the Section 36.1 Claims. ERCOT made this technical objection despite the fact that Just Energy in its capacity as Foreign Representative acts as an estate representative in the Chapter 15 Cases and is pursuing the Section 36.1 Claims in the interests of the estate. Moreover, the Monitor has confirmed that it supports the Foreign Representative in pursuing the Adversary Proceeding.

7. Under section 36.1 of the CCAA, the intention is for preference and TUV claims to be asserted by the Monitor because the Monitor is a court officer with responsibility for monitoring the business and financial affairs of the debtor during the proceeding. However, read purposively

and liberally, consistent with the objectives of the CCAA, section 36.1 does not prohibit the Foreign Representative from pursuing preference or TUV claims. In fact, an order authorizing the Foreign Representative to pursue the Section 36.1 Claims in the Adversary Proceeding is entirely consistent with both the spirit and the intent of section 36.1, which contemplates that claims under section 36.1 (unless assigned to a creditor under s. 38 of the BIA because the Monitor declines to pursue them) are to be asserted by a CCAA estate representative for the benefit of the estate.

8. The relief sought in this motion is tailored and limited in scope – it seeks only this Court's authorization for the Foreign Representative[2] to pursue the Section 36.1 Claims and is not intended to have any broader application beyond this specific factual context. Moreover, this motion is purely procedural, directed solely at determining the narrow question of the proper party to pursue the Section 36.1 Claims in the Adversary Proceeding. It does not require this Court to engage in any substantive consideration of the merits of the Section 36.1 Claims which, following this Court's direction, would be pursued in due course in the Adversary Proceeding.

9. The Plaintiffs do not believe that this Court is legally required to order that the Monitor become directly involved in pursuing the Section 36.1 Claims in the Adversary Proceeding. However, if this Court, as a technical matter, concludes that the Monitor is required to pursue the Section 36.1 Claims, the Plaintiffs request in the alternative that this Court authorize the Monitor to jointly serve as Foreign Representative in the Chapter 15 Cases in order to allow the Monitor

[2] The Foreign Representative also seeks authorization for other Just Energy Entities, as the case may be, to assist in pursuing the Section 36.1 Claims. The participation of those Just Energy Entities is necessary because (among other things) the Transfers were made by them or on their behalf and/or they are counterparties to contracts with ERCOT, such as the Standard Form Agreement.

and the Foreign Representative[3] to jointly prosecute the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc*.

PART II - FACTS

10. The Applicants sought CCAA protection because of severe short-term liquidity challenges resulting from the responses of the PUCT and ERCOT to the Winter Storm. In particular, ERCOT's actions in setting an artificial market price for electricity of USD$9000/MWh for approximately 88 hours resulted in the delivery of Invoices by ERCOT to the Just Energy Entities amounting to approximately USD$336 million, which were orders of magnitude higher than the value of the electricity purchased and directly led to the CCAA filing, as well as the Chapter 15 Cases.[4]

11. Just Energy paid all the Invoices, with the knowledge and approval of the CCAA Court and the U.S. Bankruptcy Court, under protest and subject to a reservation of its rights. Accordingly, the Plaintiffs commenced the Adversary Proceeding on November 12, 2021 by filing an initial complaint (the "**Initial Complaint**") in the U.S. Bankruptcy Court challenging the Transfers. The Initial Complaint contained five counts, asserted primarily under the U.S. Bankruptcy Code.[5]

12. In January 2022, both ERCOT and PUCT moved to dismiss the Initial Complaint. On February 2, 2022, following argument in the U.S. Bankruptcy Court, the Honourable Marvin Isgur[6] dismissed the PUCT as a defendant in the Adversary Proceeding. He also dismissed some of the

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3 With the assistance of other Just Energy Entities, including the other Plaintiffs, as the case may be.

4 Affidavit of James C. Tecce, affirmed April 14, 2022 [Tecce Affidavit] at paras. 7-8, Exhibit D.

5 Tecce Affidavit at para. 7, Exhibit D.

6 The Adversary Proceeding was reassigned to Judge Jones on March 14, 2022: Tecce Affidavit at para. 14.

counts and directed the Plaintiffs to file an amended complaint relating to certain of the counts raised in the Initial Complaint.[7]

13. The Plaintiffs filed an amended complaint (the "**First Amended Complaint**") on February 11, 2022. The First Amended Complaint contains six counts, including four separate "sub-Counts" that are based on the CCAA – the Section 36.1 Claims. Specifically:

(a) Count 1: seeks an order declaring that the Invoice Obligations are void in their full amount (approximately USD$336 million) on the basis that they are a preference, contrary to section 95 of the BIA (incorporated into the CCAA pursuant to section 36.1);

(b) Count 2: seeks an order declaring the pre-petition Transfers are void on the basis that they are a preference, contrary to section 95 of the BIA (incorporated into the CCAA pursuant to section 36.1) and should be returned in an amount no less than approximately USD$81 million;

(c) Count 3: seeks an order declaring the pre-petition Transfers are void on the basis that they are a TUV, contrary to section 96 of the BIA (incorporated into the CCAA pursuant to section 36.1) and should be returned in an amount no less than approximately USD$81 million; and

(d) Count 4: seeks an order directing ERCOT to return the Transfers made by Just Energy, pursuant to section 98(1) of the BIA (incorporated into the CCAA pursuant to section 36.1), either (i) in the amount of not less than approximately USD$274

[7] Tecce Affidavit at paras. 9-11, Exhibit E.

million or, (ii) alternatively, in the amount of not less than approximately USD$220 million.[8]

14. On March 17, 2022, ERCOT filed a motion to dismiss the First Amended Complaint (the "**Second Dismissal Motion**") on the basis, among other things, that the Foreign Representative does not have standing to advance the Section 36.1 Claims.[9] The Plaintiffs filed an Objection to the Second Dismissal Motion (the "**Objection**") arguing, among other things, that the proper parties were present and that all counts were properly pled.[10] The Objection was supported by a declaration of the Monitor indicating its support of the Foreign Representative advancing the Adversary Proceeding, as well as a declaration of Kevin P. McElcheran, providing evidence of Canadian law on preferences and TUVs.[11]

15. Argument before Judge Jones commenced on April 4, 2022. At the hearing, Judge Jones requested that the Foreign Representative seek direction from the CCAA Court with respect to the question of who is the proper party to advance the Section 36.1 Claims.[12]

16. On April 6, 2022, the U.S. Bankruptcy Court entered an Order stating that "[t]he Adversary Proceeding is abated and all deadlines in the Adversary Proceeding are stayed pending further

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8 Tecce Affidavit at paras. 12-13, Exhibit F.

9 Tecce Affidavit at para. 15, Exhibit G.

10 Tecce Affidavit at para. 16, Exhibit H.

11 Tecce Affidavit at para. 17, Exhibits I, J.

12 Tecce Affidavit at para. 19, Exhibit L.

Order of the Court so that the parties can seek direction from the Canadian Court with respect to the standing to prosecute the claims in the Adversary Proceeding."[13]

PART III - ISSUES AND THE LAW

17. The issues before this Court are:

(a) Whether the Foreign Representative (and other Just Energy Entities, as the case may be) should be authorized to pursue the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc*;

(b) Whether the Monitor should be authorized to take whatever actions or steps it deems advisable to assist and supervise the Foreign Representative (and the other Just Energy Entities, as the case may be) with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding; and

(c) In the alternative, whether the Monitor should be authorized to jointly serve as foreign representative in the Chapter 15 Cases in order to allow the Monitor, the Foreign Representative (and other Just Energy Entities, as the case may be) to jointly prosecute the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc*.

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[13] Tecce Affidavit at para. 20, Exhibit M.

A. FOREIGN REPRESENTATIVE SHOULD BE AUTHORIZED TO PURSUE THE SECTION 36.1 CLAIMS

(a) *Section 36.1 of the CCAA Should Be Read Liberally*

18. Section 36.1 of the CCAA incorporates sections 38 and 95 to 101 of the BIA into the CCAA and provides as follows:

> 36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.
>
> (2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act
>
> (a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
>
> (b) to "trustee" is to be read as a reference to "monitor"; and
>
> (c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company". (emphasis added)

19. Section 36.1 was added to the CCAA in 2009, and is intended to allow fraudulent preferences and TUVs to be investigated and clawed back for the benefit of a debtor's estate in a CCAA proceeding, thereby ensuring consistency with the BIA. Section 36.1(2) was inserted for clarity, to assist with reading BIA terminology in the CCAA context.[14]

20. In the Second Dismissal Motion, ERCOT relied on section 36.1(2)(b) of the CCAA to argue that only the Monitor has standing to pursue the Section 36.1 Claims in the Adversary Proceeding. The Foreign Representative submits that this is an unduly restrictive reading of section 36.1 of the CCAA that elevates form over substance and fails to recognize key differences between

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[14] See Industry Canada, *Bill C-12: Clause by Clause Analysis*, which describes the government's rationale for the addition of section 36.1.

the BIA and the CCAA. It does not give effect to the objective of section 36.1 to facilitate the investigation and claw back of preferences or TUVs for the benefit of a CCAA debtor's estate.

21. Sections 95 to 101 of the BIA are, on their plain wording, available to a trustee in bankruptcy. Thus, for example, section 95(1) of the BIA provides that a transaction that is a preference is "void as against … the trustee" if it is made within the applicable preference period. Similarly, section 96(1) provides that "on application by the trustee", the Court may declare that a TUV is void as against the trustee.

22. In a bankruptcy, the trustee steps into the shoes of the bankrupt by operation of law, obtaining an assignment of all of the bankrupt's assets and property. The result is to deprive the bankrupt of control over its own property for the duration of the bankruptcy and to vest such possession and control in the trustee.[15]

23. It is not necessary for the purpose of this motion for this Court to make a final determination as to whether only a trustee in bankruptcy has the standing to prosecute preference or TUV claims under sections 95 and 100 of the BIA. ERCOT, in its Second Dismissal Motion, did not make any such argument and cited no case law on this point.[16] The only issue in this motion relates to the scope of section 36.1 of the CCAA and its proper interpretation in the context of the specific facts of this proceeding.

24. Assuming without deciding that only the trustee in bankruptcy has standing to prosecute preference or TUV claims *under the BIA,* such interpretation would be consistent with the structure of the BIA and the vesting of the bankrupt's assets in the trustee. It logically follows that the trustee

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[15] BIA, s. 71.

[16] See Tecce Affidavit at Exhibit G.

should be specified in sections 95 and 96 as the party[17] who is entitled to investigate and invalidate transactions that constitute preferences or TUVs, for the benefit of the estate.

25. The same rationale for concluding that the trustee is the only proper party (and in fact, the only estate representative) who can prosecute preference or TUV claims under the BIA does not exist in relation to the Monitor under the CCAA. The CCAA is a debtor-in-possession statute in which the CCAA debtor remains in possession and control of its own property, subject to the oversight of the Court and the Monitor.

26. Moreover, it is well-established that the CCAA is to be read broadly and liberally, with a view to facilitating its objectives – namely, to allow the debtor to restructure its affairs for the benefit of its stakeholders.[18] Section 11 of the CCAA provides the Court with the jurisdiction to "make any order that it considers appropriate in the circumstances." Moreover, the broad language of section 11 "should not be read as being restricted by the availability of more specific orders."[19]

27. Consistent with these principles, the Foreign Representative submits that section 36.1(2) of the CCAA should be read to authorize the Foreign Representative, as an estate representative in the Chapter 15 Cases, that can and should pursue the Section 36.1 Claims in the Adversary Proceeding. Section 36.1(2) was inserted "for clarity" to assist in transplanting the BIA provisions into the CCAA. Section 36.1(1) of the CCAA contemplates that the application of the BIA

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[17] Subject to an assignment of the claim to a creditor, with the authorization of the court, in accordance with section 38 of the BIA, if the trustee refuses to pursue the claim.

[18] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 [*Century Services*] at para. 70.

[19] See *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 [*Essar*] at para. 118, citing *US Steel Canada (Re)*, 2016 ONCA 662 at para. 79 and *Century Services* at para. 70.

provisions in a CCAA proceeding will be subject to "any modifications that the circumstances require."

28. It would be inconsistent with these principles to read subsection 36.1(2)(b) as a prohibition against the prosecution of the Section 36.1 Claims by the Foreign Representative, simply because the Foreign Representative, on the facts of this case, is not the Monitor. This result would be particularly perverse where the Monitor has expressly filed evidence of its support of the Foreign Representative pursuing the Section 36.1 Claims in the Adversary Proceeding.

(b) ***Monitor and Foreign Representative Fulfill Similar Functions in relation to the Section 36.1 Claims***

29. The only reason why ERCOT has raised its technical objection to standing in the Adversary Proceeding is because Just Energy acts as the Foreign Representative, rather than the Monitor, and the Adversary Proceeding is being prosecuted before the U.S. Bankruptcy Court in the State where ERCOT is located, rather than the CCAA Court.

30. In a cross-border CCAA proceeding in which Canada is the centre of main interest, there is no provision of the CCAA that requires only the Monitor to act as Foreign Representative outside of Canada. It is common for the Foreign Representative to be either a CCAA applicant or the Monitor, depending on the circumstances. There are a number of examples of cases, either involving foreign insolvency proceedings recognized in Canada or Canadian proceedings recognized in the US, in which the applicant company is the Foreign Representative.[20] This Court appointed Just Energy to act as Foreign Representative for the purpose of the Chapter 15 Cases in

[20] See, for example, *Xerium Technologies (Re)*, 2010 ONSC 3974 at para. 3 (debtor company, as foreign representative of US Chapter 11 debtors, obtaining recognition order in Canada); *Cinram International (Re)*, 2012 ONSC 3767 at paras. 7, 32 (debtor company as foreign representative in US Chapter 15 proceeding).

the Initial Order.[21] This order was neither challenged nor appealed and there has been no suggestion by ERCOT or anyone that this was not proper.

31. The reference in section 36.1(2) of the CCAA to "the monitor" expresses the intention that the Section 36.1 Claims should be brought for the benefit of the debtor's estate. This wording does not expressly contemplate that an estate representative other than the Monitor could pursue claims under section 36.1. However, nor does it prohibit it.

32. In fact, it is entirely consistent with the intention of section 36.1(2), read purposively, for this Court to authorize the Foreign Representative, in its capacity as an estate representative in the Chapter 15 Cases, to pursue the Section 36.1 Claims in the Adversary Proceeding for the benefit of the estate. This conclusion is supported by one commentator, who notes that, among the remedies available to a foreign representative, are "(a) a preferential payment action; (b) a transfer at undervalue…"[22].

33. The Monitor and the Foreign Representative occupy similar positions in this context. Thus, the CCAA defines "monitor" to mean "in respect of a company, … the person appointed under section 11.7 [of the CCAA] to monitor the business and financial affairs of the company."[23] Similarly, the "foreign representative" is defined to mean "a person or body … who is authorized, in a foreign proceeding in respect of a debtor company to (a) monitor the debtor company's

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21 Initial Order at clauses 63 and 64.

22 Wayne D. Gray et al, *Gray's Commentaries on Federal Corporate Laws* (Toronto: Thomson Reuters, 2022) at § CCAA-P4:COM18, appended as Schedule "C".

23 CCAA, s. 2(1), "monitor".

business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding."[24]

34. On the specific facts of this proceeding, it would be the height of formalism to conclude, as ERCOT suggested in the Adversary Proceeding, that the Foreign Representative cannot pursue the Section 36.1 Claims in its capacity as an estate representative in the Chapter 15 Cases purely because it is not "the Monitor".

(c) *No Case Law Precludes the Foreign Representative from Pursuing Section 36.1 Claims*

35. In support of its standing arguments in the Second Dismissal Motion, ERCOT cited four CCAA cases in support of its position that only the Monitor has standing to pursue the Section 36.1 Claims. None of these cases compels such a conclusion.

36. Two of the cases cited by ERCOT—*Ernst & Young Inc. v. Aquino*[25]and *Urbancorp Cumberland 2 GP Inc.*[26]—represent examples of cases in which the Monitor is the party that is pursuing the claims under section 36.1. However, the issue of standing is not addressed in either case, as it did not arise on the facts.

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[24] CCAA, s. 45(1), "foreign representative". See also *U.S. Bankruptcy Code*, 11 USC §101(24), which defines "foreign representative" as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."

[25] 2021 ONSC 527, aff'd 2022 ONCA 202 [*Aquino*].

[26] 2017 ONSC 7156. Note that in both this case and in *Aquino*, the Monitor had been given enhanced powers under the initial orders.

37. The other two cases—*Cash Store*[27] and *Verdellen*[28]—both refuse standing to a third party to pursue claims under section 36.1, but are both distinguishable in that they do not address the issue of the standing of a foreign representative.

38. In *Cash Store*, the Court held that the debtor's DIP lenders (i.e. creditors) did not have standing to seek a declaration that certain transactions constituted preferences unless the claim was assigned to them pursuant to section 38 of the BIA.[29] Section 38 of the BIA ensures that the trustee (or monitor) formally assigns a preference claim to those creditor(s) who seek to pursue it for their own benefit (and incur the related costs) and obtains court authorization to do so. No similar considerations arise where a preference claim is pursued by the foreign representative for the benefit of the debtor's estate.

39. In *Verdellen*, the purchaser of the debtor company's business was stated not to have standing to bring an application to void a preferential agreement. The Court's statement in *Verdellen* that "it is the Monitor who would have the right to make [such] an application" was made in the context of concluding that the purchaser, who was not even a creditor, did not have standing.[30] It was not intended to and did not address the potential standing of a foreign representative.

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27 *Cash Store Financial Services, Re*, 2014 ONSC 4326, aff'd 2014 ONCA 834 [*Cash Store*].

28 *Verdellen v. Monaghan Mushrooms Ltd*, 2011 ONSC 5820 [*Verdellen*].

29 *Cash Store* at paras. 108-110.

30 *Verdellen* at paras. 45-46.

40. Neither the case law, nor the wording of section 36.1 of the CCAA, should be read as a prohibition against the Foreign Representative pursuing the Section 36.1 Claims in the Adversary Proceeding. As a result, the Foreign Representative submits that it is entitled to the relief requested.

(d) *The Monitor Should be Authorized to Assist the Foreign Representative*

41. The Foreign Representative requests that the Monitor should be authorized to take whatever actions or steps it deems advisable to assist and supervise the Just Energy Entities with respect to the prosecution of the Section 36.1 Claims in the Adversary Proceeding.

42. It is well-accepted that the Monitor is required to be appointed under the CCAA to be "the eyes and the ears" of the Court.[31] The powers of the Monitor are within the discretion of the CCAA Court. Under section 23 of the CCAA, a number of express powers of the Monitor are listed. Additionally, the Monitor shall "carry out any other functions in relation to the company that the court may direct."[32]

43. The Monitor has already been providing general assistance and support to the Foreign Representative, including in connection with the Adversary Proceeding. The Monitor's Declaration, which was filed in the Adversary Proceeding, specifically attested to the Monitor's support of the Foreign Representative in pursuing the Adversary Proceeding.[33]

44. The requested Order expressly authorizing the Monitor to assist in the Adversary Proceeding is consistent with the objectives of the CCAA and of this particular restructuring. It is

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31 See, for example, *Essar* at para. 109.

32 CCAA, s. 23(1)(k).

33 Tecce Affidavit at para. 17 and Exhibit I.

intended to assist the U.S. Bankruptcy Court, pursuant to its request, by providing clarity with respect to Canadian procedural issues to allow the Adversary Proceeding to proceed to a determination of the Section 36.1 Claims on the merits.

B. ALTERNATIVE RELIEF

45. For all of the reasons set out above, the Foreign Representative does not believe that it is legally necessary for the Monitor to be a direct participant (Plaintiff) in the Adversary Proceeding for the purpose of prosecuting the Section 36.1 Claims. However, if this Court is of the view that, as a technical matter, the Monitor is required to pursue the Section 36.1 Claims, the Foreign Representative seeks, in the alternative, an order from this Court authorizing the Monitor to jointly serve as foreign representative in the Chapter 15 Cases in order to allow the Monitor and the Foreign Representative to jointly prosecute[34] the Section 36.1 Claims in the Adversary Proceeding, *nunc pro tunc*.

PART IV - ORDER SOUGHT

46. The Foreign Representative requests that this Court issue the proposed Order found at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of April, 2022.

OHH

per Marc Wasserman / Shawn Irving

[34] With the assistance of other Just Energy Entities, as the case may be.

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *Cash Store Financial Services, Re*, 2014 ONSC 4326, aff'd 2014 ONCA 834
2. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
3. *Cinram International (Re)*, 2012 ONSC 3767
4. *Ernst & Young Inc. v. Aquino*, 2021 ONSC 527, aff'd 2022 ONCA 202.
5. *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014
6. *Urbancorp Cumberland 2 GP Inc.*, 2017 ONSC 7156
7. *US Steel Canada (Re)*, 2016 ONCA 662
8. *Verdellen v. Monaghan Mushrooms Ltd*, 2011 ONSC 5820
9. *Xerium Technologies (Re)*, 2010 ONSC 3974

Secondary Sources

1. Industry Canada, *Bill C-12: Clause by Clause Analysis*
2. Wayne D. Gray et al, *Gray's Commentaries on Federal Corporate Laws* (Toronto: Thomson Reuters, 2022)

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Proceeding by creditor when trustee refuses to act

38 (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

Transfer to creditor

(2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

Benefits belong to creditor

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

Trustee may institute proceeding

(4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

[…]

Vesting of property in trustee

71 On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

[…]

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

> **(a)** in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
>
> **(b)** in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

> **(a)** a margin deposit made by a clearing member with a clearing house; or
>
> **(b)** a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

clearing house means a body that acts as an intermediary for its clearing members in effecting securities transactions; (*chambre de compensation*)

clearing member means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (*membre*)

creditor includes a surety or guarantor for the debt due to the creditor; (*créancier*)

margin deposit means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations. (*dépôt de couverture*)

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of *person who is privy*

(3) In this section, a ***person who is privy*** means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

Protected transactions

97 (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Definition of *adequate valuable consideration*

(2) The expression ***adequate valuable consideration*** in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Law of set-off or compensation

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

Recovering proceeds if transferred

98 (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside or, in the Province of Quebec, null or annullable and set aside, and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

Trustee may recover

(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

Operation of section

(3) Notwithstanding subsection (1), where any person to whom the property has been sold or disposed of has paid or given therefor in good faith adequate valuable consideration, he is not subject to the operation of this section but the trustee's recourse shall be solely against the person entering into the transaction with the bankrupt for recovery of the consideration so paid or given or the value thereof.

Trustee subrogated

(4) Where the consideration payable for or on any sale or resale of the property or any part thereof remains unsatisfied, the trustee is subrogated to the rights of the vendor to compel payment or satisfaction.

General assignments of book debts ineffective

98.1 (1) If a person engaged in any trade or business makes an assignment of their existing or future book debts, or any class or part of those debts, and subsequently becomes bankrupt, the assignment of book debts is void as against, or, in the Province of Quebec, may not be set up against, the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

Foregoing provisions not to apply in some cases

(2) Subsection (1) does not apply to an assignment of book debts that is registered under any statute of any province providing for the registration of assignments of book debts if the assignment is valid in accordance with the laws of the province.

Other cases

(3) Nothing in subsection (1) renders void or, in the Province of Quebec, null any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

Definition of *assignment*

(4) For the purposes of this section, ***assignment*** includes assignment by way of security, hypothec and other charges on book debts.

Dealings with undischarged bankrupt

99 (1) All transactions by a bankrupt with any person dealing with the bankrupt in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate, or interest or right, in the property that by virtue of this Act is vested in the trustee shall determine and pass in any manner and to any extent that may be required for giving effect to any such transaction.

Receipt of money by banker

(2) For the purposes of this section, the receipt of any money, security or negotiable instrument from or by the order or direction of a bankrupt by his banker and any payment and any delivery of any security or negotiable instrument made to or by the order or direction of a bankrupt by his banker shall be deemed to be a transaction by the bankrupt with his banker dealing with him for value.

100 [Repealed, 2005, c. 47, s. 76]

Inquiry into dividends, redemption of shares or compensation

101 (1) When a corporation that is bankrupt has paid a dividend, other than a stock dividend, redeemed or purchased for cancellation any of the shares of the capital stock of the corporation or has paid termination pay, severance pay or incentive benefits or other benefits to a director, an officer or any person who manages or supervises the management of business and affairs of the corporation within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent.

Judgment against directors

(2) If a transaction referred to in subsection (1) has occurred, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, or solidarily, in the amount of the dividend or redemption or purchase price, with interest on the amount, that has not been paid to the corporation if the court finds that

> **(a)** the transaction occurred at a time when the corporation was insolvent or the transaction rendered the corporation insolvent; and
>
> **(b)** the directors did not have reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or the transaction would not render the corporation insolvent.

Judgment against directors — compensation

(2.01) If a transaction referred to in subsection (1) has occurred, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, or solidarily, in the amount of the termination pay, severance pay or incentive benefits or other benefits, with interest on the amount, that has not been paid to the corporation if the court finds that

> **(a)** the payment
>
> > **(i)** occurred at a time when the corporation was insolvent or rendered the corporation insolvent,
> >
> > **(ii)** was conspicuously over the fair market value of the consideration received by the corporation, and
> >
> > **(iii)** was made outside the ordinary course of business; and

(b) the directors did not have reasonable grounds to believe that the payment

(i) occurred at a time when the corporation was not insolvent or would not render the corporation insolvent,

(ii) was not conspicuously over the fair market value of the consideration received by the corporation, and

(iii) was made in the ordinary course of business.

Criteria

(2.1) In making a determination under paragraph (2)(b) or (2.01)(b), the court shall consider whether the directors acted as prudent and diligent persons would have acted in the same circumstances and whether the directors in good faith relied on

(a) financial or other statements of the corporation represented to them by officers of the corporation or the auditor of the corporation, as the case may be, or by written reports of the auditor to fairly reflect the financial condition of the corporation; or

(b) a report relating to the corporation's affairs prepared pursuant to a contract with the corporation by a lawyer, notary, accountant, engineer, appraiser or other person whose profession gave credibility to the statements made in the report.

Judgment against shareholders

(2.2) Where a transaction referred to in subsection (1) has occurred and the court makes a finding referred to in paragraph (2)(a), the court may give judgment to the trustee against a shareholder who is related to one or more directors or to the corporation or who is a director not liable by reason of paragraph (2)(b) or subsection (3), in the amount of the dividend or redemption or purchase price referred to in subsection (1) and the interest thereon, that was received by the shareholder and not repaid to the corporation.

Directors exonerated by law

(3) A judgment pursuant to subsection (2) shall not be entered against or be binding on a director who had, in accordance with any applicable law governing the operation of the corporation, protested against the payment of the dividend or the redemption or purchase for cancellation of the shares of the capital stock of the corporation and had thereby exonerated himself or herself under that law from any liability therefor.

Directors exonerated by law — compensation

(3.1) A judgment under subsection (2.01) shall not be entered against or be binding on a director who had, in accordance with any applicable law governing the operation of the corporation, protested against the payment of termination pay, severance pay or incentive benefits or other benefits and had exonerated himself or herself under that law from any resulting liability.

Directors' right to recover

(4) Nothing in this section shall be construed to affect any right, under any applicable law governing the operation of the corporation, of the directors to recover from a shareholder the whole or any part of any dividend, or any redemption or purchase price, made or paid to the shareholder when the corporation was insolvent or that rendered the corporation insolvent.

Onus of proof — directors

(5) For the purposes of subsection (2), the onus of proving

> **(a)** that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent, or
>
> **(b)** that the directors had reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or that the transaction would not render the corporation insolvent

lies on the directors.

Onus of proof — directors

(5.1) For the purposes of subsection (2.01), a director has the onus of proving any of the following:

> **(a)** that the payment
>
> > **(i)** occurred at a time when the corporation was not insolvent or did not render the corporation insolvent,
> >
> > **(ii)** was not conspicuously over the fair market value of the consideration received by the corporation, or
> >
> > **(iii)** was made in the ordinary course of business; or
>
> **(b)** that the director had reasonable grounds to believe that the payment
>
> > **(i)** occurred at a time when the corporation was not insolvent or would not render the corporation insolvent,
> >
> > **(ii)** was not conspicuously over the fair market value of the consideration received by the corporation, or
> >
> > **(iii)** was made in the ordinary course of business.

Onus of proof — shareholder

(6) For the purposes of subsection (2.2), the onus of proving that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent lies on the shareholder.

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

Definitions

2 (1) In this Act, **[…]**

monitor, in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company;

[…]

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[…]

Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

> **(i)** without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,
>
> **(ii)** not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and
>
> **(iii)** at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

[…]

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

> **(a)** to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
>
> **(b)** to "trustee" is to be read as a reference to "monitor"; and
>
> **(c)** to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

[…]

Definitions

45 (1) The following definitions apply in this Part. **[…]**

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

> **(a)** monitor the debtor company's business and financial affairs for the purpose of reorganization; or
>
> **(b)** act as a representative in respect of the foreign proceeding.

***U.S. Bankruptcy Code*, 11 USC §101**

§101. Definitions

In this title the following definitions shall apply: **[…]**

(24) The term "foreign representative" means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

SCHEDULE "C"

Wayne D. Gray et al, *Gray's Commentaries on Federal Corporate Laws* (Toronto: Thomson Reuters, 2022)

§ CCAA-P4:COM18 Commentary and Analysis

REFERENCE	DEFINED TERMS
CCAA,[1] s. 2(1)	"company", "court", "debtor company"
CCAA, s. 45(1)	"foreign proceeding", "foreign representative"

While CCAA Part IV and BIA Part XIII are almost exclusively devoted to inbound foreign proceedings, they also contain an outbound-focused provision. A Canadian court may authorize any person or body to act as a representative in respect of any proceeding under the CCAA or the BIA for the purpose of having the representative recognized in a jurisdiction outside Canada.[2]

Figure 56A depicts the situation where the foreign main proceeding is in Canada (either as a CCAA plan or a BIA proposal) and the foreign non- main proceeding is under Chapter 15 of the US Code.

[1] *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[2] CCAA, s. 56; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), s. 279.

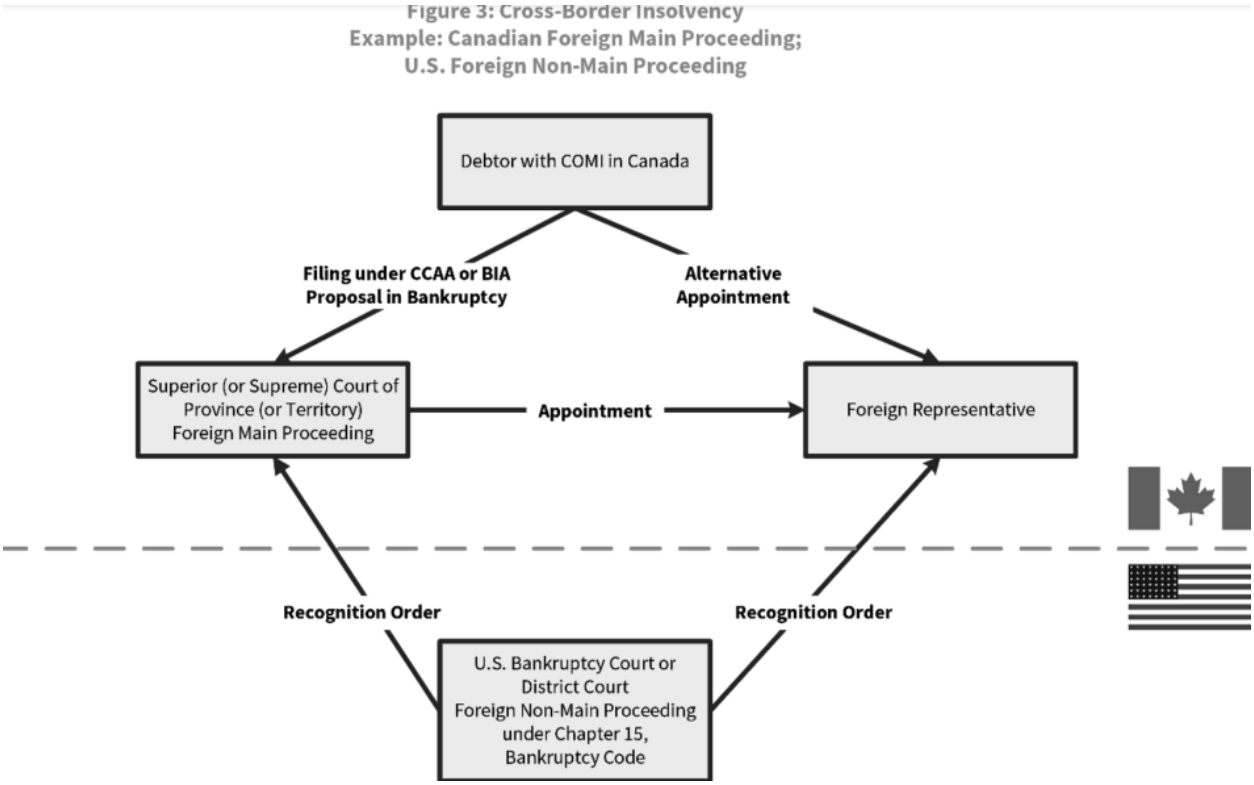

Table 56B sets out the types of representatives that Canadian courts have appointed.

Table 56B—Types of Recognized Representatives (Outbound Appointments)

TYPE OF REPRESENTATIVE	CASE
Monitor under the CCAA	*Worldspan Marine Inc., Re*;[3] and *Angiotech Pharmaceuticals Inc., Re*[4]
A debtor in the CCAA proceedings	*Cinram International Inc., Re*;[5] *Xinergy Ltd., Re*;[6] and *Horse head Holding Corp., Re*[7]
Proposal trustee under the BIA	*Electro Sonic Inc., Re*[8]

[3] *Worldspan Marine Inc., Re*, 2014 BCCA 419, 2014 CarswellBC 3207, affirming 2013 BCSC 1593, 2013 CarswellBC 2650.

[4] *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 115, 2011 CarswellBC 124 (In Chambers), at para. 13.

[5] *Cinram International Inc., Re*, 2012 ONSC 3767, 2012 CarswellOnt 8413 (S.C.J. [Commercial List]).

[6] *Xinergy Ltd., Re*, 2015 CarswellOnt 20848 (S.C.J. [Commercial List]).

[7] *Horsehead Holding Corp., Re*, 2016 ONSC 958, 2016 CarswellOnt 1748 (S.C.J. [Commercial List]).

[8] *Electro Sonic Inc., Re*, 2014 ONSC 942, 2014 CarswellOnt 1568 (S.C.J. [Commercial List]).

If an insolvency or an arrangement order has been made in respect of a debtor in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, rebuttable proof that the debtor is insolvent and that the foreign representative ("FR") was appointed by the order.[9]

Canadian courts can refuse to take an action governed by CCAA Part IV or BIA Part XIII or if the action would be against public policy in Canada.[10] The Guide to Enactment of the Model Law (the "Guide to Enactment") published by the United Nations Commission on International Trade Law ("UNITRAL") states that this provision should be interpreted restrictively. The court in *Hartford Computer Hardware Inc., Re*[11] adopted that statement and held that the debtor-in-possession ("DIP") order in that case (which included a roll-up that would be prohibited under the CCAA or the BIA) did not raise any public policy issues.[12]

Nothing in CCAA Part IV or BIA Part XIII precludes a court, on the application of a FR or another other interested person, from applying legal or equitable rules governing the recognition of foreign insolvency orders and assistance to FRs that are not at odds with the provisions of the CCAA or the BIA, as the case may be.[13] It is not mandatory for a FR to invoke CCAA Part IV or BIA Part XIII and there is no point in doing so where there are no longer any assets in Canada.[14]

In *Kriegman v. Dill*,[15] the court enforced the order of a US District court granting judgment against a Canadian resident who received monies as part of a Ponzi scheme, based not on BIA Part XIII (or CCAA Part IV) but rather on common law principles set out in seminal Supreme Court of Canada cases such as *Morguard Investments Ltd. v. De Savoye*[16] and *Beals v. Saldanha*.[17] Therefore, the judgment of the US court was enforced against a Canadian resident who had voluntarily attorned to the jurisdiction of the US court (which the defendant did by filing a proof of claim in the US proceedings and by appearing by counsel in those proceedings other than merely to contest its jurisdiction). The defendant failed to establish a lack of natural

---

[9] CCAA, s. 59; BIA, s. 282.

[10] CCAA, s. 61(2); BIA, s. 284(2).

[11] *Hartford Computer Hardware Inc., Re*, 2012 ONSC 964, 2012 CarswellOnt 2143 (S.C.J. [Commercial List]).

[12] *Hartford Computer Hardware Inc., Re*, 2012 ONSC 964, 2012 CarswellOnt 2143 (S.C.J. [Commercial List]), at paras. 17 and 18.

[13] CCAA, s. 61(1); BIA, s. 284(1).

[14] *Kriegman v. Dill*, 2018 BCCA 86, 2018 CarswellBC 539, reversing *LLS America LLC (Trustee of) v. Dill*, 2017 BCSC 469, 2017 CarswellBC 767, leave to appeal refused *David Dill v. Bruce P. Kriegman*, solely in his capacity as Court-Appointed Chapter 11 Trustee for LLS America LLC, 2019 CarswellBC 289 (S.C.C.).

[15] *Kriegman v. Dill*, 2018 BCCA 86, 2018 CarswellBC 539, reversing *LLS America LLC (Trustee of) v. Dill*, 2017 BCSC 469, 2017 CarswellBC 767, leave to appeal refused *David Dill v. Bruce P. Kriegman*, solely in his capacity as Court-Appointed Chapter 11 Trustee for LLS America LLC, 2019 CarswellBC 289 (S.C.C.).

[16] *Morguard Investments Ltd. v. De Savoye*, 1990 CarswellBC 283, 1990 CarswellBC 767, [1990] S.C.J. No. 135 (S.C.C.).

[17] *Beals v. Saldanha*, 2003 CSC 72, 2003 SCC 72, 2003 CarswellOnt 5101, 2003 CarswellOnt 5102.

justice or that the foreign judgment was obtained by fraud or offended Canadian notions of public policy.

Where the BIA and the CCAA are inapplicable because there is no insolvency, a Canadian court can recognize a foreign liquidation order on the basis of comity and a finding of a real and substantial connection between the subject matter and the foreign jurisdiction.[18]

In *Brookstone Co., Re*,[19] the applicant did not apply for a recognition order under CCAA Part IV or BIA Part XIII at the time that the Chapter 11 proceedings were ongoing. Instead, the applicant sought to stay a Canadian products liability claim under s. 61(1) of the CCAA. The Canadian court dismissed the request for recognition of the US claims bar order, holding that the argument should be made in the particular action sought to be stayed.[20] *Brookstone* serves as a lesson in not ignoring the need for a Canadian recognition order while the Chapter 11 proceedings are still pending.

There must be factored into the distribution of dividends to the debtor's creditors in Canada as if they were part of that distribution the:

a) amount that a creditor receives or is entitled to receive outside Canada by way of dividend in the foreign proceeding in respect of the debtor;[21] and
b) value of property of the debtor that the creditor acquired outside Canada (i) on account of a provable claim of the creditor, or (ii) by way of a transfer, that, if it were subject to the CCAA or the BIA, would be a preference over other creditors or a transfer at undervalue.[22]

However, a creditor, C1, is not entitled to a dividend from the distribution in Canada until every other creditor, C2, who has a claim of equal rank in the order established under the CCAA (or the BIA, as the case may be) has received a dividend whose amount is the same percentage of C2's claim as the aggregate amount referred to at (a) above and the value referred to at (b) is equal to C1's claim.[23]

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[18] See, for example, *Cavell Insurance Co., Re*, 2006 CarswellOnt 3070, 80 O.R. (3d) 500 (C.A.), affirming 2005 CarswellOnt 641, [2005] O.J. No. 645 (S.C.J. [Commercial List]), affirming 2004 CarswellOnt 5439, [2004] O.J. No. 5166 (S.C.J. [Commercial List]), additional reasons 2006 CarswellOnt 5192 (C.A.), where the Ontario court recognized a solvent scheme of arrangement under the Companies Act, 1985 (U.K.).

[19] *Brookstone Co., Re*, 2016 ONSC 6762, 2016 CarswellOnt 18675.

[20] *Brookstone Co., Re*, 2016 ONSC 6762, 2016 CarswellOnt 18675, at para. 29.

[21] CCAA, s. 60(1)(a); BIA, s. 283(1)(a).

[22] CCAA, s. 60(1)(b); BIA, s. 283(1)(b).

[23] CCAA, s. 60(2); BIA, s. 283(2).

In *Nortel Networks Corp., Re*,[24] the Canadian court and US bankruptcy court jointly decided that a claim that can be made against more than one debtor estate because of a guarantee can nevertheless only be calculated and recognized once for allocation purposes. This precludes double-counting of such claims for allocation purposes.[25]

Also, intercorporate claims against a debtor, D1, by another related debtor, D2, are to be included in the determination of the claims against D1's estate.[26] However, cash on hand by a debtor would be excluded in determining allocation. Instead, each debtor with cash on hand can deal with it in accordance with its own administration.[27]

A FR may avail itself of the following remedies:

a) a preferential payment action;[28]
b) a transfer at undervalue;[29]
c) set-off or, in Québec, compensation;[30]
d) an action setting aside void or voidable transactions;[31]
e) disgorgement of:
    i. the payment of dividends and the proceeds from certain redemptions or repurchases of shares; and
    ii. certain payments of termination pay, severance pay, incentive benefits or other benefits to directors, officers and other persons who manage or supervise the management of the business and affairs of the corporation;[32] and
f) assignment of proceedings by a trustee in bankruptcy to a creditor.[33]

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[24] *Nortel Networks Corp., Re,* 2015 ONSC 4170, 2015 CarswellOnt 10304 (S.C.J. [Commercial List]), leave to appeal refused 2016 ONCA 332, 2016 CarswellOnt 6785, application/notice of appeal *Nortel Networks Inc. v. Pension Protection Fund*, 2016 CarswellOnt 14117 (S.C.C.).

[25] *Nortel Networks Corp., Re*, 2015 ONSC 4170, 2015 CarswellOnt 10304 (S.C.J. [Commercial List]), at paras. 19 and 20, leave to appeal refused 2016 ONCA 332, 2016 CarswellOnt 6785, application/notice of appeal *Nortel Networks Inc. v. Pension Protection Fund, 2016 CarswellOnt 14117* (S.C.C.).

[26] *Nortel Networks Corp., Re*, 2015 ONSC 4170, 2015 CarswellOnt 10304 (S.C.J. [Commercial List]), at paras. 33 and 40, leave to appeal refused 2016 ONCA 332, 2016 CarswellOnt 6785, application/notice of appeal *Nortel Networks Inc. v. Pension Protection Fund*, 2016 CarswellOnt 14117 (S.C.C.).

[27] *Nortel Networks Corp., Re*, 2016 ONCA 332, 2016 CarswellOnt 6785, at para. 31(f).

[28] BIA, ss. 95(1) and (2), which are incorporated by reference in s. 36.1(1) of the CCAA.

[29] BIA, s. 96(1), which is incorporated by reference in s. 36.1(1) of the CCAA.

[30] CCAA, s. 21; BIA, s. 97(3).

[31] BIA, s. 98, which is incorporated by reference in s. 36.1(1) of the CCAA.

[32] BIA, s. 101, which is incorporated by reference in s. 36.1(1) of the CCAA.

[33] BIA, s. 38, which is incorporated by reference in s. 36.1(1), CCAA.

If an order is made recognizing a foreign proceeding, the FR may commence and continue proceedings under the CCAA or the BIA, as the case may be, as if the FR were the debtor or a creditor of the debtor.[34]

In *Tucker v. Aero Inventory (UK) Ltd*.,[35] the court temporarily lifted a mandatory stay order so that the FR could assign the debtor into bankruptcy under the BIA. The purpose was to pursue a preferential payment and transfer at the undervalue proceeding under the BIA, including fixing an early date for the initial bankruptcy event.

[34] CCAA, s. 51; BIA, s. 274.

[35] *Tucker v. Aero Inventory (UK) Ltd.*, 2010 ONSC 1196, 2010 CarswellOnt 1094 (S.C.J. [Commercial List]).

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C 36, AS AMENDED;

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC. ET AL.

Applicants

Court File No. CV-21-00658423-00CL

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