

# focus

on

## Insolvency Law

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FRASER MILNER CASGRAIN LLP

### STAY OF PROCEEDINGS LIFTED IN CROSS-BORDER REORGANIZATION TO ALLOW PURSUIT OF INSURED CLAIM

In *Re: Carrey Canada Inc.* (2006) CarswellOnt. 7748, the Ontario Superior Court considered an application for the lifting of the stay to allow certain creditors of the debtor to pursue a claim which may have been insured under the debtor's liability policy.

The debtor obtained a stay of proceedings pursuant to an Order under section 18.6(4) of the *Companies' Creditors Arrangement Act* ("CCAA") which recognized and enforced a General Claims Bar Order and Confirmation Order issued by the US Bankruptcy Court in connection with a Joint Plan of Reorganization of the debtor's parent company and the debtor in the United States.

Certain claimants applied to the Court for an Order lifting the stay of proceedings and permitting them to continue with certain actions against the debtor for the limited purpose of allowing the claimants to obtain judgments against the debtor which were to be enforceable only against the liability insurer of the debtor.

Ultimately, the Court allowed the application, relying heavily on the decision of the Ontario Court of Appeal in *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449, which held that the protection afforded by the CCAA was meant for the debtor seeking such protection, was not to insulate insurers from providing appropriate indemnification, and that the insurer's rights and options would be the same whether the debtor was or was not the subject of CCAA proceedings.

The debtor attempted to distinguish *Algoma Steel*, on the basis that the Canadian Court was (in this case) being asked to lift the stay of proceedings created by the US Bankruptcy Court in the context of US bankruptcy proceedings. Therefore, the debtor submitted, it was inconsistent with the principles of comity for the Canadian Court to pick and choose which provisions of the US Order should be enforced and which should not, especially in light of the fact that the Canadian Court had previously ordered the recognition of the US Order.

The Court rejected this argument on the basis that (1) it was the debtor itself that initiated the motion before the Canadian Court expressly seeking a stay of proceedings and recognition of the US Order, (2) Ontario was the "natural forum" for the claims, as all the parties were located in Ontario, as were the sites of the environmental claims at issue, and (3) application of Ontario law (section 132(1) of the *Insurance Act* (Ontario)) was at issue, and was best dealt with by the Canadian Courts.

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