

# focus

## on

# Insolvency Law

May 2009

The logo for Fraser Milner Casgrain LLP, consisting of the letters 'FMC' in white on a dark blue square background.

FRASER MILNER CASGRAIN LLP

### RECOGNITION OF FOREIGN PROCEEDINGS

Magna Enterprises Corp. (“MEC”), a foreign bankrupt corporation, brought an application for ancillary relief pursuant to s. 18.6 of the CCAA. Section 18.6 gives the court 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 this Act with any foreign proceeding”.

MEC is a publicly traded Delaware corporation with its head office in Aurora, Ontario. On March 5, 2009, prior to this application, MEC and certain subsidiaries filed for bankruptcy protection pursuant to Chapter 11 of the United States Bankruptcy Code.

The applicant relied on the fact that, while the restructuring will be principally administered by the U.S. Bankruptcy Court, MEC’s management is based in Canada and MEC has assets in Canada. MEC also relied on the following facts to support their s. 18.6 application: (i) MEC and its U.S. Debtor Affiliates have filed for Chapter 11 protection and operate under the automatic stay of proceedings such a filing provides; (b) MEC owns and manages horseracing and gambling facilities in the U.S. and Austria, but does not operate any in Canada; (c) MEC only employs 25 residents of Canada at its head office; (d) only 6 of MEC’s 50 subsidiaries are Canadian based; (e) for the year ended December 31, 2007, 96.6% of MEC’s revenues were generated in the U.S., and no revenues were generated from Canada; (f) MEC has no real properties, fixed assets, racing licenses in Canada; (g) the MEC restructuring is expected to be complex and will require MEC’s management in Canada to devote a significant amount of time to the restructuring – a multitude of creditors in Canada would distract management from its task.

In exercising discretion under s. 18.6, the court should consider whether there is a real and substantial connection between a matter and the foreign jurisdiction. Canadian courts have held that “where a cross-border insolvency is most closely connected to one jurisdiction, it is appropriate for the court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings”. Justice Morawetz found a real and substantial connection between MEC and the United States.

Since all of MEC’s management and accounting functions are performed at its head office in Canada and because restructuring is likely to be complex, thereby requiring MEC’s management in Canada to devote significant time to the restructuring, Morawetz J stated that a recognition order and stay in Canada would ensure order, predictability, and fairness. He also held that a stay of proceedings in Canada which mirrors the stay in the U.S. would be of assistance to ensure the orderly restructuring of MEC. Morawetz J granted the following relief:

- (a) recognizing the U.S. bankruptcy proceedings;
- (b) staying proceedings in Canada in respect of MEC;
- (c) placing a prohibition on interfering with the rights of MEC; and
- (d) requiring relevant parties to continue to provide services to MEC.

For further information please contact David Mann at 403 268-7097 or David LeGeyt at 403 268-3075, or visit our website [www.fmc-law.com/insolvency](http://www.fmc-law.com/insolvency).