

# focus

## on

# Insolvency Law

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### IN RECOGNIZING A FOREIGN INSOLVENCY PROCEEDING CANADIAN COURT GRANTS STAY OF PROCEEDINGS IN CANADA

Courts have broad discretion to grant orders under s. 18.6 of the CCAA in cases where there is no formal Canadian bankruptcy filing.

Magna Entertainment Corp. ("MEC") is a publicly-traded Delaware corporation with its head office in Ontario. On March 5, 2009, MEC and certain of its U.S. subsidiaries filed for Chapter 11 protection in the United States. Although MEC's management is based in Canada and MEC has assets in Canada, MEC's main interests and majority presence are in the U.S.

Because of the limited (though still sizable) presence of MEC in Canada, MEC sought an order under s. 18.6 of the Companies Creditors' Arrangement Act, but did not initiate a full CCAA filing. 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".

The basis of MEC's application was that "the MEC restructuring is expected to be complex and will require MEC's management in Canada to devote significant time to the restructuring and a multitude of creditor actions in Canada would distract management from this task, which could impair the orderly restructuring of MEC and the U.S. Debtor Affiliates' operations".

The test that the Court applied in exercising its discretion under s. 18.6 was whether there is a "real and substantial connection" between the matter and the foreign jurisdiction. It is appropriate for principal control to be exercised in the jurisdiction to which the debtor company is most closely connected, and to have collateral support from all other jurisdictions in which proceedings may be initiated. In cross-border insolvency processes, the principles of comity are of foremost importance in order to avoid a multiplicity of proceedings.

Justice Morawetz was satisfied that MEC and its U.S. subsidiaries should reorganize as a global unit, and that the process would be best supervised by the U.S. Bankruptcy Court. Under the authority granted by s. 18.6, and without instituting full CCAA proceedings, the Court granted an order 1) recognizing the U.S. bankruptcy proceedings, 2) instituting a stay of proceedings in Canada, 3) prohibiting interference with rights of MEC (i.e. contractual rights), and 4) requiring the continued provision of services to MEC. This was intended to ensure order and predictability, and provide a greater chance of success to the foreign restructuring.

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