Fordham Journal of Corporate & Financial Law

Volume 7 | Issue 2 Article 6

2001

Corporate Groups and Crossborder Insolvencies: A Canada-United States Perspective

Jacob Zeigel

CORPORATE GROUPS AND CROSSBORDER INSOLVENCIES:

A CANADA - UNITED STATES PERSPECTIVE*

Jacob S. Ziegel†

I. INTRODUCTION

World trade and international investments have expanded rapidly over the past twenty-five years.[1] Not surprisingly, there has

---

* For the convenience of Canadian readership, and at the request of the author, the Editors of the Fordham Journal of Corporate & Financial Law have not conformed Canadian case and statute citations to the Seventeenth Edition of The Bluebook.

† Professor of Law Emeritus, University of Toronto. This is the written version of an oral presentation by the author at the Fordham Law School Eugene P. Delia S. Murphy Conference on Corporate Law held on November 15, 2001. I am much indebted to Ian Fletcher, Edward Flynn, Lynn LoPucki, Jeffrey MacIntosh, Dan Prentice, Harry Rajak, and Jay Westbrook for providing me with information relevant to this topic and not otherwise readily available, but I alone must assume responsibility for the views expressed in this Article. In the preparation of this Article, I have also made use of a memorandum on the same topic prepared by me in August 1998 and circulated among the reporters and consultants to the American Law Institute's *Transnational Insolvency Project*.

1. *See* Carl A. Nelson, *Let Business Reduce World Poverty*, SAN DIEGO UNION-TRIB., Feb. 1, 2002 (stating that since 1963, there has been a seventeen-fold rise in world trade); *see also* Jeff Donn, *America Responds: Border Control, Attacks Bring Tightened Security at Checkpoint*, HOUSTON CHRON., Sept. 24, 2001 ("[T]he cross-border business between the United States and its largest trading partner, Canada, has expanded to $1.4 billion a day."); Ross P. Buckley, *Globalization Good? Bad? Both*, CHINA DAILY, Aug. 31, 2001 ("[T]he cross-border flow of capital into the largest economies increased 60 times between 1970 and 2000"); Vernon Ellis, *Can Global Business Be a Force for Good?*, NEW STATESMAN, July 16, 2001 ("Since 1950, world trade has increased fourteenfold . . . . [m]ore and more productive assets are acquired across borders, with global foreign direct investment flows of $1.1 [trillion] in 2000.").

been a corresponding increase in the number of crossborder insolvencies involving multinational enterprises, large and small,[2] which has fueled the drive for greater harmonization among the many different national rules governing the treatment of crossborder insolvencies. Canada and the United States are very active participants on both sides of this phenomenon. The two countries are each other's largest trading partners, with over eighty percent of Canada's external trade being with the United States.[3] Similarly, there has been a steady increase in the number of crossborder insolvencies that have come before the courts of both countries in which Canadian and U.S. bankruptcy[4] judges have been called upon to recognize each other's proceedings and to cooperate closely with a view to maximizing returns for creditors in the liquidation of assets or to help bring about the reorganization of an ailing enterprise.[5]

---

2. *See* E. Bruce Leonard, *The International Year in Review*, 2001 AM. BANKR. INST. J. 34 ("[This past year, 2001] has seen a number of major developments in cross-border insolvency cases and in the development of international and domestic cooperation in cross-border insolvency cases."); *see also* Jay Lawrence Westbrook, *The Transnational Insolvency Project of the American Law Institute*, 17 CONN. J. INT'L L. 99, 99 (2001) ("Global enterprises operating in global markets must inevitably produce global bankruptcies. Their number and importance rose in the last decade, despite the general prosperity, and is likely to grow even greater during the downturn that is now underway.").

3. The U.S. accounted for 85.7% of Canada's total exports in 1999; in turn, Canada imported 76.3% of its total imports from the U.S. *Statcan CANSIM Database*, Series D399449, D399518, D397990, and D398058, *available at* http://www.statcan.ca/english/CANSIM/ (last visited May 10, 2002).

4. In Canada, the term "bankruptcy" is usually restricted to liquidation proceedings under Part II of the Bankruptcy and Insolvency Act, R.S.C. 1985, chap. B-3 (2001) [hereinafter BIA]. Commercial reorganization proceedings under Part III, Division 1 of the Act (known as "commercial proposals") and "arrangements" with creditors under the Companies' Creditors Arrangements Act, R.S.C. 1985, chap. C-36 (2001) [hereinafter CCAA], are usually referred to by those names and, technically speaking are not bankruptcy proceedings. This terminological distinction does not exist in the U.S. Bankruptcy Code. To avoid confusion, "bankruptcy" is used in this Article in the broader U.S. Code sense. Similarly, the term "insolvency proceedings" is used in a non-technical sense to cover both liquidation and reorganizational proceedings unless the context indicates otherwise.

5. *See, e.g., In re* Toga Mfg. Co., 28 B.R. 165, 169 (Bankr. E.D. Mich. 1983)

The literature describing these developments, both North American and overseas, is very substantial, but there is one aspect that does not appear to have received the attention it deserves.[6] These are the problems particular to the reorganization or liquidation of insolvent corporate groups. Large corporations are typically organized in groups.[7] The group may have a few affiliates or a thousand or more.[8] Given the close business bonds between

---

(quoting the following Congressional pronouncement, "[p]rinciples of international comity and respect for the judgments and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules."); Menegon v. Philip Servs. Corp., [1999] O.J. No. 4080 (Ontario, Blair J.) (involving a crossborder bankruptcy of a multi-national conglomerate with plans filed in U.S. and Canadian courts). *Compare* Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329, 330-38 (1993) (discussing the need for cooperation in transnational bankruptcies as well as shortcomings of U.S. bankruptcy laws that hinder such cooperation) *and* Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555, 557-86 (2001) (discussing various theories on how principles of cooperation should be applied in transnational bankruptcy cases) *with* Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000) (expressing continuing skepticism about the prospects for international agreement on the applicable principles, particularly those involving corporate groups, and arguing the case for cooperative territoriality based on the locality of the debtor's assets).

6. *But see* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROBLEMS IN THE BANKRUPTCY OR REORGANIZATION OF PARENT AND SUBSIDIARY CORPORATIONS § 17.11 (1985 & Supp. 1999). A succinct and valuable statement of some of the issues also appears in AMERICAN LAW INSTITUTE, TRANSNATIONAL INSOLVENCY PROJECT: PRINCIPLES OF COOPERATION IN TRANSNATIONAL BANKRUPTCY CASES AMONG MEMBERS OF NAFTA: COUNCIL DRAFT 106-14 (2000). For general literature, see PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW (1995) and Karl Hofstetter, *Parent Responsibility for Subsidiary Corporations: Evaluating European Trends*, 39 INT'L. & COMP. L.Q. 576 (1990).

7. *See* BLUMBERG, *supra* note 6, at § 17.11.

8. Loewen Inc., which filed for Chapter 11 in 1999, had 1,098 affiliates in the group, although the filings only encompassed about 875 members. (The data was supplied to the author by Edward M. Flynn, research analyst at the Executive Office for the United States Trustee, Washington, D.C., and Professor Lynn M. LoPucki. Professor LoPucki maintains a bankruptcy research database for large Chapter 11 cases. *See* http://teddy.law.cornell.edu:8090/lopucki.htm (last visited Apr. 12, 2002).

Canada and the U.S., it is highly predictable that a U.S-centered group will have affiliates in Canada, and vice versa. For a variety of reasons, the failure of a major member of a group will often jeopardize the financial survival of the whole group. Consequently, it is very common in Canada and the U.S. for a corporate group to make a joint insolvency filing encompassing all or most of the members of the group, with a view to reorganizing the affairs of the whole enterprise or to bring about a going concern sale if that course of action should be decided upon.[9] The consolidation may be procedural ("procedural consolidation") or, much less frequently, substantive in character ("substantive consolidations"). The evidence indicates that seventy per cent or more of major corporate restructurings in Canada and the U.S. are in some form of consolidated basis.[10] This then raises the question, in the case of crossborder insolvencies, of how well the Canadian and U.S. bankruptcy rules and principles dovetail with one another to bring about successful joint proceedings in both countries.

There is another side to the coin. The insolvency proceedings may be limited to one member of the group. Nevertheless, creditors of the insolvent company may argue that the parent company was so deeply implicated in the affairs of the failing affiliate that it should be held jointly responsible for the liabilities of the affiliate. Yet again, even if there is no attempt to hold the parent company directly liable, the trustee may argue that a claim the parent company may have against the affiliate should be subordinated to the claims of other creditors because the parent company abused its dominant position. These are familiar issues in domestic insolvency law.[11] The question for consideration is how

---

9. *See* ED FLYNN, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, STATISTICAL ANALYSIS OF CHAPTER 11 15, tbl. 11A (1989); *see also* information supplied to author by Professor Lynn M. LoPucki on Feb. 3, 2002 (on file with the Fordham Journal of Corporate & Financial Law). Of the 274 cases, covering the period 1980-2001, in Professor LoPucki's Bankruptcy Research Database, only seventy-three filings (27%) were by a single entity. *Id.* Professor LoPucki also identified approximately one third of the cases in his database as having at least one foreign corporation in the corporate group. *Id.*

10. *See* sources cited *supra* note 9.

11. *See, e.g.*, Pepper v. Litton, 308 U.S. 295, 310 (1939) (citing *In re* Burntside Lodge, Inc., 7 F. Supp. 785 (D.C. Minn. 1934) as follows:

well they play out in a crossborder context where the parent company is U.S. based and the subsidiary is located in Canada, and vice versa with respect to a Canadian parent company and a U.S. based subsidiary. Having said this, I must also add quickly that most of the Canada-U.S. crossborder cases I am familiar with have involved problems of the first type, those arising from consolidated filings, and not from attempts to hold a parent company liable for the activities of its affiliates.[12]

II. TWO PRELIMINARY POINTS

A. Meaning of "Corporate Group"

For the purposes of this Article, it is not necessary to engage in a technical analysis of the meaning of "corporate group." I use the term to describe a group of companies with a common parent, proximate or remote, including of course a direct parent-subsidiary relationship.[13]

B. Canadian Domestic Insolvency Regimes

Insolvency conflict of law rules operate within the matrix of the domestic regime of which they are a part. Optimally, therefore, a reader studying the Canada-U.S. interactions should

---

> The relations of a stockholder to a corporation and to the public require good faith and fair dealing in every transaction between the stockholder and the corporation which may injuriously affect the rights of creditors and the general public, and a careful examination will be made into all such transactions in the interests of creditors.);

id.; see also Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliated Questions in Bankruptcy*, 42 U. CHI. L. REV. 462, 562 (1975) (discussing issues of liability between parent and subsidiary companies).

12. An example can be found in the reorganization of the Bramalea Group of companies, *infra* text accompanying notes 93-103 (involving a restructuring under the CCAA of a major North American real estate corporation, headquartered in Toronto, which carried on business through numerous operating subsidiaries in Canada and the U.S.); *see also* Menegon v. Philip Servs. Corp., [1999] O.J. No. 4080 (Ontario, Blair J.).

13. *See* BIA § 4(2) (2001) (defining "related person"); *see also* 11 U.S.C. § 101(2) (2000) (defining "affiliate").

have some knowledge of both bankruptcy systems.[14] Most readers of this article will be familiar with the U.S. Bankruptcy Code but may know little about Canadian insolvency law. I offer the following highly condensed overview of the Canadian terrain.

Under Canada's constitution, the federal government has exclusive jurisdiction in relation to questions of bankruptcy and insolvency.[15] Canada's basic insolvency rules are found in the Bankruptcy and Insolvency Act ("BIA"),[16] known before 1992 as the Bankruptcy Act. The forerunner of the present Act was adopted in 1919 and was largely based on the British Bankruptcy Act of 1914.[17] The 1919 Act was revised in 1949. The 1949 Act, in turn, was extensively amended in 1992[18] and 1997.[19] Further amendments are anticipated in the near future.

Canada has no system of federal bankruptcy courts. Instead, the judges of the superior courts in each province, all of whom are appointed by the federal government, are authorized to sit as bankruptcy judges in conformity with arrangements made by the chief justice in each province.[20] Appeals from bankruptcy court decisions are to the regular appellate courts of the province, and from them to the Supreme Court of Canada.[21]

---

14. It is for this reason that Phase 1 of the American Law Institute's TRANSNATIONAL INSOLVENCY PROJECT, *supra* note 6, was devoted to statements of the domestic insolvency systems of the three NAFTA partners, Canada, the U.S., and Mexico.

15. Canada, Constitution Act 1867 (U.K.), 30-31 Vict., ch. 3, § 91(21).

16. *See generally supra* note 4 .

17. *See* Jacob S. Ziegel, *Secured Transactions in Personal Property and the Federal-Provincial Conflict in Canadian Bankruptcy Law*, 46 S.C. L. REV. 877, 881 (1995). One basic departure from the British model was the fact that the 1919 Canadian Act applies to incorporated companies as well as to individuals and unincorporated businesses. *See* Jacob S. Ziegel, *The Modernization of Canada's Bankruptcy Law in a Comparative Context,* 33 TEX. INT'L L.J. 1, 3 (1998). This integrated approach may have been influenced by the U.S. Bankruptcy Act of 1898 and remains a distinguishing feature of the BIA as compared with its British counterparts. *See id.*

18. *See* Ziegel, *Modernization, supra* note 17, at 3.

19. *Id.*

20. BIA §§ 183-85 (2001). The federal Minister of Industry can also designate members of other courts to sit as bankruptcy judges. *Id.* § 186.

21. *Id.* §§ 183(2) & (3).

The BIA recognizes both voluntary and involuntary proceedings in straight bankruptcies and reorganizations.[22] However, the debtor's insolvency is a precondition in *all* insolvency proceedings and it is generally assumed that the federal government's bankruptcy and insolvency power imposes this requirement.

Canada has two quite distinct commercial reorganizational regimes: (1) the "commercial proposals" regime governed by Part III Division 1 of the BIA,[23] and (2) the "creditors' arrangements" regime found in the Companies' Creditors Arrangements Act ("CCAA").[24] The BIA regime is available to individuals and unincorporated businesses as well as incorporated businesses regardless of the size of the debtor's liabilities.[25] Division 1 reorganizations are perceived to be very rule oriented, at least in comparison with the loosely structured provisions of the CCAA. The CCAA is restricted to corporate entities, whether incorporated under Canadian or foreign law,[26] and the debtor corporation and its affiliates, if any, must owe at least Can. $5 million to creditors.[27] The CCAA is significantly shorter than Division 1 and still has many gaps in it despite substantial amendments made in 1997. In practice, most large corporations opt to reorganize under the CCAA because they prefer its greater flexibility and are attracted by the courts' willingness to bridge any gaps by invoking their "inherent jurisdiction" to craft judicially made rules to enable the Act to function properly.[28]

In terms of substantive rules, Canadian bankruptcy law fully recognizes prebankruptcy security agreements so long as they comply with relevant, usually provincial, law and are perfected in accordance with applicable requirements (again, usually of

---

22. *Id.* § 2.
23. *Id.* §§ 50-66.
24. *See supra* note 4.
25. *See* BIA § 2 (defining "person").
26. CCAA § 2 (defining "company").
27. *Id.* § 3.
28. For detailed descriptions of how Canadian courts apply the CCAA in practice, see JACOB S. ZIEGEL & DAVID E. BAIRD, CASE STUDIES IN RECENT CANADIAN INSOLVENCY REORGANIZATIONS: IN HONOUR OF THE HONOURABLE LLOYD WILLIAM HOULDEN (1997) [hereinafter CASE STUDIES].

provincial origin.)[29] However, federal laws also play a significant role in the case of bank secured financing. Rules governing voidable preferences and voidable transfers are found both in provincial laws and in the BIA,[30] but are not as strict or comprehensive in their impact as are the rules in the U.S. Bankruptcy Code.

The BIA has no provisions authorizing substantive consolidations of the assets and liabilities of related debtors in bankruptcy, but Canadian courts have followed U.S. precedents in recognizing a common law power to make such orders if the circumstances warrant it.[31] It remains unsettled whether Canada has adopted the American doctrine of equitable subordination.[32] However, the federal and provincial business corporations Acts contain powerful "oppression remedy" provisions which, so far as insiders are concerned, may lead to the same results as equitable subordination.[33] Canadian federal and provincial courts also have common law powers to lift the corporate veil to prevent incorporation abuses. However, the power is used much more sparingly than appears to be the case in the United States. Canada has no common law doctrine of successor liability.

Prior to 1997, Canada had no statutory rules for the recognition of foreign insolvency proceedings and the extension of assistance to foreign representatives.[34] Instead, recognition was based on fragmented and not always consistent common law

---

29. *See* BIA § 72(1) (2001) (other federal and provincial laws continue to apply unless incompatible with the BIA); *see also id.* § 67(1) (stating that except as otherwise provided, all property of the debtor passes to the trustee in straight bankruptcies.). All the common law provinces in Canada have adopted an Article 9 type version of a Personal Property Security Act; Quebec, a civil law jurisdiction, adopted its own version of Article 9 in the 1994 revision of the Civil Code of Quebec.

30. *See id.* §§ 90-100.

31. *See infra* text accompanying notes 40-42.

32. *See infra* text accompanying note 115.

33. *See infra* text accompanying notes 124-125.

34. The common law position is discussed in J. S. Ziegel, Canadian Law in Transnational Insolvency Cases, in American Law Institute, *Transnational Insolvency Project, International Statement of Canadian Bankruptcy Law,* (forthcoming May 2002) (manuscript at 89 *et seq.*, on file with the Fordham Journal of Corporate & Financial Law).

precedents. The 1997 amendments added a new Part XIII to the BIA[35] and added similar but truncated recognitional rules to § 18.6 of the CCAA.[36] These provisions are substantially different in structure from the provisions in §§ 304-306 of the U.S. Bankruptcy Code[37] and arguably less generous. Canada has not so far adopted the UNCITRAL Model Law on Cross-Border Insolvencies[38] but the desirability of doing so is under active consideration.

III. REORGANIZATIONS OF CROSSBORDER INSOLVENT CORPORATE GROUPS

A. Problems in Procedural Consolidation

1. Initiating the Proceedings

The premise on which the following discussion proceeds is that management of a corporate group, whose members are located in Canada and the U.S., have decided that the group needs to be reorganized. This may be because the group, as a common enterprise, is insolvent or on the verge of insolvency even though individual members of the group may be solvent, or it may be because one or more members of the group are facing mass tort suits which, if even partially successful, will rapidly deplete the group's collective financial resources.[39]

The first question management's legal advisors will have to confront is whether to aim for procedural or substantive consolidation of the proceedings in the group's home jurisdiction.

35. BIA §§ 267–275 (2001).

36. CCAA § 18.6 (2001).

37. 11 U.S.C. §§ 304-306 (2000).

38. *United Nations Commission on International Trade Law; Model Law on Cross-Border Insolvency*, 36 I.L.M. 1386 (1997), *available at* http://www.uncitral.org/english/texts/insolven/insolvency.htm (last visited Mar. 22, 2002) [hereinafter UNCITRAL MODEL LAW].

39. *See, e.g.*, Babcock & Wilcox Canada (Re) (2000) 18 C.B.R. (4th) 157 (Ont.) and U.S. counsel's affidavit in support of the application for assistance by the Ontario court.

It is generally accepted that a substantive consolidation order is difficult to secure in both Canada and the U.S.,[40] because it implies dismantling the walls separating the members of the group and putting all the unsecured assets and liabilities into a common estate. Procedural consolidation, on the other hand, follows almost as a matter of course and merely requires compliance with rules of venue and procedure. The substantive right and obligations of members of the group are left intact.[41] The evidence is that procedural consolidation is almost *de rigueur* where a financially distressed group seeks to reorganize itself.[42]

However, even in procedural consolidations, there are jurisdictional and recognitional problems so far as Canada is concerned. With respect to U.S. proceedings, title 28, § 1408(2) apparently allows any number of affiliates to file in the same district court so long as the first petitioner has its domicile, residence, principal place of business or principal assets in the district of the district court.[43] Once the filing has been made, Bankruptcy Rule 1015(b) then allows the bankruptcy court to make an order for the joint administration of the estate.[44]

40. *See generally* Fred S. Hodara & Robert J. Stark, *Protecting Distributions for Commercial Creditors in Asbestos-Related Chapter 11 Cases*, 10 J. BANKR. L. & PRAC. 383, 415-16 (2001) ("Although the Bankruptcy Code does not expressly authorize the substantive consolidation of bankruptcy estates, courts have rendered such orders, relying upon their general equitable jurisdiction."); Selinda A. Melnik, *Cross-Border Insolvencies: The United States Perspective - A Primer*, 628 PLI/COMM. 225 (1992) ("Substantive consolidation . . . is viewed as a drastic remedy which is granted sparingly and only after carefully weighing the prejudice that certain creditors may suffer absent consolidation against the prejudice to others occasioned by consolidation.").

41. *Cf.* Unsecured Creditors Comm. v. Leavitt Structural Tubing, 55 B.R. 710, 711-12 (N.D. Ill. 1985), *aff'd*, 796 F.2d 477 ("[P]rocedural consolidation is merely a matter of convenience and cost saving; it does not create substantive rights."); *In re* Coles, 14 B.R. 5, 5-6 (Bankr. E.D. Pa. 1981) ("The joint administration of an estate involves merely handling the two cases together for administrative purposes: i.e., appointing one trustee, keeping one docket, etc., while the consolidation of cases treats the consolidated estates as one and may affect the substantive rights of creditors.").

42. *But see infra* text accompanying notes 105-106 (stating that partial *de facto* consolidations appear to be very common in U.S. Chapter 11 proceedings).

43. 28 U.S.C. § 1408(2) (2000).

44. FED R. BANKR. P. § 1015(b).

In Canada, neither the BIA nor the CCAA has a counterpart to Title 28, § 1408(2). Section 2 of the CCAA defines a "debtor company" as one "having assets or doing business in Canada"[45] without making allowances for corporate groups. Similarly, voluntary proposal proceedings under the BIA must involve an insolvent person, which is defined *inter alia* as a person who resides, carries on business or has property in Canada.[46] Occasionally, a question arises whether a U.S. based affiliate satisfies the BIA or CCAA jurisdictional requirements,[47] but if need be, a small bank account can always be opened in the name of the affiliate to establish the presence of assets in Canada. Significantly greater difficulties arise because of the BIA and CCAA requirements that the debtor must be "an insolvent person" (BIA)[48] or a "bankrupt or insolvent debtor company" (CCAA).[49]

2. Recognitional Problems

Assuming group proceedings have been properly initiated in Canada or the U.S., the next question to be considered is how readily those proceedings will be recognized in the other jurisdiction. The answer is, at least theoretically, that significant recognitional problems arise under both U.S. and Canadian law. Like the Canadian legislation, the Bankruptcy Code does not establish a separate status for corporate groups. Rather, § 304(a) provides that a foreign representative may commence a case ancillary to the foreign proceeding, with "foreign proceeding" being defined[50] as a proceeding in a foreign country in which the debtor's domicile, residence, place of business or principal assets were located at the commencement of the proceeding. Interpreted literally, these requirements would be difficult to satisfy where the foreign representative seeks to acquire § 304(a) status vis-à-vis a

45. CCAA § 2 (2001) (defining "debtor company").
46. BIA § 2 (2001) (definition of "insolvent person").
47. *See, e.g.*, CASE STUDIES, *supra* note 28, at 18, 41 n.2.
48. BIA § 2 (defining "insolvent person").
49. CCAA § 2 (defining "debtor company").
50. 11 U.S.C. § 101(23) (2000).

wholly U.S. based member of the group.[51]

So far as Canada is concerned, the 1997 amendments to the BIA do not mirror the U.S. Code requirement that the debtor must have its place of business or principal assets in the foreign jurisdiction, but this is a small consolation. There is a long-standing Anglo-Canadian conflict of laws rule that a foreign insolvency proceeding is only entitled to be recognized in Canada if the debtor has its domicile in that jurisdiction.[52] That rule was recently applied by Registrar Funduk in Alberta[53] in refusing to recognize Chapter 11 proceedings initiated in New York, as part of a group filing, against the Alberta-based subsidiary and other subsidiaries of the Singer Company NV, and refusing the applicant's request for a stay of proceedings against the respondents to enforce a judgment against Singer Canada.[54]

As must be obvious, these technical requirements in both the Canadian and U.S. bankruptcy legislation are inappropriate for corporate groups and need to be updated. There are two solutions.[55] One is to adopt the UNCITRAL Model Law[56] approach and entitle even a non-main foreign proceeding ("NMFP")[57] to recognition and some assistance by the requested

51. This requirement was recently strictly applied by the Delaware Bankruptcy Court in rejecting Teleglobe Inc.'s application for Section 304 status with respect to Teleglobe's U.S. based subsidiaries. *See Teleglobe Plans Suffer Setback*, GLOBE & MAIL (Toronto), May 27, 2002, at B.1.

52. *See* Singer Sewing Mach. Co. of Can. Ltd. (Re), 2000 A.C.W.S.J. LEXIS 47707, at *14 (Alta. Q.B.) ("Comity does not require [a Canadian court] to recognize a Chapter 11 order over a Canadian company carrying on business only in Canada and whose assets are all in Canada. Who the shareholders are is irrelevant and who the creditors are is irrelevant.").

53. *Id; see also* Jacob S. Ziegel, *Corporate Groups and Canada-U.S. Crossborder Insolvencies: Contrasting Judicial Visions*, 35 CAN. BUS. L.J. 459, 459-60 (2001) (comparing recent crossborder bankruptcy cases decided in Canada, including *Singer Sewing Machine,* with particular emphasis on analyzing the willingness of courts in Canada to recognize proceedings in the U.S., and vice versa).

54. *See Singer*, 2000 A.C.W.S.J. LEXIS 47707.

55. There is also a third solution, quite often applied by Canadian courts in recent *ex parte* applications by counsel for U.S. debtors, and this is to disregard the common law domiciliary rule, at least for purposes of a stay order in Canada.

56. UNCITRAL MODEL LAW, *supra* note 38.

57. *See id.* at Art. 2(c).

country's courts.[58] The other solution is to adopt the recommendation in the American Law Institute's ("ALI") *Principles of Cooperation*[59] to the effect that it shall be permissible to file bankruptcy for a subsidiary in the same jurisdiction as the parent company's bankruptcy, and to have either procedural or substantive consolidation under applicable law, absent a proceeding involving the subsidiary in the country of its main interests.[60]

I believe the ALI Report has it right. However, its solution does not overcome the long held view in Canada that the federal government's bankruptcy and insolvency power is restricted to insolvent debtors.[61] If the constitutional restriction exists, presumably it applies to the recognition and regulation in Canada of foreign insolvency proceedings as well as to the initiation of purely domestic proceedings.[62] In my view, the self-imposed fetters on the Canadian federal government's legislative powers are ripe for reconsideration.

It is generally assumed that a corporate group, like a single corporation, only has one center of gravity. However, this proposition was questioned in the *Maxwell Communication* case.[63] The parent company was incorporated under English law and England was the financial and governance center of the Maxwell Group.[64] On the other hand, Maxwell's most important subsidiaries were located and managed in the U.S. Furthermore, a Chapter 11 petition was actually filed in New York a day earlier

58. *See id.* at Art. 17, 21; *see also* Ziegel, *Corporate Groups, supra* note 53, at 486-89.

59. TRANSNATIONAL INSOLVENCY PROJECT, PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT (Tentative Draft, April 14, 2000).

60. *Id.*

61. Ziegel, *Corporate Groups, supra* note 53, at 472-74.

62. Arguably, a broader jurisdictional basis for the Canadian federal government's recognitional power could be located in the federal government's trade and commerce power in § 91(2) of the Constitution Act, but the Federal government has not sought to rely on it so far.

63. *In re* Maxwell Communication Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd, complaint dismissed at* 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

64. *In re Maxwell*, 170 B.R. at 801-02.

than the initiation of administration proceedings under the British Insolvency Act.[65] The U.S. bankruptcy court took the position that U.S. interest in the administration of the U.S. based assets and protection of the claims of U.S. creditors was as great as England's with respect to the group as a whole.[66] Happily, the momentary impasse was resolved by the British and U.S. judges agreeing on joint administration of the Maxwell estate and the appointment of a U.S. examiner by Judge Brozman under Chapter 11 to facilitate the harmonization and coordination of the proceedings in the two countries.[67]

Joint administration of the estates of corporate groups with affiliates in Canada and the U.S. has become a common crossborder feature between Canada and the U.S. for the past decade or more.[68] Joint administration requires no formal finding that the group has more than one center of gravity. Rather it reflects the fact that both jurisdictions believe their creditors have a sufficiently high stake in the proper administration of the estates in each country that neither court should be expected to surrender its jurisdiction to the other.

3. Exterritorial Application of Automatic Stays and Injunctive Orders

An issue that has surfaced in recent years in Canada and that is unrelated to joint administration of estates involves the question of how much recognition should be given in Canada to automatic stays arising under § 362 of the U.S. Code and to injunctions issued by U.S. bankruptcy courts[69] with respect to proceedings against non-debtor affiliates of a debtor corporation.

---

65. *See id.*

66. *Id.*

67. *See* Evan D. Flaschen & Ronald J. Silverman, *The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communication Corporation International Insolvency*, *in* CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW, ch. 25 (J. S. Ziegel ed., 1994).

68. *See, e.g.,* Olympia & York *in* CASE STUDIES, *supra* note 28, at ch. 6 *and* the Everfresh Reorganization *in* CASE STUDIES, *supra* note 28, at ch. 14.

69. Pursuant to the bankruptcy court's ancillary powers under Code, 11 U.S.C. § 105(a) (2000).

The scope of automatic stays under § 362 is much broader than the stay of proceedings triggered under the BIA, which is limited to proceedings by *creditors* against the debtor or the debtor's property.[70] Also, the BIA has no counterpart to the ancillary powers provision in §105(a) of the U.S. Code,[71] often used by U.S. courts in class action bankruptcies to issue injunctions protecting non-debtor affiliates of the debtor from hostile proceedings and to seek the assistance of foreign courts in applying the injunction to foreign based affiliates of the U.S. debtor corporation.[72] Canadian courts have acceded to these requests in *ex parte* applications but without discussion of the apparent anomaly that a U.S. stay or injunctive order may be given a wider reach than is available domestically to a debtor in Canada under the BIA. It seems clear that the UNCITRAL Model Law avoids the anomaly by not obliging the authorities in the requested country to apply a broader stay than is available under the forum's domestic law.[73]

B. The Challenges of Concurrent Insolvency Proceedings

As previously mentioned, concurrent proceedings are very common in crossborder insolvencies spanning Canada and the U.S.[74] The resulting legal and administrative challenges are formidable, particularly given the many substantive and procedural differences in the bankruptcy laws of the two countries. Happily, in most cases the problems have been reduced to manageable size thanks to close cooperation between bankruptcy judges on both sides of the border and the courts' approval of protocols to govern the administration of the estates.[75]

---

70. *See* BIA §§ 69, 69.1, 69.3 (2001). The stay does not apply to secured creditors in straight bankruptcy proceedings. *Id.* § 69.3(2). The position is different under the CCAA because the court imposed stays under § 11 apply to all proceedings against the debtor company and are not restricted to proceedings by the debtor's creditors.

71. *See* 11 U.S.C. § 105(a).

72. *See, e.g.*, Babcock & Wilcox, *supra* note 39.

73. UNCITRAL MODEL LAW, art. 20(1); *see also* Ziegel, *Corporate Groups*, *supra* note 53, at 487-88.

74. *See supra* notes 1-5 and accompanying text.

75. *See* E. Bruce Leonard, *Breakthroughs in Court-to-Court Communications*

The easiest cases are those where there is no substantive consolidation and assets and liabilities belonging to each affiliate of the group can be readily segregated. Then each jurisdiction essentially applies its own claims and priority rules for distribution of the net proceeds of the estates. The task becomes much more challenging when assets and liabilities among members of the group are so hopelessly intermingled that substantive consolidation becomes unavoidable. Whose insolvency rules should be applied and when? To what extent can courts waive rules in crossborder proceedings that would be mandatory in purely domestic cases?[76] Whose voidable transfer rules apply?[77] Can Chapter 11 type plans be used binationally to overcome rigidities in insolvency rules? Clearly there is much scope for creative engineering by counsel in such cases.[78]

C. Total and Partial Substantive Consolidations

1. The Canadian Position

Substantive consolidation of the cases of members of a group are of course a well established feature of U.S. insolvency law.[79] This is true even though there is a difference of opinion among U.S. courts about the tests to be applied to determine whether such an order should be made.[80] Canadian courts too have embraced the doctrine[81] because of its compelling logic where the business of

---

in Cross-Border Cases, AM. BANKR INST. J., at 165 (2001).

76. *See, e.g.*, Bank of Credit and Commerce International (No.10) [1996] 4 All. Eng. Rep. 796 (including a holding by the Vice-Chancellor that the set off rules in the British Insolvency Act were mandatory and that the English based funds of the Bank could not be released to the foreign liquidators without allowing the set off claims; *see also* IAN FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 74-75 (1999).

77. *See* 11 U.S.C. § 105(a) (2000); *cf.* Peter Kennedy, *360 Net Given Deadline on U.S. Creditor Concerns*, GLOBE & MAIL (Toronto), Feb. 14, 2002, at B3.

78. *See* CURRENT DEVELOPMENTS, *supra* note 67, at chs. 24 & 26.

79. *See* COLLIER ON BANKRUPTCY 2:105.09[1][A] (15th rev. ed.).

80. *See id.* at 2:05.09[2].

81. *See* New Zealand Law of Companies, LNZ Companies § 352 (2002). Unlike other Commonwealth courts, such as England and Australia, which have

the group has been conducted as if it were a single entity and outsiders were not aware of the group's legal structure or did not care with which member of the group they dealt.

According to Ellen Hayes, a Canadian author, up to 1994 at least sixteen consolidated plans of arrangements were attempted in Canada.[82] Several of these involved uncontested plans and did not answer the question whether substantive consolidations were part of Canadian law.[83] The substantive issue was raised before the British Columbia Court of Appeal *In re Northland Properties*.[84] The Court there found statutory authority to make a consolidation order in § 20 of the CCAA.[85] The section provides that the CCAA provisions can be applied conjointly with the provisions of any Act authorizing compromises or arrangements between a company and its shareholders.[86] The applicants in *Northland* had applied for approval of the plan and amalgamation of the companies not only under the CCAA but also under the British Columbia Companies Act.[87]

Since then, Canadian courts have made consolidation orders in at least four other cases,[88] one of which expressly relied on *Northland*.[89] The Court of Appeal's reliance in *Northland* on § 20 of the CCAA was not very persuasive since the section does not predicate the existence of multiple debtor companies.[90] Justice

---

not legislated on the issue, New Zealand has adopted a statutory provision conferring discretionary powers on the courts to permit substantive consolidation.

82. Ellen L. Hayes, *Substantive Consolidation Under the Companies' Creditors Arrangement Act and the Bankruptcy and Insolvency Act*, 23 CAN. BUS. L.J. 444, 445 (1994).

83. *Id.*

84. (1989) B.C.L.R.2d 122 (Brit. Columbia).

85. *Id.*

86. *See* R.S.C., ch. c-36, § 20 (2001) (Can.).

87. (1989) 3 W.W.R. 363, 73 C.B.R. (N.S.) 195.

88. *See Re* Fairview Indus. Ltd. (1991), 11 C.B.R. (N.S. 3d) 43 (N.S.); *see also Re* Lehndorff Gen. Partners Ltd. (1993), 17 C.B.R. (3d) 24 (Ont.); *Re* A & F Baillargeon Inc. (1993), 27 C.B.R. (3d) 27 (Que.), and *Re* Assoc. Freezers of Can. Inc. (1995), 36 C.B.R. (3d) 227 (Ont.). These cases do not include the CCAA cases discussed below.

89. *Re* Fairview Indus. Ltd. (1991), 11 C.B.R. (N.S. 3d) 43 (N.S.).

90. *See* CCAA, R.S.C., ch. c-36, § 20 (2001) (Can.).

Trainor's judgment at the trial level in *Northland* is more helpful since he relied on U.S. precedent and not on § 20 of the CCAA.[91] He also adopted the following balancing test appearing in *In re Baker and Getty Fin. Services Inc.*: "The propriety of ordering substantive consolidation is determined by a balancing of interests. The relevant inquiry asks whether 'the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition.'"[92]

Several of the substantive consolidations have involved restructurings under the CCAA by large corporate groups with strong crossborder links to the U.S. An arresting example of one such consolidation involved the Bramalea group of companies.[93] Bramalea was a major North American real estate corporation, headquartered in Toronto, which carried on business through numerous operating subsidiaries in Canada and the U.S.[94] Bramalea was also a party to many partnerships and joint venture arrangements. Bramalea had a complex debt structure involving dozens of special project loans, both to the company itself and to several of its subsidiaries and joint ventures.[95] Bramalea also had secured lines of credit from two Canadian chartered banks and a floating charge debenture issue in the principal amount of Can. $500 million.[96]

Based on a balance sheet analysis alone, some of the subsidiaries arguably were not insolvent. This created problems for the CCAA proceedings, given that (as previously mentioned) the Act requires all debtor companies to be insolvent.[97] However, Bramalea took the position that the viability of the subsidiaries

---

91. (1991) B.C.L.R.2d 122.

92. *In re* Baker & Getty Fin. Servs., Inc., 78 B.R. 139, 142 (Bankr. N.D. Ohio 1987). Despite his extensive discussion of the U.S. doctrine, Justice Trainor did not in fact make a consolidation order since he thought it was premature for him to do so at this early stage of the case; *see also* Ralph McRae, *Northland Properties Ltd. in* CASE STUDIES, *supra* note 28, at ch. 4.

93. For a detailed discussion, *see* R. Gordon Marantz, *The Bramalea Story* in CASE STUDIES, *supra* note 28, at ch. 1.

94. *Id.*

95. *Id.*

96. *Id.* at 2-5.

97. *See* CCAA §§ 2 (2001) (defining "debtor company); *see also id.* § 4.

could not be sustained without Bramalea's support.[98] The initial draft court material prepared by Bramalea's counsel therefore focused on the insolvency of the group as a whole.[99] For the purposes of the CCAA filing Bramalea and its subsidiaries, Canadian and American, were treated as a single business entity.

Bramalea subsequently filed a prepackaged plan of arrangement under the CCAA, which was subsequently approved by the various classes of creditors, secured and unsecured.[100] The key features of the plan, as accepted for filing by Justice Lloyd Houlden of the Ontario Court of Appeal acting as trial judge in these proceedings,[101] were these:

> (a) the court implicitly accepted Bramalea's contention that it was a single integrated business operating in both Canada and the U.S., so the affairs of numerous Canadian and U.S. corporations were substantively consolidated;
>
> (b) the court made a single order imposing a global stay of proceedings, not only in respect of Bramalea but also in respect of a large number of its affiliates;
>
> (c) in making the stay order, the court accepted a broad geographical jurisdiction purporting to stay U.S. creditors with direct claims over U.S. assets;
>
> (d) proceedings involving numerous Canadian and U.S. corporations were consolidated into one proceeding;
>
> (e) classes of creditor were substantively consolidated, that is, creditors of different corporate entities were treated as if they were all creditors of one entity;
>
> (f) U.S. creditors were consolidated with Canadian creditors; and

98. Marantz, *supra* note 93, at 6.
99. *Id.*
100. *Id.* at 21-22.
101. Justice Houlden was a leading bankruptcy counsel during his many years at the Ontario Bar and also served as a trial judge before his elevation to the Ontario Court of Appeal. Philosophically, as a youngster who had lived through the Depression of the 1930s, he was very much committed to the reorganization of insolvent businesses as a means of saving jobs and enterprises.

(g) cross-border entities, projects & creditors were consolidated, all funds were pooled rather than being segregated according to specific projects, and there was no ring fencing of assets.[102]

As will be noted, the plan of arrangement not only treated the Bramalea group as a single entity but included the U.S. as well as the Canadian subsidiaries. In short, the plan ignored national boundaries and treated all creditors as being subject to the same (i.e., Canadian) insolvency law. All these traditional barriers could be breached because the creditors supported the plan and the legality of the plan was never tested in court. As Gordon Marantz, counsel for Bramalea, reminds us in his account of the Bramalea saga,[103] what happened in Bramalea is no guide to what would have happened had the plan been contested.

He might also have added that it is unclear whose law will be applied to determine the availability and appropriateness of a substantive consolidation order where the group has contacts with more than one country. As a matter of practicality, it seems unlikely that a Canadian or U.S. court will make a crossborder consolidation order without the consent of the parties or the support of the court in the other jurisdiction.

2. *Partial Substantive Consolidations*

It is accepted law that a consolidation order may be partial in its scope.[104] However, it does not appear to be widely appreciated that partial consolidation orders are widely used *informally* in Chapter 11 proceedings without the court making a formal consolidation order. The author is indebted to Professor Lynn LoPucki for providing him with this information in the course of a recent exchange of email messages.[105] The author queried

102. Marantz, *supra* note 93, at 16-17. I have slightly rearranged some of the wording and punctuation in the original text.

103. *See id.* at 22.

104. *See In re* Giller, 962 F.2d 796, 799 (8th Cir. 1992) (holding that the "bankruptcy court retains the power to order a less than complete consolidation").

105. Exchange of e-mail messages between the author and Professor Lynn LoPucki (Feb. 3 & 10, 2002) (available on filed with the Fordham Journal of Corporate & Financial Law).

Professor LoPucki about U.S. consolidation practices in large Chapter 11 reorganizations and this elicited the following replies:

- most substantive consolidations in large Chapter 11 cases are accomplished by provisions in the plan without a court order;
- most Chapter 11 plans involving large companies do not recognize the separate corporate existence of the group members—all are "lumped together;"
- in nearly all large Chapter 11 cases, the court confirms only a single plan covering all of the debtor entities. If the plan respects separate entities, it is by creating separate classes in a plan for the creditors of separate entities. Seldom are more than two or three entities recognized;
- Chapter 11 does not expressly permit creditors of different entities (i.e., members of the same corporate group) to be lumped together in one plan but that is the practice;
- Chapter 11 does not expressly permit creation of a common fund for payment of members of the same corporate group, but this too is common practice. The initiative for creating a common fund may come from the debtor or the creditors' committee. In either event, the plan's contents will be the result of preplan negotiations;
- preplan negotiations will proceed in the shadow of (1) what the court would rule if a consolidation motion were made, and (2) the economics of litigation. Professor LoPucki surmises that many creditors of different entities are given the same treatment because the interrelationships among the entities are very complex.[106]

---

106. Professor Jay Westbrooke, who was privy to this exchange of e-mails, added the following codicil from his own experience as a practicing attorney in Washington, D.C., in the 1970s:

> I am reminded by this exchange that in the Chrysler workout, which was my last major case before teaching, the bankers were anxious to keep separate Chrysler Credit, which had a much higher credit rating and which would have given them a much larger payout pro rata than the parent. Amidst the tectonic pressures,

IV. PARENT-SUBSIDIARY RELATIONSHIPS: HOLDING THE PARENT CORPORATION LIABLE FOR A SUBSIDIARY'S ACTIONS

The question for consideration under this heading is the opposite of the question discussed in the previous part of this Article. The assumption here is that only the subsidiary is insolvent and the subject of insolvency proceedings. The question is under what circumstances a U.S. parent corporation can be held accountable for the actions of its Canadian subsidiaries and vice versa with respect to the liability of a Canadian parent corporation for the actions of a U.S. based subsidiary.

As indicated earlier, the author is not aware of any recent Canadian cases involving the vicarious liability of a U.S. parent company for the actions of its Canadian based insolvent subsidiary. One reason for this paucity of precedents is that it will usually be much more profitable for plaintiffs to sue the U.S. parent company in the U.S. than to sue in Canada.[107]

The reasons for this conclusion are the following. First, Canadian courts, like the British courts, are still wedded to the entity doctrine of incorporation represented by the seminal decision of the House of Lords in *Salomon v. Salomon & Co.*[108] Neither thin capitalization nor control of the subsidiary by the parent corporation are sufficient to lift the corporate veil.[109] The

---

> political and economic, of that case, they largely failed. They also failed partially or completely in similar efforts in other large cases in which I acted in the late seventies.

E-mail from Jay Westbrooke, Professor of Law, University of Texas, to Jacob Ziegel, Professor of Law Emeritus, University of Toronto (Feb. 10, 2002) (on file with the Fordham Journal of Corporate & Financial Law).

107. This proposition is illustrated by the asbestos litigation in *Amchen Products v. British Columbia* (Workers' Compensation Board) [1993] 1 S.C.R. 897, where the plaintiffs elected to sue the defendants in Texas even though the injuries were suffered in British Columbia. Presumably the plaintiffs' decision to sue in Texas was influenced by the Texas strict liability regime for harmful products, high jury awards for compensatory and punitive damages, and the absence at the time of a *forum non conveniens* doctrine in Texas law.

108. [1897] App. Cas. 22.

109. For recent Canadian case law *see, inter alia,* Transamerica Life Ins. Co. of Can. v. Can. Life Assurance Co. [1996] 28 O.R. (3d) 423 (Ont. Sup. Ct.); Gregorio v. Intrans-Corp [1994] 18 O.R. (3d) 527 (Ont. Ct. App.); and B.G.

recognized exceptions fall under the following headings: statutory and contractual provisions, fraudulent conduct by the dominant shareholder, evidence that the subsidiary was only acting as the parent corporation's agent, and proof that the subsidiary's incorporation was only a facade.[110]

Second, unlike the U.S., Canada has no strict liability for defective products causing injury to persons: proof of the manufacturer's or supplier's negligence is still necessary for a successful suit.[111] A third reason is that the Canadian insolvency legislation has not copied the "wrongful trading" provisions in Section 214 of the British Insolvency Act[112] or the concept of a "shadow director" in the British Act allowing a parent company to be held responsible if it allows the subsidiary to continue trading when the subsidiary's directors knew or should have realized that

---

Preeco I (Pacific Coast) Ltd. v. Bon Street Developments Ltd. [1989] 60 Dom. L. Rep. (4th) 30 (Brit. Col. Ct. App.).

110. The exceptions are exhaustively discussed in the English Court of Appeal's seminal decision in Adams v. Cape Industries P.L.C. [1990] Ch. 433; *see also* Dan D. Prentice, *Veil Piercing and Successor Liability in the United Kingdom*, 10 FLA. J. INT'L L. 469 (1996). For more recent English developments involving parent-subsidiary relationships in an international context, see Peter Muchlinksi, *Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case*, 50 INT'L. & COMP. L. Q. 1 (2001) and P.T. Muchlinki, *Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review II*, AMICUS CURIAE, Mar./Apr. 2002, at 25. Recent Canadian cases have also strongly disavowed Justice Wilson's obiter dictum in the Supreme Court of Canada in Constitution Insurance Co. of Canada v. Kosmopoulous [1987] 34 D.L.R. (4th) 208 (S.C.C.) (at 213). "[T]he best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the interests of the Revenue.'" L.C.B. GOWER, MODERN COMPANY LAW 112 (4th ed. 1979). *But see* Ontario Limited v. Fleischer (2002), 56 O.R. (3d) 417 at 437-40 (Ont. Ct. App.) (citing Judge Wilson's dictum without referring to its disavowal in earlier Ontario and British Columbia decisions). The meaning of "facade" in the above exception is far from clear and has a strong subjective flavor to it.

111. This restriction gives buyers of goods an important incentive to sue the immediate merchant seller of the product for breach of the implied warranties under the provincial sale of goods acts since warranty liability under the acts is strict.

112. *See* British Insolvency Act of 1986, c.45, § 214 (1991).

the company would be unable to pay for the goods and services.[113]

There are other reasons as well that favor a U.S. based suit against a U.S. parent corporation. Canada has no common law doctrine of successor liability[114] and the question whether the doctrine of equitable subordination will be followed in Canada remains unresolved.[115] Assuming problems of jurisdiction by U.S. courts and objections of *forum non conveniens* can be overcome, a Canadian trustee or debtor in possession will also find it advantageous to pursue voidable preference and voidable transfer claims against the parent company in the U.S. This is because the Bankruptcy Code's provisions in Sections 547 and 548[116] are much more liberal than the comparable provisions in Sections 95 and 100 of the BIA.[117]

These examples squarely raise the choice of law question. Whose law will a U.S. court apply in respect to Canadian based or Canadian related conduct of the U.S. parent company? In the case of lifting the corporate veil, Professors Gordon and Blumberg have suggested[118] it should be the law of the subsidiary's jurisdiction whose veil is being pierced.[119] So far as choice of law rules involving voidable transfers are concerned, U.S. courts have

113. *See id.* § 251 (1991) (defining a shadow director as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act (but . . . a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity)").

114. *See* GEORGE W. ADAMS, CANADIAN LABOR LAW § 8.460 *et seq.* (2d ed. 993).

115. The Supreme Court of Canada refused to commit itself in Can. Deposit Ins. Corp. v. Canadian Commercial Bank [1992] 97 Dom. L. Rep. (4th) 385, at 419 (Iacobucci J.). For the subsequent lower court Canadian case law, see Thomas G.W. Telfer, *Transplanting Equitable Subordination: The New Free-Wheeling Equitable Discretion in Canadian Insolvency Law?* 36 CAN. BUS. L .J. 36 (2001) (querying the need for the doctrine in Canada); *cf.* R. Schulte, *Corporate Groups and the Equitable Doctrine of Claims on Insolvency*, 18 CO. LAW. 2 (1997) (examining the English position and arguing the need for a doctrine of equitable subordination to monitor parent-subsidiary relationships).

116. 11 U.S.C. §§ 547-48 (2000).

117. BIA §§ 95, 100 (2001).

118. *Proceedings Fourth Annual International Business Law Symposium: Multinational Corporations and Cross Border Conflicts: Nationality, Veil Piercing, and Successor Liability*, 10 FLA. J. INT'L L. 221, 269 (1995).

119. *Id.*

applied a variety of tests and none apparently clearly dominates the field.[120]

However, not all is bleak from the perspective of a plaintiff seeking to sue the U.S. parent in Canada. This is because the Canada Business Corporations Act[121] and many of the provincial business corporations acts[122] have adopted a very powerful statutory remedy for the protection of minority shareholders and others including, importantly, a company's creditors.[123] This discretionary remedy applies where the business or affairs of a corporation or its affiliates have been carried on in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards *inter alia* the interests of any creditor.[124] Oppression remedy actions are usually

---

120. *See* Jay L. Westbrooke, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 516-19 (1991). In the much discussed decision in, *In re* Maxwell Comm. Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd.*, 186 B.R. 807 (Bankr. S.D.N.Y. 1995), Judge Brozman favored a case specific choice of law rule based on contacts and state interests in each case.

121. R.S.C. 1985, ch. C-44, §§ 238-42 (2002) (Can.).

> § 241: Application to court re oppression
> (1) A complainant may apply to a court for an order under this section.
> Grounds.
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
> (a) any act or omission of the corporation or any of its affiliates effects a result,
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.
> The oppression remedy was borrowed from the United Kingdom where it was first introduced in the Companies Act of 1948. One of the first reported, and still leading, decision under the new doctrine involved abusive conduct by a parent company in seeking to freeze out a minority shareholder in a subsidiary.

Id. § 241; Scottish Co-op Wholesale Socy. Ltd. v. Meyer [1959] A.C. 324 (Sc.).

122. *See, e.g.,* Alberta Business Corporations Act, S.A. 1981, ch. B-15 *et. seq.* (2000); *see also* Ontario Business Corporations Act, R.S.O 1990, ch. B-16, Pt. XVII, s.247 *et. seq.* (2002).

123. *See supra* notes 120-121 and accompanying text.

124. *See* R.S.C. 1985, ch. C-44, § 241(1),(2) (2001) (Can.). Paradoxically, while creditors are specifically mentioned as a class of protected persons under § 241(2), a creditor can only be a complainant under § 238 with the leave of the court. On the use of the oppression remedy by creditors, see J. Ziegel, *Creditors*

brought outside bankruptcy. However, it is well established Canadian law that a trustee represents the interests of creditors and there is no reason why a subsidiary's trustee should not be able to bring an oppression remedy action against the parent company if he believes the parent's conduct was responsible for the creditors' losses.[125]

V. CONCLUSION

It would be foolish to make firm predictions about an area as fluid and unsettled as the treatment of corporate groups in crossborder insolvencies. However, we can learn much from past experience. The first lesson surely is that national and international insolvency legislation can no longer ignore the reality and distinctive problems of corporate groups. A second lesson is that efficiency imperatives and the expense and difficulty of disentangling intragroup liabilities and entitlements often drive the parties, creditors and debtor corporations alike, to agree on at least a partial substantive consolidation. It is that same consensus that allows counsel to overcome what otherwise might appear to be insuperable difficulties in reconciling conflicting national insolvency rules. This is no reason not to pursue the search for greater harmonization of substantive rules, but it is a very slow and difficult process.

In addition, in both Canada and the U.S. we need more systematic, empirical studies of the treatment of crossborder insolvencies to serve as a reference point for future solutions. Much useful data already exists, as illustrated by the statistics and reports referred to in this Article, but that data, and other studies of the same type, need to be sifted more systematically to identify similarities and differences and to construct a hierarchy of models to serve as future precedents.

---

as Corporate Stakeholders: The Quiet Revolution - An Anglo-Canadian Perspective, 43 U. TORONTO L.J. 511, 526-29 (1993).

125. *Cf.* Peoples Dep't Stores Inc. v. Wise [1998] Que. Judgts. 3571 (on appeal to the Que. Ct. Appeal) (involving, among others, a trustee's claim for misfeasance by the affiliates directors leading to the debtor's bankruptcy); *see also* Edward M. Iacobucci, *A Wise Decision? An Analysis of the Relationship Between Share Ownership Structure and Director's and Officers' Duties,* 36 CAN. BUS. L.J. 337 (2002).

So far as the accountability of solvent parent corporations for the liabilities of insolvent subsidiaries are concerned, these problems belong to a world of their own and have no organic links to corporate group insolvencies unless and until the liability of the parent corporation or other members of the group has been established.

Notes & Observations