

**NEW YORK STATE BAR ASSOCIATION
INTERNATIONAL SECTION
SEASONAL MEETING**

**Montreal, Quebec
October 25, 2018**

**Across a Well-Traveled Border:
Experience in U.S.–Canadian
Insolvency Proceedings**

**Chair: Mark Bloom, Greenberg Traurig, LLP, Miami
Panelists: Regional Senior Judge Geoffrey B. Morawetz,
Ontario Superior Court of Justice, Toronto
Judge Martin Glenn, U.S. Bankruptcy Court, New York
Denis Ferland, Davies Ward Phillips & Vineberg LLP, Montreal**

**Identifying and Addressing
Practical Problems in Cross-
Border Insolvencies**

Starting Point



- ▶ Assume an insolvent corporate group with U.S. entities and Canadian entities and substantial operations in both jurisdictions

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- ▶ U.S. entities file under Chapter 11 of the United States Bankruptcy Code (“Chapter 11”)
- ▶ Canadian entities file under the Companies’ Creditors Arrangement Act (“CCAA”)

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- ▶ U.S. Debtors (operating through debtor in possession) and Canadian debtors (operating through management with involvement of a Court-appointed Monitor) recognize the need for cooperation and communication between courts

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- ▶ Initial step is for debtors to obtain court orders in both jurisdictions that provide for a cross-border communication protocol.
- ▶ Common for protocols to incorporate the Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (as promulgated by the Judicial Insolvency Network Conference)

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- ## Protocol
- ▶ Purpose is to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communication among the jurisdictions involved
 - ▶ Protocol establishes the basis for judge to judge communications
 - ▶ Protocol recognizes that each Court has jurisdiction over certain matters

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- ▶ Issues arise which require orders from both courts
- ▶ Examples:
 - DIP Financing
 - Asset Sales
- ▶ Desirable to have cooperative approach

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- ▶ Circumstance of each case will determine whether a joint hearing is required
- ▶ Joint hearing usually involves a common issue requiring concurrent determination
- ▶ Commonly used on asset sales
- ▶ Although referred to as a joint hearing, it may be more accurate to reference parallel motions

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- ▶ Joint hearings used extensively in Nortel Networks
 - at least 8 major transactions
 - asset sale procedures
 - asset sales in excess of \$8 billion
 - approval of Funding Agreements

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- Practice Points**
- ▶ Planning, Planning, Planning
 - ▶ Logistics have to be considered
 - required notice in each jurisdiction
 - coordination of judicial schedules
 - judges have more than one matter on their docket

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- › Coordination of court administrative staff
- › Remember
 - courtroom availability
 - not all courtrooms have video equipment
 - technical requirements
 - time estimates
 - Rule 1 - it always takes longer than anticipated

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Additional Considerations

- › What relief is being requested?
- › How does the process differ for each jurisdiction?
- › What type of evidence is required?
- › What is the legal test that has to be met in the U.S.?
- › What is the legal test that has to be met in Canada?
 - recognize and accept that there are certain differences
- › Keep both courts apprised as to whether debtor expects opposition to the motion

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Communication

- › Judges may communicate in advance of the hearing
 - important for each judge to be aware of the process in the foreign jurisdiction
 - process can range from being reasonably consistent (asset sales) to being very different (approval of Funding Agreement where local court has to consider impact on local entities)


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- › Desirable for judges to reach agreement on process to be followed at hearing and to communicate outcome to counsel
- › Objective from judge's standpoint is to conduct the joint hearing with seamless transition from court to court
- › Generally argument will proceed in Court A followed by Court B
- › Recess at conclusion of argument
- › Judges confer to determine status in Court A and Court B
- › Ruling from Court A followed by Court B
- › Formal court orders to be issued

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Joint Hearings

- › Best outcome achieved if requested relief in both courts is not opposed
- › There are potential issues if there is opposition
 - what is the evidentiary record?
 - affidavits
 - oral evidence at hearing
 - cross examination
 - inconsistent results
 - appeals



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