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Olympia & York: Navigating Uncharted Waters

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Due to its size, complexity and economic impact, the Olympia & York restructuring was virtually unprecedented in Canadian debtor-creditor relations. The enormity of the Olympia & York debt,[1] the number of major financial institutions involved and the public interest in the concurrent legal proceedings in Canada, the United States and the United Kingdom, combined to make this insolvency an international event.

This paper begins by reviewing the background of the Olympia & York group of companies, and then proceeds to describe the novel approach adopted in order to enable the debtor companies to finance themselves during the court-supervised restructuring process, the cross-border implications[2] of concurrent proceedings under the *Companies'*

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1 The aggregate indebtedness of the Olympia & York group of applicants (29 altogether) amounted to about Cdn $13.5 billion.

2 Although certain legal entities in the Olympia & York group were in administration in the United Kingdom, the English insolvency proceedings had no material impact on the proceedings in Canada and the U.S. One exception involved

Creditors Arrangement Act ("CCAA") and Chapter 11 of the *U.S. Bankruptcy Code* ("Chapter 11") and, finally, the process of reaching a consensus among disparate groups of creditors which culminated in court approval of the CCAA plan.

1. BACKGROUND

Many of the unique aspects of the Olympia & York restructuring result from the intricacies of the corporate structure of the Olympia & York world-wide group of companies. Consequently, prior to examining the details of the restructuring process, some understanding of the corporate structure of the companies is important.

When court protection was sought in May 1992, Olympia & York,[3] through a complicated ownership structure, owned and operated numerous major commercial real estate projects in Canada[4] and the United States. It had completed nearly two phases of the six-phase Canary Wharf Project in London, had a controlling interest in Gulf Canada Resources Limited (the largest Canadian owned and publicly traded company engaged in the exploration and production of oil and natural gas), a controlling interest in Abitibi-Price Inc. (the world's largest producer of newsprint) and a major interest in each of Trizec Corporation Ltd. (a large real estate conglomerate) and Santa Fe Pacific Corporation (a major U.S. railroad conglomerate).

In Canada, all of the Olympia & York companies were organized around a centralized management structure and, in the ordinary course of their business, operated under a centralized cash management system. This meant that revenues generated by the various assets and operations of the group, as well as drawings under various loan facilities, were utilized indiscriminately to meet current obligations of all of the companies. O & Y's U.S. real estate interests, although ultimately

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a motion brought by American Express in Canada seeking to serve a termination notice in respect of its lease at Canary Wharf.

3 Olympia & York Developments Ltd. ("OYDL") was the parent of a world-wide group of companies operating primarily in Canada, the United States and England. For ease of reference, the family of companies is referred to hereafter as "Olympia & York" or as "O & Y".

4 Major projects in Canada include First Canadian Place, The Exchange Tower, Scotia Plaza and Aetna Canada Centre in Toronto, 240 Sparks Street and L'Esplanade Laurier in Ottawa, Edmonton City Centre in Edmonton and Fifth Avenue Place, Amoco Centre and Shell Centre in Calgary.

controlled by management of OYDL in Toronto, were operated separately from the Canadian assets, with the day-to-day management being at the Olympia & York offices in New York City.

An unusual feature about the group, especially from a Canadian perspective, was that Olympia & York did not have an operating lender but, rather, dealt with numerous financial institutions around the world for a variety of financing purposes. The consequences of this multi-faceted financing structure will be discussed in a later section of this paper.

2. DECISION TO SEEK COURT PROTECTION

There were numerous reasons for the financial erosion of Olympia & York, including (i) the extent and duration of the worldwide real estate meltdown and the resulting credit crunch, (ii) the collapse of commercial paper programs utilized by O & Y for some of its financing requirements, and (iii) difficulties relating to the Canary Wharf development. These three factors, together with a number of others of lesser significance, created a severe cash squeeze in late 1991. The cash squeeze was exacerbated when an expected $275 million financing, scheduled to close in early 1992, was reduced by the lenders to $131 million. Because this financing required O & Y to grant security on most of its residual equity in its Canadian real estate, access to additional sources of financing virtually evaporated.

By the beginning of May, 1992, it became obvious to Olympia & York that a court supervised restructuring of its debt was required to avoid financial collapse. OYDL, through a complex corporate unlimited partnership structure, owned 80% of the O & Y controlled U.S. assets, with the other 20% being owned, through a similarly complex structure, by various Reichmann family companies. The first issue which arose was whether, and to what extent, there should be filings concurrent in Canada and the United States.[5]

[5] The resolution of this issue does not always result in concurrent filings, notwithstanding multinational components in an insolvency. The most striking recent Canadian example is that of Bramalea Limited, consisting of 25 Canadian corporations and 14 U.S. subsidiaries and affiliates, which filed under the CCAA in Canada in December 1992. The link with the U.S. affiliates was restricted to the assertion that the Bramalea group was a single integrated business. The Court imposed a global stay of proceedings, not only with respect to Bramalea itself but also with respect to numerous affiliates, including U.S. single purpose limited

There has been much public speculation as to the motivation for the concurrent filings in Canada and the United States. One leading counsel for a major U.S. creditor[6] has gone so far as to suggest publicly that the concurrent filings were nothing more than an attempt on O & Y's part and its counsel to achieve "cognitive dissonance" among creditors by, in effect, dropping the cat among the multi-jurisdictional pigeons. While hesitating to reject the compliment to the authors of this paper's intelligence (albeit unintended) implicit in that analysis, the reason for the concurrent filings was much less sophisticated and forms an appropriate starting point for a discussion of some of the principal multinational or cross- border issues raised by the O & Y mega-insolvency.

The law of creditors' rights in Canada, loyal to its English common law underpinnings, remains essentially creditor-friendly. As a basic principle, subject to few and limited exceptions, Canadian law recognizes and enforces the contractual rights which are freely negotiated by creditors and debtors. On the other hand, American insolvency law, as articulated in Chapter 11, reflects a greater bias towards debtor rehabilitation based on a concern for the interests of all stakeholders in the enterprise, such as employees, equity holders, unsecured creditors and the communities in which the enterprise carries on business. In Chapter 11, the interests of these stakeholders often prevail over the contractual rights of secured creditors. The mechanism for tilting this balance is reflected in the elaborate, well-defined code comprised by Chapter 11, as supplemented by extensive judicial and regulatory interpretation.

In Canada, prior to the 1992 amendments to the BIA[7] revising the Act's proposal provisions, the CCAA presented the only possibility for achieving a compromise with creditors under the umbrella of a judicially imposed stay which did not require the agreement of all creditors to the amendment of their contracts. Unlike Chapter 11,

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partnerships whose principal assets were in the U.S. For a discussion of the scope of the Bramalea order, see Christopher W. Besant, *Cross- Border Reorganizations in Canada: The Bramalea Case, Parts I and II*, Newsletter of Committee J: Insolvency and Creditors' Rights, International Bar Association, Vol. 5, No. 2 (December, 1993) and Vol. 6, No. 1 (June, 1994).

6 The remark was made by counsel for Citibank at the "Conference on International and Comparative Commercial Insolvency Law" held at the Faculty of Law, University of Toronto from June 24 to June 26, 1993.

7 *Bankruptcy and Insolvency Act*, R.S. 1992, c. 27, ss. 2, 50-66.

however, the CCAA stay is only granted at the discretion of the court, usually after a hearing at which all parties with an interest may be represented. Under Chapter 11 and under the proposal provisions of the BIA, the stay issues automatically on the initial filing. One reason, therefore, for the decision to effect concurrent U.S. and Canadian filings in O & Y's case, was to obtain the benefit of the automatic stay under Chapter 11, given the possibility that a Canadian filing and request for a stay was likely to be contested. It was hoped that the automatic stay under Chapter 11 would hinder creditor initiated adversarial proceedings sufficiently long enough to permit the Ontario Court to hear the applicants' arguments in favour of granting the CCAA stay.

There was also a significant substantive reason for the concurrent filings. All of the five U.S. applicants were indirect owners of U.S. assets. Although Olympia & York's U.S. operations were considered to be financially healthier than the Canadian operations, it was clear that a massive restructuring of the U.S. operations would also be required. Indeed, discussions with nervous U.S. creditors were already under way. The imposition of the stay for the five U.S. applicants would create a "fire wall" preventing U.S. creditors from moving through the intricate web of U.S. and Canadian partnerships to the ultimate Canadian parent. At the same time, Canadian creditors would effectively be barred from acquiring immediate control of the U.S. restructuring process. Moreover, the protection afforded debtors under Chapter 11 in itself provided grounds for some optimism as to the potential rehabilitation of Olympia & York's U.S. operations.

The ultimate decision was to institute proceedings under the CCAA and to commence concurrent voluntary and full Chapter 11 cases for the five intertwined companies. The alternative possibility of seeking recognition of the Canadian proceedings under s. 304 of the U.S. Bankruptcy Code was rejected for the following reason. Under s. 304, only a foreign representative (i.e., a "duly selected trustee or administrator, or other representative of an estate in a foreign proceeding"[8]) is entitled to commence ancillary proceedings. "Foreign proceeding" is defined in the Bankruptcy Code to mean:

> [P]roceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets are located at the commencement

[8] *Bankruptcy Code*, s. 101.

> of such proceedings, for the purpose of liquidating an estate, adjusting debts by composition, extension or discharge, or effecting a reorganization.[9]

Because there is no trustee under a CCAA filing and it was not the Canadian applicants' intention to seek the appointment of a monitor, it was unclear whether the threshold condition for the use of s. 304 existed. Consequently, on May 14, 1992, five Chapter 11 cases were commenced. As soon as word was received from U.S. counsel that the Chapter 11 cases had been filed with the appropriate court officer, a joint application was made on behalf of the 29 Olympia & York companies (including the five that filed for Chapter 11) seeking protection under the CCAA.

(a) Commencement of Proceedings

On the afternoon of May 14, 1992, an *ex parte* application was made on behalf of O & Y in an empty Toronto Court room seeking to enjoin all creditors from enforcing their security between the time that they received notice of the CCAA application and the time that the Court ruled on the application. Mr. Justice Robert Blair of the Ontario Court of Justice, General Division, indicated that he would view any attempt by a creditor to take advantage of notice of the application as a pre-emptive strike which could be reversed by the Court. He therefore refused the injunction and the hearing of the application under the CCAA seeking, among other things, a stay of proceedings, was adjourned to 8 o'clock that evening. O & Y's major creditors were served with notice of the CCAA proceedings at approximately 6 o'clock that evening.

An insolvency of national and international importance impacts on real estate, stock, bond and currency markets. Consequently, maintaining secrecy in respect of the decision to file as well as the timing of the proposed filing is crucial. When counsel for Olympia & York appeared at 8:00 p.m. to present the application, the Court House was overflowing with lawyers, journalists and spectators. Despite the number of people involved in the preparation of the Canadian and U.S. filings, there do not appear to have been any leaks prior to or during the day of May 14, 1992, with the result that the market was able to digest the impact of the filings during the night of May 14-15 rather than

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9 *Bankruptcy Code*, s. 101(22).

during the day when markets were open. At about midnight on May 14, 1992, Mr. Justice Blair granted an order substantially in the terms proposed by the applicants and stated that failure to have granted the protection to Olympia & York could have had "cataclysmic" consequences.

The May 14 CCAA order authorized the applicants to file a plan of compromise or arrangement by July 13, 1992, and to convene meetings of creditors by September 21, 1992. It enabled O & Y to remain in possession of its property and to continue to carry on its business in the ordinary course as long as no steps were taken to impair the security of lenders. The order provided that the applicants were to make no payments of capital or interest on account of amounts owing to lenders during the stay period expiring October 21, 1992, but did not prevent the applicants from paying trade creditors the amounts owing to them as at the date of filing. The order was novel in that it also contemplated the constitution of creditors' committees to represent the various groups of creditors. It also provided for the appointment of an "information officer" who was empowered to gain access to the books and records of the applicants and was required to respond to any reasonable request for information from creditors. Because of the importance of these features of the order we proceed to discuss them more fully in the following paragraphs.

(b) Creating New Roles

(i) Information officer

Traditionally, in CCAA proceedings, the court appoints a monitor or coordinator to fulfil a role generally analogous to that of a bankruptcy trustee under a proposal. The monitor or coordinator is generally empowered to limit, to some degree, the debtor's freedom to manage its affairs during the court supervised restructuring. However, in O & Y's case, the applicants were anxious to avoid the appointment of a monitor or coordinator and to allow O & Y's management to retain maximum control over its affairs during the court supervised restructuring process. The innovative concept of information officer was proposed by the applicants and incorporated into the CCAA order both to satisfy their needs and also to meet a creditors' complaint, often voiced prior to the CCAA filing, about O & Y's secrecy in dealing with its creditors. In conjunction with the appointment of the information officer, an information room was established in which copies of hundreds of relevant documents were deposited for review and inspection by creditors. The information officer was also required by the May 14 order to prepare reports on at least a monthly basis for distribution among the creditors' committees providing information, *inter alia*, about the financial affairs of the applicants and details on the cash flows of their operations. At the same time, the May 14 order clearly limited the powers of the information officer and stated expressly that he could not take possession of the applicants' property or manage their business and affairs.

(ii) Creditors' Committees

Because of the number of competing creditors and the virtual impossibility of dealing with them on a one-to-one basis, the applicants proposed the establishment of creditors' committees for groups of creditors linked with a community of economic interests. Pursuant to the order, each of the committees was to comprise no more than three representative creditors from each group. One of the incentives for the acceptance of the creditors' committee structure was that the applicants undertook to pay the costs and expenses of the professionals advising the committees. These costs and expenses amounted to several million dollars.

In early June, 1992, lengthy discussions were held between representatives of the applicants and the lenders on appropriate groupings of creditors and to designate the appropriate creditors' committees. On June 5, 1992,[10] Blair J. issued an order identifying six groups of creditors for the purposes of establishing the committees. The creditors were primarily grouped depending on whether or not they were secured creditors. Accordingly, creditors who had advanced funds against the security of marketable (ie., publicly traded) securities comprised one group; lenders who had advanced funds directly against the primary security of the applicants' Canadian real estate formed another; and lenders who had advanced U.S. $2.5 billion against the security of the Gulf and Abitibi control blocks formed a third committee. Most importantly, one of the committees which was struck

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[10] Unreported, Doc. No. B125/92.

was mandated to represent the interests of unsecured, under-secured and contingent creditors of the applicants.

The initial creditor response to the proposed formation of creditors' committees was extremely negative. Creditors were concerned that the constitution of these committees would prejudge the ultimate classification of their claims for purposes of voting on the plan. Project lenders, in particular, were concerned that they would be inappropriately grouped into larger lender classes in order to have the plan "crammed down" on any reluctant dissenting minority in each class. Ultimately, the organization of creditors into committees was of great assistance in facilitating negotiations between the applicants and the creditors and did not have the adverse consequences anticipated by creditors. On the contrary, although creditors were grouped into only six creditors' committees, 37 classes of creditors were ultimately identified for purposes of voting on the Plan.

(c) Pre-Petition Debts

One of the cornerstones of the Canadian restructuring, as it evolved, was that trade creditors and employees were to be immune from the restructuring process. The payment of pre-existing trade debt was, however, of some concern to counsel for O & Y's U.S. entities since the automatic stay provisions in the Bankruptcy Code provide for a stay in respect of the collection, assessment or recovery of any pre-petition claims.[11] Fortunately, in the context of O & Y's aggregate debt, the amounts involved for the payment of suppliers of goods and services were insignificant so that the payment of pre-petition debts never became a significant issue in either the CCAA proceedings or the Chapter 11 cases.

(d) Debtor in Possession Funding

The CCAA does not recognize the concept of debtor-in-possession financing with its concurrent American law concepts of adequate protection, protection against the use of cash collateral and other protective measures. Canadian creditors' psyche is inherently suspicious of the debtor-in-possession. Canadian insolvency practice envisages the

[11] *Bankruptcy Code*, s. 362(*a*).

naming of monitors or interim receivers to supervise, if not to control, receipts and disbursements, whereas the legislative history of s. 1108 of the *Bankruptcy Code* shows a bias towards continued "normal" operation of a debtor's business during the reorganization period.

Under s. 364(*a*) of the *Bankruptcy Code*, the debtor is permitted to obtain unsecured credit in the ordinary course of its business without prior court approval. Typically, the type of debt incurred under this provision is straight credit and these debts are entitled to a first priority administrative expense.[12] Chapter 11 also provides for court authorization of a priority over all administrative expenses in the form of a lien on unencumbered property or a junior lien on property of the estate subject to a prior lien.[13] Finally, s. 364(*d*) of the *Bankruptcy Code* enables the court in some circumstances to permit the debtor to obtain credit by granting a super priority lien or lien of equal rank with existing liens on property of the estate providing the existing security interests are adequately protected.

Within a week of the May 14, 1992 order, a number of creditors who held security on specific assets brought motions before the Court seeking to segregate revenues in order to ensure that the rents from buildings owned by a specific applicant would not be used to pay the expenses of another building (generally owned by a different member of the O & Y group). Because of the centralized cash management system historically employed by O & Y, such a segregation was inconsistent with its previous activities and, more importantly, without the access to revenues from specific assets, the applicants would be unable to finance their general, administrative and restructuring costs. These costs became known during the course of the restructuring as the "GAR costs".

The issue as to who would fund the GAR costs, as well as the attempt by certain creditors to create "lock boxes" around various secured assets, occupied most of the time and energy of the participants in the restructuring process during the months of May and June. The questions related to the funding of GAR costs pitted secured creditors against unsecured creditors because secured creditors with security on specific assets were seeking to have the bulk of the GAR costs paid

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[12] Louis P. Rochkind, "Chapter 11 of the Bankruptcy Code: An Overview", in *Corporate Restructuring*, Insight Press, Seminars held in Toronto on November 26, 1991, and May 5-6, 1992, at p.22.

[13] *Bankruptcy Code*, ss. 503(*b*), 507(*b*) and 364(*c*).

from the proceeds of the sale of unencumbered assets. The position of several secured project lenders was that because the unsecured creditors had the most to gain from a restructuring, they should bear the brunt of the GAR costs. The unsecured and undersecured creditors took issue with this approach and advocated a fair distribution of the GAR costs.

Issues relating to adequate protection as it is understood in American law have never really been debated in the Canadian context. American practice accepts with judicial equanimity the fact that secured property of an estate may be used for financing, subject to adequate protection[14] of the existing secured creditor. Canadian secured creditors, on the other hand, at least until the Olympia & York case, viewed with concern, if not horror, the prospect of using the proceeds of the sale of inventory, collection of receivables or cash flow from rental receipts for restructuring purposes if they were encumbered with existing security interests.

It had always been an article of faith that a Canadian restructuring could not be commenced unless it was supported by a lender or group of lenders who would continue to fund the necessary expenses attendant upon restructuring. As previously explained, O & Y did not use an operating lender in the usual sense of that term, and could not look to funding by such a lender in the CCAA filing. It therefore followed that it would have to fund itself out of available cash flow while at the same time suspending all interest and principal payments to its lenders. The extent of the incursion into cash flow became a matter of significant concern to secured lenders who considered themselves already to be so undersecured as to make any inquiry into adequate protection an academic exercise.

In the result, a hybrid and unique type of funding was put in place. The system was grounded on a two-pronged basis for financing GAR costs: (a) the application of cash flow from secured assets, such as rentals from real property and dividends from securities, to cover the costs of managing the encumbered asset and to pay a management fee to cover overall GAR costs; and (b) the sale of unencumbered assets to generate further revenues to fund GAR costs. The GAR funding system was initially set forth in a July 3, 1992 order of the Court[15] and was extended and amended in three subsequent orders.

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[14] *United States v. Whiting Pools Inc.*, 462 U.S. 198, esp. at 203-204 (1983).

[15] Unreported, Doc. No. B125/92.

As a result of this mechanism, which was ultimately consensual albeit with no small degree of judicial encouragement, the interested parties were able to avoid at least the appearance of an imposed diminution in value of the security although some of the secured creditors were, and remain, of the view that the GAR compromise had the effect of damaging secured lending in Canada. This perception is rendered more acute because each piece of real estate was generally held by a separate O & Y corporation. The perception persisted that the cash flow thrown off by an asset in one corporation, which ought to have been used to service the debts of that corporation, was instead used to finance and support the restructuring of another corporation. So much for ring- fencing![16]

(e) Creation of Court Ordered Security Interests

There is a bias in Canada against allowing a debtor in a restructuring environment to grant security on assets which are otherwise encumbered or, if unencumbered, available to meet the claims of creditors.

The GAR order, as amended, contemplated that a list of unencumbered assets of the applicants would stand charged, by way of a fixed and specific mortgage and charge in favour of the secured creditors who had "overfunded" the GAR costs. The overfunding was the amount by which the GAR costs assessed to classes of secured creditors in respect of a particular asset exceeded the sum of the direct operating costs and the management amounts for such asset. Despite the creation of this first charge on the unencumbered assets, the applicants were also authorized by the Court to borrow against the security of such

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[16] Canadian courts continue to wrestle with the issue of how to finance the debtor during the court protective period and prior to the completion of the reorganization. The solution adopted in *Olympia & York* is typical of the *ad hoc* solutions which have found their way into Canadian law, in the absence of a specific legislative provision. See, as an example, *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 101 (B.C.S.C.); *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.); *Re Horizon Village Corp., Canada* (1991), 8 C.B.R. (3d) 25 (Alta. Q.B.); *Re Philip's Manufacturing Ltd.* (1991), 9 C.B.R. (3d) 1 (B.C.S.C.); *Station Mont-Tremblant Inc. v Banque Commerciale du Canada* (1984), 54 C.B.R. (N.S.) 241 (Que. S.C.); *Pacific National Lease Holding Corp v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C.C.A.); and *In Re Eaton Company*, (unreported) February 27, 1997 (Houlden J.).

unencumbered assets granted in priority to the charges securing the overfunding of GAR costs as long as the borrowed amounts would, in turn, stand charged in favour of the overcontributing secured creditors. Although this mechanism was complicated and cumbersome, it did provide the applicants with flexibility in the funding of their operations during the restructuring.

(f) Sale of Assets

Part of the funding, designed to provide the applicants with enough time to submit a reorganization plan, arose from the authorized sale of their unencumbered assets. The potential for sale of these assets was adversely affected by s. 71(1) of the *Bankruptcy Act* (as it then was[17]). This stipulates that the effective date of the bankruptcy is retroactive to the date of the filing of the petition. As a consequence of that retroactivity, transactions entered into during the period between the filing of a petition and the judgment granting a petition are voidable unless they are entered into in good faith and without knowledge on the part of the person contracting with the debtor of the debtor's commission of an "act of bankruptcy". Since petitions in bankruptcy had been filed against all of the applicants but had been suspended pending the outcome of the CCAA proceedings, parties dealing with the applicants were legitimately concerned about the prospects of their transactions being annulled, should the CCAA Plan not succeed and should a receiving order be issued against the relevant applicant. This concern required the creation of a procedure which would give some comfort to persons acquiring unencumbered assets from the applicants.

The solution was to obtain court approval and direction with respect to transactions of any significance. The first and largest transaction related to the sale by an Olympia & York subsidiary of its shareholdings in Santa Fe Energy Resources Inc., a transaction which had been planned prior to the filings. The fact of the filings, however, made the underwriting of shares particularly tense and necessitated concurrent orders from both the Canadian and American courts authorizing the transaction with the appropriate safeguards to protect the interests of secured creditors holding pledges of the Santa Fe shares.

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[17] Section 71(1) was repealed in the 1997 amendments to the BIA, S.C. 1997, c. 12, s. 67, which did away with the "relation back" doctrine generally.

(g) Companion Orders

During the course of the O & Y CCAA proceedings, Mr. Justice Blair issued more than 70 orders. In cases where the applicants deemed that court approval of any particular transaction was required by both the Canadian Court and the U.S. Bankruptcy Court, the applicants sought companion orders in the Chapter 11 cases. The CCAA order dated May 14, 1992, included the following provision:

> THIS COURT SEEKS AND REQUESTS the aid and recognition of any Court or administrative body in any province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

As discussed above, by separate orders obtained from the Ontario Court and the U.S. Bankruptcy Court, O & Y and Olympia & York SF Holdings Corporation were authorized to sell their interest in Santa Fe Pacific Corporation and Santa Fe Energy Resources Inc. for net proceeds in excess of $500 million. Similar companion orders were rendered in respect of the GAR funding provisions and various other matters.

Obtaining companion orders was not always a simple matter. There was an ongoing concern, certainly not intended by any of the counsel, that an American or Canadian court would view itself as being dependent on or serving the other court and there was a concern by the applicants (shared, incidentally, by the bulk of the creditors) that such a perception could adversely affect the course of the restructuring. Fortunately, the skill and manifest competence of both judges was such that non-consensual dismissal of the proceedings in either jurisdiction by reason of the primacy of the other jurisdiction in respect of a specific matter never became an issue.

(h) Use of Protocols

In cases where there is no insolvency treaty between competing jurisdictions, the use of a protocol can, in certain circumstances, reconcile differences between local insolvency laws. *Maxwell Communication Corporation plc* was a case where the debtor company was simultaneously engaged in two primary bankruptcy proceedings[18] and, subject to different courts and, naturally, different decisions. In that case, the goal was to harmonize the Chapter 11 proceedings with the UK administration proceedings in order to facilitate a rehabilitation and reorganization of the debtor.[19]

In the O & Y case, an analogous agreement was a Memorandum of Understanding pursuant to which the five applicants who were subject to both the CCAA proceedings and the Chapter 11 cases were authorized to retain and compensate professionals pursuant either to the CCAA proceedings or the Chapter 11 cases.

The BIA provides for a technique of taxation of professional fees whereas the CCAA has no control mechanism with respect to the payment of fees to professionals. Although the CCAA order of May 14, 1992, and subsequent GAR Orders provided for Price Waterhouse, in its role as information officer, to review the reasonableness of monthly GAR costs, including professional fees, the rules in respect of the payment of professional fees were far less rigid than those under Chapter 11. O & Y's U.S. insolvency counsel were quite concerned about the incongruity of the two systems and the ability of OYDL, as an applicant under both the CCAA and Chapter 11, to pay the professionals in the Canadian case without the sanction of the U.S. Bankruptcy Court. The protocol of understanding, sanctioned by the U.S. Court, adopted a territorial theory of professional engagement and fee determination.

Effectively, those professionals who were rendering services in the United States were to be governed, so far as the five corporations which had filed jointly in Canada and in the United States were concerned, by American rules of procedure while professionals rendering services in Canada were to be governed by Canadian rules. The agreement

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[18] Maxwell filed a voluntary petition under Chapter 11 of the Bankruptcy Code and, the following day, obtained an order from the High Court in London putting the company into administration under the English *Insolvency Act*, 1986, primarily with the view to protecting the company from creditors in the United Kingdom. In order to avoid the potential for conflict, the joint administrators appointed by the English High Court and the Examiner appointed by the United States Bankruptcy Court entered into a protocol on January 15, 1992, setting forth the terms and conditions of an agreement as to the day to day operations of the company so as to enhance the debtor's reorganization.

[19] Final Supplemental Order Appointing Examiner and Approving the Agreement Between the Examiner and Joint Administrators dated January 15, 1992.

provided, however, that each court did not surrender or abandon its jurisdiction in respect of all professional engagements and the payment of all fees so that each court retained the jurisdiction, at some future time, to revisit the issue of professional fees. In approving the protocol, the U.S. Court relied on s. 105(*a*) of the *Bankruptcy Code* which provides that a Bankruptcy Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the *Bankruptcy Code*.[20]

(i) Preservation of Recourses with Respect to Fraudulent Preferences

Unlike Chapter 11 and the BIA, the CCAA contains no provisions relating to fraudulent preferences or fraudulent transfers. Limited as it is to corporate restructurings, where the expectation is that the debtor will keep control of its own assets, it is philosophically inconsistent with the intent and purpose of the CCAA for it to contemplate recovery of fraudulent preferences or transfers.

This inconsistency was itself inconsistent with the needs of the creditors when the applicants filed for protection under the CCAA in May, 1992. Concerns were expressed that some lenders had enhanced their security during the weeks leading up to the filing so that other concerned creditors required a mechanism to stop the clock from running with respect to the timing on these alleged preferences. Under the BIA (prior to the 1997 amendment), preferences, other than those between related persons, could generally be attacked only if they took place within the three months next preceding the date of the bankruptcy.[21] The date of the bankruptcy is the date of filing of a petition in bankruptcy, not the date of the judgment granting it. To address this problem several creditors wished to file petitions in bankruptcy, but they were precluded from doing so by the May 14,

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[20] American Courts have held that the basic purpose of s.105(a) is to enable the court to do whatever is necessary to aid its jurisdiction and that it has authority under the section to use its equitable powers to assure the orderly conduct of the reorganization proceedings. See *In Re Neuman*, 71 B.R. 567, 571 (S.D.N.Y. 1987) and *In Re Baldwin-United Corp. Litigation*, 765 F.2d 343, 348 (2d Cir. 1985).

[21] BIA, s.95. Various provincial statutes supplement the BIA provisions and the time periods are generally longer under provincial legislation.

1992 order staying proceedings in Canada as well as by the automatic stay of proceedings arising from the five Chapter 11 cases.

An additional problem arose from the fact that the creditors who were anxious to toll the limitation period with respect to the impugned transactions were not necessarily creditors of all the corporations which had supposedly participated in the fraudulent preferences. This meant that they could not file bankruptcy petitions against those applicants. A further issue arose as to whether each of the 29 applicants had committed an act of bankruptcy.

A solution which is certainly unique in Canadian law was found and the "instant bankruptcy" was born. With the consent of the relevant applicants, the creditors obtained an order from the Canadian Court instructing each of the 29 applicants to borrow $1,100 from one of the creditors[22] and to default on a demand for payment of the debt. The CCAA stay was lifted momentarily to permit the moving creditors to file petitions in bankruptcy against the applicants. Pursuant to the Order of Blair J. dated May 21, 1992, on filing of each petition for a receiving order, the stay was re-imposed. Each petition was thereupon suspended, pending the outcome of the restructuring efforts under the CCAA. A companion order, permitting these bankruptcy filings, was also obtained in the U.S.

Mr. Justice Blair's willingness to sanction this approach was not entirely shared by Judge Garrity of the U.S. Bankruptcy Court, whose consent to the filings was essential given the stay of proceedings against the U.S. applicants under Chapter 11. In dealing with the issue, Judge Garrity noted[23] that he might not have acceded to the instant bankruptcy petitions absent the precedential order of the Canadian Court. In making his order, he recognized the inevitability of conflicts between U.S. and Canadian law and practice in a case of this complexity. He made it clear that the relief sought would not have been allowed had it not been for the purpose for which it was being sought, namely the Canadian proceedings. Judge Garrity also noted that notions of comity would not necessarily lead him to follow blindly the lead of the Canadian Court but that he was prepared to make the order given the unique situation.

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[22] The threshold debt required to permit the filing of a petition for receiving order is $1,000.

[23] Unreported, United States Bankruptcy Court, Southern District of New York, Case Nos. 92 B 42698 – 42700 and 42702.

(j) Stay-Lift Proceedings

The May 14 CCAA order provided for a suspension and stay, in very wide terms, of all legal proceedings intended to enforce the recovery of a debt against any of the applicants. A concurrent automatic stay was in force in the United States as a result of the Chapter 11 filings and a stay of a similar nature arose with respect to the U.K. operations because of the English administration order. Canadian courts have the discretion to lift the stay in appropriate circumstances. In the Olympia & York restructuring, the simplest situation was that of a constructing lien claimant which had started proceedings in respect of its claim prior to the filing and found itself precluded from continuing by the stay order. It therefore ran the risk that, without a lifting of the stay, it would be out of time and lose its lien rights. The stay was, of course, lifted for that purpose.

Of greater complexity was the situation of creditors who had debtors in all three jurisdictions. This required leave in a multiplicity of jurisdictions. An example was the case of American Express, which had agreed to lease space at Canary Wharf. American Express had not moved into its new premises but saw itself potentially obliged to do so with no expectation that the landlord could or would perform its contractual obligations. It accordingly had to seek permission to serve "time is of the essence" notices on its landlord and the other parties to the lease arrangements. Service of such a notice would force the landlord to perform its obligations in a timely manner and, in default thereof, entitle the lessee to repudiate the lease. The permission to serve such a notice on OYDL was sought in Canada. In an initial judgment,[24] Mr. Justice Blair dismissed the application, largely on the ground that the application was both premature and unnecessary. In a subsequent judgment,[25] after leave had been obtained from the U.K. court, leave was granted in Canada as well.

The necessity of having to obtain leave in two jurisdictions to do something as simple as serving a notice highlighted the need for a mechanism which would permit one forum to take jurisdiction with respect to purely procedural matters to the exclusion of other fora which are only indirectly affected, if at all, by these matters. The recently adopted amendments to the BIA and the CCAA regarding international

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[24] Unreported, June 30, 1992, Doc. No. B125/92.

[25] Unreported, September 2, 1992, Doc. No. B125/92.

insolvencies[26] will expressly empower Canadian courts to make such orders and grant such relief necessary to facilitate the coordination of Canadian and foreign insolvency proceedings and to seek assistance from foreign tribunals.

(k) "No Means No" Motions

The fact that there had been parallel and concurrent filings of five of the same corporations in both Canada and the United States raised concerns on the part of some secured creditors that these corporations would seek two bites at the enemy in the sense that if a restructuring effort were to fail in one jurisdiction, a second attempt at restructuring would be made in the second jurisdiction. A second complication of a similar nature arose when the 1992 BIA amendments came into effect on November 30, 1992, and introduced a completely revised proposal regime in Part III Division 1, which also applied to secured creditors. These factors, taken in combination, led some secured creditors to insist upon an undertaking by the applicants that, if a class of secured creditors voted against the CCAA restructuring, the members of that class would not be restrained from exercising their remedies by either a second attempt at reorganization in the U.S. or under the new BIA provisions. The applicants agreed to give these undertakings but the concerned secured creditors considered the undertakings alone to be insufficient because, arguably, an undertaking not to seek protection under a protective statute might be unenforceable as being contrary to public policy, at least so far as Canada is concerned.[27]

With a view to giving comfort to these secured creditors, the applicants obtained, from both the Canadian and U.S. Courts, a declaration by way of separate orders that "No means No"; that is, a declaration that a class of creditors which had refused to accept the restructuring, would not thereafter be the subject of further proceedings of a reorganizational nature.

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[26] S.C. 1997, c. 12, s. 118 adding Pt. XIII to the BIA and s. 125 adding s. 18.6 to the CCAA.

[27] Some support for this proposition may be gleaned from the wording of s. 8 of the CCAA.

(l) Settlement Authorizations

The O & Y applicants were never particularly concerned, in Canada, about settling the various incidental matters which arise in the normal course of any reorganization. One such settlement did, however, require authorizations from both the Canadian and the American courts. Prior to the CCAA filing, one of the applicants had operated an account with a Canadian chartered bank. On the day the CCAA application was filed, the account was in credit balance for some $800,000, but there was a concurrent liability to the bank in an amount well in excess of the credit balance. The initial order had prohibited set-offs, except with respect to swaps. Understandably, the bank did not relish the prospect of having to release the $800,000 without being able to set off this liability against the substantially greater indebtedness of the applicant to the bank. On the eve of trial of this issue, the parties reached an agreement the effect of which was that the amount standing to the credit of the relevant applicant would be evenly split, with one half of the proceeds going to the applicant and the balance going to reduce the loan to the bank. Judgment by consent was entered accordingly in the Canadian Court and a concurrent authorization was then obtained from the American Court.

(m) Claims Officer

In an order rendered by Mr. Justice Blair on October 2, 1992, the procedure for the validation of claims was set forth and the role of "claims officer", conceived and proposed by O & Y, was created. Essentially, the Court ordered that a claimant who intended to dispute a notice of disallowance of claim would have four business days to apply to a claims officer for a ruling on the disallowance. In order to enhance the credibility of the process, Mr. Justice David Henry, a retired Ontario judge, was proposed by O & Y to fill the role of claims officer. He was given the discretion to define the procedure for the determination of a contested claimant's claim as well as to rule on who would bear the costs of the procedure. The order further contemplated a right of appeal from any ruling of the claims officer to the Ontario Court of Justice. Mr. Justice Henry's appointment was extremely successful and avoided several lengthy hearings in court to determine the validity of various claims. Mr. Justice Henry was also appointed to preside over the meetings of creditors to vote on the plan and this too was beneficial in ensuring that the voting process would have the greatest possible legitimacy.

3. THE REORGANIZATION PLAN

(a) The Initial Plans

The original CCAA plan, which was distributed by the applicants in August, 1992, contemplated that all secured and unsecured creditors, other than certain project lenders, would participate in an "equity plan" providing for a pro rata distribution of between 49% and 60% of the common shares of OYDL. The plan also envisaged that the Reichmann family would retain control of O & Y during the five-year plan period and, depending on the results achieved in this period, the equity in OYDL retained by the Reichmann family would vary between 20% and 51%. This proposal was not warmly received by several of the key creditors and many viewed the plan as a failure on the applicants' part to accept the consequences of the group's insolvency. The original plan was, therefore, abandoned by the applicants.

In October 1992, a new joint plan was filed under both the CCAA and Chapter 11.[28] It was a departure from earlier proposals put forward by the applicants and their shareholders in that its focus was primarily aimed at enhancing and maximizing values which could potentially come out of the U.S. real estate interests. The October plan sought to preserve massive tax losses considered to be a major asset of OYDL by spinning off OYDL's interest in Olympia & York Realty Corp. It further contemplated that by the end of the plan period, 90% of OYDL's share capital would be owned by creditors. In view of the concessions which were being proposed by applicants, the October plan envisaged releases being granted by all of the applicants and their creditors to Reichmann family members and Reichmann entities in

[28] In Canada, the plan was accompanied by an information circular and in the U.S. by a disclosure statement. The applicants decided to delay the filing of the motion in the U.S. to approve the disclosure statement until after the approval of the plan in Canada. This was done because the U.S. Bankruptcy Court must approve the disclosure statement and any amendments to the statement, with the practical result that the plan must be finalized prior to delivery of the disclosure statement to creditors.

respect of various claims that the Olympia & York companies or their creditors could assert against them.

Upon dissemination of the October plan, it became clear that the major creditors would accept nothing less than immediate effective control of Olympia & York while at the same time wishing to avoid a legal change of control which could result in negative tax consequences. So far as the U.S. assets indirectly owned by OYDL were concerned, major conflicts arose between unsecured creditors of OYDL, who wished to obtain a substantial interest in the U.S. real estate through their position as creditors of the parent company, and a major creditor with a direct claim against Olympia & York Realty Corp., the subsidiary through which these assets were held. At various times, Olympia & York was forced to be a spectator of these conflicting positions and at other times it played the role of mediator.

(b) The Final CCAA Plan

As a result of intensive negotiations following the dissemination of the October plan, a new plan of compromise and arrangement, together with an information circular, was distributed to creditors on December 16, 1992. Essentially, the December plan provided that the corporate governance of O & Y would be entrusted to a court appointee acting with direction from representatives of the undersecured and unsecured creditors. Contrary to previous proposals, the unsecured debt of the applicants, amounting to over $4 billion, would not be converted into equity with the result that the effective interest of the Reichmann family in OYDL would be eliminated. The December Plan provided for the right of secured creditors, after giving notice, to enforce their security in respect of collateral granted to them by Olympia & York. It also provided for releases to be granted by specific applicants in favour of the Reichmann family and Reichmann entities regarding identified transactions. The December plan attempted to marry the competing interests of the secured and unsecured creditors. This was because the unsecured creditors wished to preserve Olympia & York as an ongoing entity while the secured creditors wished to preserve their rights to enforce security if they deemed it advantageous to do so.

The focus of creditors at this point was primarily two-fold: first, to ensure that they understood the transactions in respect of which releases would be granted to Reichmann family members and Reichmann entities and, second, to examine the effects of the creditors' competing claims with respect to OYDL's interest in the U.S. assets of Olympia & York. So far as the latter issue was concerned, matters relating to the corporate governance of O & Y's U.S. operations were only resolved after the creditors' approval and court sanction of the Canadian plan.

(c) The Reichmann Released Transactions

A major hurdle which had to be overcome, prior to the meetings of creditors, was the issue of the releases granted in the CCAA plan.[29] Those releases had the effect of releasing the Reichmann family and related entities as well as directors and officers from claims or rights of action that any of the debtor companies or any trustee of a debtor company could assert against them.

There was a good deal of controversy at the time regarding the legality of structuring a plan which would release directors, officers and senior management from claims which could otherwise be asserted against them based on their activities prior to the CCAA filing. Olympia & York took the position that the releases which were being sought affected all creditors equally and did not prevent any single creditor from asserting a claim which was particular to that creditor. Despite the sensitivity of the issue relating to the Reichmann released transactions, at the meeting of unsecured creditors convened on January 25, 1993, to approve the plan, one of the co-chairs of the Unsecured Creditors' Committee stated the following:

> On behalf of the co-chairs, the subject of Reichmann Released Transactions has been reviewed with the full committee on a number of occasions.... We satisfied ourselves on a number of transactions for release. We endeavoured to negotiate with the debtor to have the Reichmann Released Transactions removed from the Plan. After several hours over more than two occasions, it was the conclusion of the debtor with its legal counsel that the Released Transactions must form part of the CCAA Plan. The vote that was taken today in the Committee was fully cognizant of the 31 Released Transactions being contained as part of the Plan and what each member within that Committee determined is that it is prepared

[29] The final plan defined 31 transactions in respect of which releases were being sought. These transactions were termed "Reichmann Released Transactions" in the plan. In addition, the plan gave effect to a series of transactions known as the "GWU Residual Claim", which ultimately resulted in the forgiveness of substantial Reichmann family indebtedness to O & Y.

> ... to support the Plan with the Reichmann Released Transactions being a component of the total Plan.[30]

In the light of the O & Y experience and other precedents, provisions appearing in the 1997 amendments to the BIA[31] will allow, in the context of a proposal under this Act, releases in favour of directors of a nature similar to the releases granted in favour of the Reichmann family.

The issue of the Reichmann released transactions was an emotional one because the releases were being sought in the context of an insolvency where substantial sums were lost by creditors. That being said, each transaction in respect of which a release was to be given was fully documented and creditors were given every opportunity to conduct whatever due diligence they required in order to ascertain that the release was appropriate. In every restructuring, there are a series of "gives" and "gets". In this particular restructuring, the Reichmann released transactions represented one of the "gets" of the shareholders in return for the many concessions which they made under the plan.

(d) Substantive Consolidation

In Chapter 11 cases, the claims of creditors against different legal entities in a debtor group may be "substantively consolidated" in appropriate circumstances so that creditors are classified according to the nature of their claims (e.g., nature of the security), against the debtor group, irrespective of the identity of the actual legal entity which is the debtor of a particular creditor. The applicants adopted a variation of this approach. Under the plan, all unsecured or undersecured creditors of the applicants were classified as belonging to one class of unsecured creditors, regardless of the legal identity of the actual debtor company. While many creditors found this approach acceptable, some major Canadian creditors expressed great concern about what they perceived as a dangerous and unprecedented innovation.[32] On the other

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[30] Transcript of meeting held on January 25, 1993, pp. 75-76. For a more detailed review of the subject, see Mark E. Meland "Extending 'Protection' to Third Parties in a Restructuring Plan — An Overview" (1993) 20 C.B.R. (3d) 61.

[31] S.C. 1997, c. 12, s. 30.

[32] This precedent has since been confirmed in the *Bramalea* reorganization which ignored legal form and classified creditors according to economic substance.

hand, from the debtors' perspective, the substantive consolidation of the debtor entities only recognized economic realities.

The impasse was ultimately resolved by preparing a plan which resulted *de facto* in a substantive consolidation of the 29 applicants for purposes of the treatment of unsecured claims but on its face presented itself as a collection of individual plans for purposes of the treatment of classes of secured creditors. The Court ultimately sanctioned the feature of the Plan which contemplated its overall approval despite rejection by various classes of creditors. The recognition of substantive consolidation as a feature of Canadian restructurings should contribute in future to the facilitation of multinational insolvencies.

(e) Voting on Plan

Blair J. ordered that the meetings of creditors to consider the plan should commence on Monday, January 11, 1993. Virtually on the eve of the first meeting, a secured creditor with a direct claim against Olympia & York Realty Corp. initiated a motion before the U.S. Bankruptcy Court seeking to enjoin the holding of the meetings under the Canadian proceedings. The creditor alleged that the Canadian proceedings prejudiced its position unfairly because they jeopardized the existence of substantial tax losses in the U.S. As a result of the motion, urgent negotiations took place between counsel for the applicants and creditors with competing interests in the U.S. real estate. The negotiations led to a number of changes being made to the December plan, primarily in respect of the corporate governance of Olympia & York, and the injunction proceedings were withdrawn. Between January 11 and January 25, 1993, the creditors met to vote on the plan.[33] 25 of the 34 classes of secured creditors voted in favour of the plan and 90.6% of the unsecured creditors in number and 92.3% of the unsecured creditors in value gave their approval.

[33] The plan was amended virtually on a daily basis as a result of frantic negotiations between the various protagonists. As late as January 25, 1993, the date of the last meeting of creditors, substantial amendments were made to ensure creditor support. The difficulty was that often a change which favoured one group of creditors impacted negatively on another. The process was slow and often very frustrating.

(f) Court Approval of Plan

On February 5, 1993, Mr. Justice Blair sanctioned the Plan.[34] In his reasons, he emphasized that his overriding concern in sanctioning a plan which had been previously approved by creditors was to determine whether it was fair and reasonable. In that regard, he stated the following:

> The Plan must be 'fair and reasonable'. That the ultimate expression of the Court's responsibility in sanctioning a Plan should find itself telescoped into those two words is not surprising. 'Fairness' and 'reasonableness' are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. 'Fairness' is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity — and 'reasonableness' is what lends objectivity to the process.'[35]

(g) Effect of CCAA Plan on Dissenting Classes

There has been some controversy as to whether or not a plan of compromise and arrangement under the CCAA can be sanctioned if it has not obtained the approval of the statutory majority of creditors in all classes. Blair J., in the sanction order, resolved the question in the following manner:

> In the end, the question of determining whether a plan may be sanctioned when there has not been unanimity of approval amongst the classes of creditors becomes one of asking whether there is any unfiarness to the creditors who have not approved it, in doing so. Where, as here, the creditor classes which have not voted to accept the Final Plan will not be bound by the Plan as sanctioned, and are free to exercise their full rights as secured creditors against the security they hold, there is nothing unfair in sanctioning the Final Plan without unanimity, in my view.[36]

The non-binding effect of the plan on dissenting classes highlights one of the differences between the CCAA and the U.S. Bankruptcy

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[34] *Olympia & York v. Royal Trust*, (1993) 17 C.B.R. (3d) 1 (Ont. Gen. Div.). The plan was sanctioned only in respect of those classes of creditors which had approved it by the requisite majority in number and 75% in value of claims voted. The members of those classes of creditors which voted against the plan were deemed not to be bound by the plan.

[35] *Ibid*, at 9.

[36] *Ibid.*, at 19.

Code. Under s.1129(b) of the U.S. Code, it is possible to cram-down a plan on a class of creditors which has rejected it. The operation of the subsection has been explained in the following words:

> If a class of interests rejects a proposed Chapter 11 plan, the plan proponent may nevertheless impose s. 1129(b) treatment and have the plan confirmed if it satisfies one of two conditions in respect of the class of interests. The plan must either provide that each interest holder will be paid property of a value as of the plan's effective date equal to the greatest of the interest's fixed liquidation preference, fixed redemption price, or value; or the plan must provide that each interest holder will receive at least the same value it would receive in Chapter 7 and that no junior interest shall receive any property or retain any interest in the reorganized debtor.[37]

(h) Corporate Governance

The plan contained provisions regarding the corporate governance of a number of the major applicants, including those entities which ultimately controlled Olympia & York's U.S. operations. In particular, the corporate governance of the parent entities to the U.S. operations raised a number of highly sensitive inter-creditor issues, which could not be resolved in the negotiations occurring between the filing of the October plan and the approval of the December plan in January 1993.

A resolution of the intense inter-creditor disputes raised by these issues was ultimately only reached in the summer of 1993, after the U.S. Bankruptcy Court had appointed Cyrus Vance, fresh from his experiences in the mine fields of Bosnia, to act as mediator. Mr. Vance succeeded in achieving a consensus among the U.S. and Canadian creditors and in developing a protocol for the corporate governance of Olympia & York's U.S. operations and the Canadian parents of those operations. The protocol was ultimately sanctioned by both the United States Bankruptcy Court and the Canadian Court. According to Judge Garrity,[38] the purpose of the protocol was to bridge the gap between the U.S. creditors and the Canadian equity and to harmonize matters arising in the Canadian and U.S. proceedings regarding the corporate governance of the three Canadian parents of the U.S. operations who

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[37] Martin J. Bienenstock, *Bankruptcy Reorganization*, Practising Law Institute, New York City, 1987, at pp. 626-627.

[38] Remarks of Judge Garrity in connection with the order rendered on July 15, 1993, Unreported, United States Bankruptcy Court, Southern District of New York, Case Nos. 92 B 42698 – 42700 and 42702.

were also three of the five U.S. applicants in the Chapter 11 proceedings.

Mr. Justice Blair's judgment sanctioning the protocol offers the following insights into the judicial approach which facilitated the successful resolution of many of the issues addressed in this paper:

> Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts — sometimes substantive, sometimes procedural between the jurisdictions. The Courts of the various jurisdictions should seek to co-operate amongst themselves, in my view, in facilitating the transborder resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international co-operation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.[39]

4. CONCLUSION

The restructuring of Olympia & York may serve as a road map for large multinational insolvencies involving numerous diverse interests and competing jurisdictions. Some have described the Olympia & York case as the "mother of all restructurings". In the Olympia & York restructuring, there were clearly no winners and this shows that all parties were forced to compromise in order to obtain the best that was possible as opposed to the best possible deal. Solutions were generally arrived at by the interested parties based on boardroom imperatives rather than through the judicial process. In our view, this was a highly desirable result.

The CCAA proceedings in Canada and the Chapter 11 cases in the U.S. avoided a financial crisis which could have resulted had there been simultaneous forced liquidations of many of the major commercial real estate projects in Canada and the United States. The process, which took place over several months in a relatively orderly manner, generally allowed the marketplace to digest calmly the impact of the Olympia & York insolvency.

Although the process did not cure the Olympia & York patient or enable it to regain its former financial health, it afforded certain

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[39] *Olympia & York Developments Ltd. v. Royal Trustco* (1993), 20 C.B.R. (3d) 165, at 167 (Ont. Gen. Div.).

advantages to all concerned parties. The most important of these was to allow them to make decisions and to take actions in a supervised, controlled and relatively serene environment.