

# focus

on

## Insolvency Law

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### ANCILLARY FOREIGN PROCEEDINGS IN CANADA

Lear Corporation, a Delaware corporation, its Canadian subsidiaries, and other affiliates, sought an Order under s. 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA") for a declaration that Chapter 11 proceedings in the U.S. Bankruptcy Court (New York) constituted "foreign proceedings" and for a stay of proceedings. Introduced to the CCAA in 1997 to assist with the administration of the increasing number of cross-border insolvencies, s.18.6 is aimed at increasing cooperation, comity, and coordination between courts of different jurisdictions.

Section 18.6 defines a "foreign proceeding" as "a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally". It is trite law that U.S. Chapter 11 proceedings fall within this definition. The Court has broad discretion to make orders on terms it considers appropriate, with the purpose to facilitate the aims of the CCAA and of s. 18.6 generally.

Whereas s. 18.6(2) permits a debtor company to bring an application for recognition of a foreign proceeding, s. 18.6(4) grants the same right to any "interested" person. In *Re Babcock & Wilcox Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), the Court confirmed that an interested person need not meet the definition of "debtor company" under the Act, i.e. need not be insolvent, greatly widening the scope of applicants under that section. In the application of Lear and its affiliates, the Court determined that all of the applicants (aside from the debtor) were interested persons, including a partnership.

The Court outlined the requirements of s. 18.6: it is important to determine if a real and substantial connection exists between a matter and the foreign jurisdiction. In light of the principle of comity, and avoiding a multiplicity of proceedings, it is appropriate that a foreign Court exercise control over insolvency

proceedings, including the interests of Canadian creditors. This promotes stability and certainty, and helps to ensure the most equitable and fair treatment of creditors as is possible.

The Court found a real and substantial connection between Lear's Canadian, U.S., and international operations and the forum of the United States. Lear's Canadian entities were a part of a multi-national enterprise (across 36 countries) with operations in North America being managed out of a U.S. corporate headquarters. Moreover, the U.S. enterprise provided significant operational support to the Canadian entities, and was important to its continued future success. The Court additionally sought to avoid a multiplicity of proceedings, to assist the applicants in carrying on business in as normal a fashion as possible, and to preserve value.

Factors the Court considered important to assess in any s. 18.6 application include the anticipated efficiency and speed of the restructuring, particularly where the Canadian component of an international enterprise is relatively small. The Court should also consider the impact on Canadian stakeholders, should the order be granted, including whether any juridical advantage to Canadian creditors would be compromised. If there is prejudice to Canadian stakeholders, while this may not warrant the refusal of the s. 18.6 relief, it may require the Court to incorporate necessary protections into the discretionary order.

The Order was granted with provisions including a stay of proceedings, restrictions on cash flow outside of the ordinary course of business, administrative and directors' charges, a comeback clause, and the appointment of an Information Officer (with a role akin to a monitor in full-fledged CCAA proceedings). Lastly, the Court sought the aid and assistance of the U.S. Courts in any proceedings wherein the Information Officer would seek standing before that Court.

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