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FINANCIAL SERVICES E-NEWS

Determining the Centre of Main Interest in Corporate Group CCAA Filings

A number of commentators have written articles about Part IV of the *Companies' Creditors Arrangement Act* (CCAA), which deals with recognizing and enforcing foreign insolvency proceedings, however little has been written about the treatment of corporate groups in this context. Part IV of the CCAA deals with entities on an individual basis, and how to deal with corporate groups is not well addressed in international insolvency legislation. In the recent case involving the Part IV filing of the Elephant & Castle group of companies (collectively, "E&C"), the Ontario Superior Court of Justice (the "Ontario Court") had a chance to address the concept of a corporate group filing.

On June 28, 2011, E&C commenced proceedings (the "Chapter 11 Proceedings") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division, under Chapter 11 of Title 11 of the United States Code. The purpose of the Chapter 11 Proceedings was to allow E&C to continue to operate in the ordinary course while it pursued the sale of its business. E&C operates and franchises authentic, full-service British style restaurant pubs in both the United States and Canada. Concurrently with the Chapter 11 filing, E&C also sought recognition of the Chapter 11 Proceedings in the Ontario Court as a "foreign main proceeding" under the CCAA.

The E&C group, a total of 14 companies, includes three Canadian entities, including the parent company, all of whose registered offices are in Canada (the "Canadian Debtors"). In addition, nearly one-half of E&C's operating locations are in Canada, approximately 43% of the employees work in Canada and GE Canada Equipment Financing G.P. (a Canadian company) is the primary secured creditor of E&C. As such, E&C sought to rebut the centre of main interest ("COMI") presumption prescribed by the CCAA for the Canadian Debtors. Absent proof to the contrary, the debtor's registered office is deemed by the CCAA to be the COMI. The remaining companies in the E&C group were all incorporated in various American jurisdictions.

The issue before the Ontario Court was whether the Chapter 11 Proceedings should be recognized as a foreign proceeding and, if so, whether they were a "foreign main proceeding" or a "foreign non-main proceeding" under section 47 of the CCAA. If the court recognizes the Chapter 11 Proceedings as a "foreign main proceeding" the relief under section 48 of the CCAA, including the stay of proceedings, is automatic instead of discretionary. A "foreign main proceeding" is defined in the CCAA as a foreign proceeding in a jurisdiction where the debtor has its COMI.

On July 4, 2011, the Ontario Court granted the relief E&C requested and recognized the Chapter 11 Proceedings as "foreign main proceeding." The endorsement of the Honourable Justice Morawetz, released July 11, 2011, provided that the court was satisfied that E&C had met the requirements of s. 47(1) of the CCAA and it was appropriate for the



court to recognize the foreign proceeding. Justice Morawetz further found that the presumption contained in s. 45(2), that each debtors' COMI is their registered office, was rebutted in the circumstances and the debtors' COMI was found to be the United States. In arriving at this finding, Justice Morawetz cited the jurisprudence on the issue of a debtor's COMI and noted that, in interpreting COMI, the following factors are usually significant:

- the location of the debtor's headquarters or head office functions or nerve centre;
- the location of the debtor's management; and
- the location which significant creditors recognize as being the centre of the company's operations.

Morawetz J. further noted that E&C's headquarters or head office functions or nerve centre is in Boston, Massachusetts and the location of the debtors' management is in Boston. Further, GE, the primary secured creditor, did not oppose the relief sought. In these circumstances, Justice Morawetz concluded that, for the purposes of this application, each of the E&C entities, including the Canadian Debtors, have their COMI in the United States. Having reached this conclusion, certain mandatory relief set out in s. 48(1) of the CCAA was granted, along with the remainder of the relief sought.

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