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COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

MATTERS IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC
1985, c. B-3.

CLERK'S STAMP:

IN THE MATTER OF KERNHEM INTERNATIONAL B.V.

APPLICANT RAGNILD MEULENBERG, AS FOREIGN REPRESENTATIVE

DOCUMENT **BRIEF OF LAW**

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I. INTRODUCTION

1. This Brief of Law is submitted on behalf of the Applicant, Ragnild Meulenberg, as Foreign Representative, in support of her Originating Application dated April 6, 2023 (the “**Application**”), for an Order recognizing and giving full force and effect in Canada pursuant to section 269 of the *Bankruptcy and Insolvency Act*¹ (the “**BIA**”) a bankruptcy order of Kernhem International B.V. (the “**Debtor**”) dated September 27, 2022 granted by Ms. C.J. Hofman (the “**Foreign Order**”) in the Amsterdam District Court of the Netherlands made in Court Action No. C/16/22/221, and granting other related relief.

II. FACTS

2. The Debtor is a Dutch company with its registered office in Hilversum, the Netherlands.² Pursuant to a shareholders’ agreement dated December 4, 2009, and amended December 15, 2010, KNOC KAZ B.V. (“**KNOC**”) provided a loan to the Debtor (the “**Loan**”).³ The Loan became due on December 7, 2021, and, after repeated requests, the Debtor failed to repay KNOC the USD \$167,669,104.36 owing pursuant to the Loan.⁴ As a result, on September 8, 2022, KNOC filed a petition for bankruptcy of the Debtor in the Central District Court of the Netherlands made in Court Action No. F/16/22/221 (the “**Foreign Proceeding**”).⁵
3. On September 27, 2022, Ms. C.J. Hofman heard the petition and granted the Foreign Order.⁶ The Foreign Order, *inter alia*, appointed as trustee of the Foreign Proceedings the Foreign Representative, Ragnild Meulenberg.⁷
4. Since then, the Foreign Representative has completed a sales process in the Netherlands and has entered into an asset purchase agreement with KNOC (the “**Transaction**”) pursuant to section 3:251(2) of the *Dutch Civil Code*. The supervisory judge in the Foreign Proceeding provided the Foreign Representative with authorization for completing the Transaction.⁸
5. The Transaction includes, *inter alia*, the purchase of 25,750,005 shares (the “**Black Hill Shares**”) held by the Debtor in KNOC Black Hill Ltd. (“**Black Hill**”), a corporation registered pursuant to the *Alberta Business Corporations Act*⁹ with its registered office in Edmonton, Alberta.¹⁰ The Debtor

¹ RSC 1985, c B-3 [BIA]. [TAB 1]

² Affidavit of Ragnild Meulenberg sworn April 3, 2023 at para 2 and Exhibit “A” [Meulenberg Affidavit].

³ *Ibid* at Exhibit “A”.

⁴ *Ibid* at Exhibit “A”.

⁵ *Ibid* at para 3.

⁶ *Ibid* at para 4.

⁷ *Ibid* at para 5.

⁸ *Ibid* at para 7.

⁹ RSA 2000, c B-9.

holds the Black Hill Shares pursuant to a Securities Pledge Agreement between the Debtor and KNOC dated February 28, 2011.¹¹

6. In order to complete the closing of the Transaction, the Foreign Representative must seize the Black Hill Shares located in Canada.¹²

III. ISSUES

7. Whether the Foreign Order be recognized and given full force in Canada pursuant to subsection 270(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”).
8. Whether further relief should be granted pursuant to subsection 272(1) of the *BIA*, namely the following:
- (a) staying all proceedings against the Debtor, as further outlined at paragraphs 2 to 4 of the Proposed Order appended to the Application (the “**Stay**”);
 - (b) appointing BDO Canada Limited (the “**Administrative Delegate**”) as delegate of the Foreign Representative to assist with the administration or realization of all the Debtor’s current and future assets, undertakings and properties of every nature and kind whatsoever, located in Canada (collectively, the “**Property**”); and
 - (c) granting an administrative charge in favour of the Foreign Representative, Administrative Delegate and counsel to the Administrative Delegate, if any (the “**Administration Charge**”).

IV. LAW & ARGUMENT

A. This Court has jurisdiction to grant the Order

9. Sections 269 to 273 of the *BIA* give this Court the jurisdiction to grant the Order sought herein:

Application for recognition of a foreign proceeding

269(1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

- (a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
- (b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative’s authority to act in that capacity; and
- (c) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

¹⁰ Meulenberg Affidavit, *supra* note 2 at para 8 and Exhibits “C” and “F”.

¹¹ *Ibid* at Exhibit “E”.

¹² *Ibid* at para 9.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

(...)

Order recognizing foreign proceeding

270(1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Effects of recognition of a foreign main proceeding

271(1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,

- (a) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;
- (b) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and
- (c) if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

When subsection (1) does not apply

(2) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor at the time the order recognizing the foreign proceeding is made.

Exceptions

(3) The prohibitions in paragraphs (1)(a) and (b) are subject to the exceptions specified by the court in the order recognizing the foreign proceeding that would apply in Canada had the foreign proceeding taken place in Canada under this Act.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.

Orders

272(1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

- (a) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 271(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;
- (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtors' property, affairs, debts, liabilities and obligations;
- (c) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and
- (d) appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,
 - (i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and

(ii) to take any other action that the court considers appropriate.

(...)

Terms and conditions of orders

273 An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

B. The requirements for this Court to recognize the Foreign Proceeding have been met

10. Pursuant to subsection 269(2) of the *BIA*, in order to recognize the Foreign Proceeding, the Foreign Representative must present the following:
- (a) a certified copy of the instrument that commenced the Foreign Proceeding;
 - (b) a certified copy of the instrument authorizing the Foreign Representative to act in that capacity; and
 - (c) a statement identifying all foreign proceedings in respect of the Debtor that are known to the Foreign Representative.
11. Furthermore, subsection 270(1) of the *BIA* stipulates that once this Court is satisfied that the Foreign Proceeding is a “foreign proceeding” and that the Applicant is a “foreign representative” as defined in subsection 268(1) of the *BIA*, this Court shall make an order recognizing the Foreign Proceeding. Subsection 270(1) leaves no room for discretion; once the requirements have been satisfied, an order must be granted recognizing the Foreign Proceeding.¹³
12. Subsection 268(1) defines “foreign proceeding” and “foreign representative” as follows:

Definitions

268(1) The following definitions apply in this Part.

(...)

foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor’s collective interests generally under any law relating to bankruptcy or insolvency in which a debtor’s property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to

- (a) administer the debtor’s property or affairs for the purpose of reorganization or liquidation; or
- (b) act as a representative in respect of the foreign proceeding.

¹³ See e.g., *Heijs v Gerald W. Breuker, as Dutch Trustee*, 2018 PECA 12 [TAB 2] at para 31: “There is no issue that the applications judge was satisfied pursuant to s. 270(1) that the application related to a foreign proceeding and that the applicant is a foreign representative. Therefore, the applications judge had no option but to make the order recognizing the foreign proceeding (BIA s. 270(1)).” (*emphasis added*)

13. In *MtGox Co., Re*¹⁴ (“**MtGox**”), the Ontario Superior Court of Justice granted an order recognizing the Japanese bankruptcy proceedings of MtGox Co. (“**MtGox**”) as a foreign proceeding under subsection 270(1) of the *BIA*. MtGox was a Japanese corporation that became insolvent and commenced Japanese bankruptcy proceedings pursuant to the *Bankruptcy Act of Japan*, Act No. 75 of June 2, 2004 before the Tokyo District Court, Twentieth Civil Division (the “**Tokyo Court**”). The Tokyo Court appointed Nobuaki Kobayashi as the bankruptcy trustee. In analyzing whether the requirements under subsection 270(1) had been satisfied, the Court stated the following:

14 A foreign proceeding is broadly defined in section 268(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

15 The Japan bankruptcy proceeding is a judicial proceeding dealing with creditors' collective interests generally under the Japan Bankruptcy Act, which is a law relating to bankruptcy and insolvency, in which MtGox's property is subject to supervision by the Tokyo District Court, Twentieth Civil Division. As such, the Japan bankruptcy proceeding is a foreign proceeding pursuant to section 268(1) of the *BIA*.

16 Section 268(1) of the *BIA* defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

17 The Trustee has authority, pursuant to the Japan Bankruptcy Act and the bankruptcy order made by the Tokyo District Court in the Japan bankruptcy proceeding, to administer MtGox's property and affairs for the purpose of liquidation and to act as a foreign representative. Thus the Trustee is a foreign representative pursuant to section 268(1) of the *BIA*.¹⁵

(emphasis added)

14. In *Heijs v Gerald W. Breuker, as Dutch Trustee*,¹⁶ the Prince Edward Island Court of Appeal dealt with, *inter alia*, recognition of a Dutch bankruptcy proceeding as a foreign proceeding in Canada under subsection 270(1). The Court noted that the application from the Dutch trustee included the documents specified in section 269 of the *BIA* which were accepted by the applications judge as evidence that the Dutch proceeding was a foreign proceeding, and that the applicant trustee was a foreign representative. The applications judge therefore granted an order pursuant to subsection 270(1) and the Court of Appeal upheld this decision, clearly demonstrating that bankruptcy proceedings conducted in the Netherlands pursuant to Dutch bankruptcy laws can be considered “foreign proceedings” and trustees appointed by Dutch courts pursuant to those foreign proceedings can be considered “foreign representatives”.

¹⁴ 2014 ONSC 5811 [*MtGox*]. [TAB 3]

¹⁵ *Ibid* at paras 14-17.

¹⁶ 2018 PECA 12.

15. As such, in the case at hand, all of the requirements in subsections 269(2) and 270(1) have been satisfied.

(a) Subsection 269(2)

16. Appended to the Affidavit of Ragnild Meulenberg dated April 3, 2023 (the “**Affidavit**”) is a certified copy of the petition that commenced the Foreign Proceeding and a certified copy of the Foreign Order which authorizes the Foreign Representative to act in that capacity. Furthermore, paragraph 14 of the Affidavit contains a statement from the Foreign Representative which identifies the Foreign Proceeding and within proceedings as the Debtor’s sole “foreign proceedings” (as defined in subsection 268(1) of the *BIA*) known to the Foreign Representative.

(b) Subsection 270(1)

17. Similar to the situation in *MtGox*, the Foreign Proceeding is a judicial proceeding dealing with creditors’ collective interests generally under the Netherlands’ *Bankruptcy Act*, which is a law relating to bankruptcy and insolvency, in which the Debtor’s property is subject to supervision by the Amsterdam District Court of the Netherlands. As such, the Foreign Proceeding is a “foreign proceeding” pursuant to section 268(1) of the *BIA*.
18. Likewise, the Foreign Representative has authority pursuant to the Foreign Order to act as a representative in respect of the foreign proceeding. Thus, the Foreign Representative is a “foreign representative” pursuant to subsection 268(1) of the *BIA* and both requirements under subsection 270(1) are satisfied.
19. As the requirements under subsections 269(2) and 270(1) of the *BIA* have been satisfied, this Court must grant an order recognizing the Foreign Proceeding in Canada.

C. The requirements for this Court to grant further relief pursuant to subsection 272(1) have been met

20. Pursuant to subsection 272(1), once the Foreign Proceeding has been recognized as a foreign proceeding, this Court may, if it is satisfied that it is necessary for the protection of the Property or the interests of a creditor, make any order it considers appropriate, including specific enumerated examples such as staying proceedings against the Debtor as contemplated under subsection 271(1)(a) and entrusting the administration of the Property to the Foreign Representative or any other person designated by this Court.

21. In order to complete the closing of the Transaction and protect KNOC and other creditors' interests, the Foreign Representative must be able to seize the Black Hill Shares.¹⁷ The Stay, as outlined in paragraphs 2 to 4 of the Proposed Order, is necessary in order to preserve the Black Hill Shares and protect the interests of the creditors.
22. Similarly, as the Foreign Representative is not present in Canada, it is necessary for the protection of the Property and the interests of the creditors that the Administrative Delegate be appointed to assist the Foreign Representative in administering the Property. The Administrative Delegate is a Licensed Insolvency Trustee in Canada who has the necessary qualifications to assist the Foreign Representative and who has agreed to act in this capacity.¹⁸
23. Lastly, the Administration Charge is required in order to secure the professional fees of the Foreign Representative and Administrative Delegate.¹⁹ Such charges are commonly granted in Canadian insolvency proceedings in order to secure the professional fees of the insolvency professionals whose services are necessary in order to benefit the estate of the bankrupt and the creditors.

V. CONCLUSION

24. All of the requirements for the Foreign Proceeding to be recognized as a "foreign proceeding" have been met. A certified copy of the Foreign Proceeding, a certified copy of the Foreign Order and a statement from the Foreign Representative identifying all foreign proceedings in respect of the Debtor have all been produced. The Foreign Proceeding and the Foreign Representative both satisfy the definitions of "foreign proceeding" and "foreign representative" under subsection 268(1) of the *BIA*. As such, this Court must grant an Order recognizing the Foreign Proceeding as a "foreign proceeding" in Canada.
25. Furthermore, it is necessary for the protection of the Property and the interests of the creditors that an Order be made with respect to the Stay, appointing the Administrative Delegate, and granting the Administrative Charge. Therefore, this Court should exercise its discretion under subsection 272(1) of the *BIA* to grant such an Order.

¹⁷ Meulenberg Affidavit, *supra* note 2 at para 9.

¹⁸ *Ibid* at para 10.

¹⁹ *Ibid* at para 13.

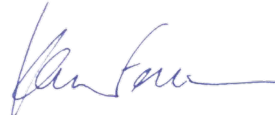
VI. RELIEF CLAIMED

26. For the foregoing reasons, the Debtor respectfully requests an order:

- (a) recognizing and giving full force and effect in Canada to the Foreign Order pursuant to section 269 of the *BIA*;
- (b) granting the following relief pursuant to subsection 272(1) of the *BIA*:
 - (A) granting the Stay;
 - (B) appointing the Administrative Delegate to assist with the administration or realization of all the Property pursuant to section 272 of the *BIA*; and
 - (C) granting the Administrative Charge pursuant to section 272 of the *BIA*; and
- (c) granting such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of April, 2023

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VII. TABLE OF AUTHORITIES**A. Legislation**

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. **[TAB 1]**
2. *Business Corporations Act*, RSA 2000, c B-9

B. Jurisprudence

3. *Heijs v Gerald W. Breuker, as Dutch Trustee*, 2018 PECA 12. **[TAB 2]**
4. *MtGox Co., Re*, 2014 ONSC 5811. **[TAB 3]**

TAB 1



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to March 20, 2023

À jour au 20 mars 2023

Last amended on September 1, 2022

Dernière modification le 1 septembre 2022

(i) the distribution of property in the customer pool fund among customers who have proved their claims, and

(ii) the disposal of customer name securities; or

(b) such other report relating to that distribution or disposal as the court may direct.

1997, c. 12, s. 118.

PART XIII

Cross-border Insolvencies

Purpose

Purpose

267 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;

(d) the protection and the maximization of the value of debtors' property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Interpretation

Definitions

268 (1) The following definitions apply in this Part.

foreign court means a judicial or other authority competent to control or supervise a foreign proceeding. (*tribunal étranger*)

a) un relevé, d'une part, de la distribution des biens du fonds des clients aux clients qui ont prouvé leur réclamation et, d'autre part, de l'aliénation des valeurs mobilières immatriculées;

b) tout autre rapport sur la distribution ou l'aliénation que le tribunal ordonne.

1997, ch. 12, art. 118.

PARTIE XIII

Insolvabilité en contexte international

Objet

Objet

267 La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

a) assurer la collaboration entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;

b) garantir une plus grande certitude juridique dans le commerce et les investissements;

c) administrer équitablement et efficacement les instances d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les débiteurs;

d) protéger les biens des débiteurs et en optimiser la valeur;

e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Définitions

Définitions

268 (1) Les définitions qui suivent s'appliquent à la présente partie.

instances étrangères Toute procédure judiciaire ou administrative, y compris la procédure provisoire, régie par une loi étrangère relative à la faillite ou à l'insolvabilité qui touche les droits de l'ensemble des créanciers et dans le cadre de laquelle les biens et les affaires du débiteur

foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor has the centre of the debtor's main interests. (*principale*)

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding. (*secondaire*)

foreign proceeding means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation. (*instances étrangères*)

foreign representative means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to

(a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or

(b) act as a representative in respect of the foreign proceeding. (*représentant étranger*)

Centre of debtor's main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor's registered office and, in the case of a debtor who is an individual, the debtor's ordinary place of residence are deemed to be the centre of the debtor's main interests.

1997, c. 12, s. 118; 2004, c. 25, s. 102; 2005, c. 47, s. 122.

Recognition of Foreign Proceeding

Application for recognition of a foreign proceeding

269 (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application

(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

sont placés sous la responsabilité ou la surveillance d'un tribunal étranger aux fins de réorganisation ou de liquidation. (*foreign proceeding*)

principale Qualifie l'instance étrangère qui a lieu dans le ressort où le débiteur a ses principales affaires. (*foreign main proceeding*)

représentant étranger Personne ou organisme qui, même à titre provisoire, est autorisé dans le cadre d'une instance étrangère à administrer les biens ou les affaires du débiteur aux fins de réorganisation ou de liquidation, ou à y agir en tant que représentant. (*foreign representative*)

secondaire Qualifie l'instance étrangère autre que l'instance étrangère principale. (*foreign non-main proceeding*)

tribunal étranger Autorité, judiciaire ou autre, compétente pour contrôler ou surveiller des instances étrangères. (*foreign court*)

Lieu des principales affaires

(2) Pour l'application de la présente partie, sauf preuve contraire, le siège social du débiteur ou, s'agissant d'une personne physique, le lieu de sa résidence habituelle est présumé être celui où il a ses principales affaires.

1997, ch. 12, art. 118; 2004, ch. 25, art. 102; 2005, ch. 47, art. 122.

Reconnaissance des instances étrangères

Demande de reconnaissance des instances étrangères

269 (1) Le représentant étranger peut demander au tribunal de reconnaître l'instance étrangère pour laquelle il a qualité.

Documents accompagnant la demande de reconnaissance

(2) La demande de reconnaissance est accompagnée des documents suivants :

a) une copie certifiée conforme de l'acte introductif — quelle qu'en soit la désignation — de l'instance étrangère ou le certificat délivré par le tribunal étranger attestant l'introduction de celle-ci;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The court may require a translation of any document accompanying the application.

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Order recognizing foreign proceeding

270 (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Effects of recognition of a foreign main proceeding

271 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,

(a) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;

(b) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or

b) une copie certifiée conforme de l'acte — quelle qu'en soit la désignation — autorisant le représentant étranger à agir à ce titre ou le certificat délivré par le tribunal étranger attestant la qualité de celui-ci;

c) une déclaration faisant état de toutes les instances étrangères visant le débiteur qui sont connues du représentant étranger.

Documents acceptés comme preuve

(3) Le tribunal peut, sans preuve supplémentaire, accepter les documents visés aux alinéas (2)a) et b) comme preuve du fait qu'il s'agit d'une instance étrangère et que le demandeur est le représentant étranger dans le cadre de celle-ci.

Autres documents

(4) En l'absence de ces documents, il peut accepter toute autre preuve — qu'il estime indiquée — de l'introduction de l'instance étrangère et de la qualité du représentant étranger.

Traduction

(5) Il peut exiger la traduction des documents accompagnant la demande.

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Ordonnance de reconnaissance

270 (1) S'il est convaincu que la demande de reconnaissance vise une instance étrangère et que le demandeur est un représentant étranger dans le cadre de celle-ci, le tribunal reconnaît, par ordonnance, l'instance étrangère en cause.

Nature de l'instance étrangère

(2) Il précise dans l'ordonnance s'il s'agit d'une instance étrangère principale ou secondaire.

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Effets de la reconnaissance d'une instance étrangère principale

271 (1) Sous réserve des paragraphes (2) à (4), dès le prononcé de l'ordonnance de reconnaissance qui précise qu'il s'agit d'une instance étrangère principale :

a) il est interdit d'intenter ou de continuer une action, mesure d'exécution ou autre procédure visant les biens, dettes, obligations ou engagements du débiteur en cause;

otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and

(c) if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

When subsection (1) does not apply

(2) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor at the time the order recognizing the foreign proceeding is made.

Exceptions

(3) The prohibitions in paragraphs (1)(a) and (b) are subject to the exceptions specified by the court in the order recognizing the foreign proceeding that would apply in Canada had the foreign proceeding taken place in Canada under this Act.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Wind-up and Restructuring Act* in respect of the debtor.

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Orders

272 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 271(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations;

(c) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and

b) si le débiteur exploite une entreprise, il ne peut disposer, notamment par vente, des biens de l'entreprise situés au Canada hors du cours ordinaire des affaires ou de ses autres biens situés au Canada;

c) s'il est une personne physique, il ne peut disposer, notamment par vente, de ses biens au Canada.

Non-application du paragraphe (1)

(2) Le paragraphe (1) ne s'applique pas si, au moment où l'ordonnance de reconnaissance est rendue, une procédure a déjà été intentée sous le régime de la présente loi contre le débiteur.

Exceptions

(3) Les interdictions visées aux alinéas (1)a) et b) sont subordonnées aux exceptions que le tribunal précise dans l'ordonnance de reconnaissance et qui auraient existé au Canada si l'instance étrangère avait été intentée sous le régime de la présente loi.

Application de la présente loi et d'autres lois

(4) Le paragraphe (1) n'a pas pour effet d'empêcher que soit intentée ou continuée, contre le débiteur, une procédure sous le régime de la présente loi, de la *Loi sur les liquidations et les restructurations* ou de la *Loi sur les arrangements avec les créanciers des compagnies*.

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Mesures disponibles après la reconnaissance d'une instance étrangère

272 (1) Si l'ordonnance de reconnaissance a été rendue, le tribunal, sur demande présentée par le représentant étranger demandeur, peut, s'il est convaincu que la mesure est nécessaire pour protéger les biens du débiteur ou les intérêts d'un ou de plusieurs créanciers, rendre toute ordonnance qu'il estime indiquée, notamment pour :

a) s'il s'agit d'une instance étrangère secondaire, imposer les interdictions visées aux alinéas 271(1)a) à c) et préciser, le cas échéant, à quelles exceptions elles sont subordonnées, par l'effet du paragraphe 271(3);

b) régir l'interrogatoire des témoins et la manière de recueillir les preuves et de fournir des renseignements concernant les biens, affaires, dettes, obligations et engagements du débiteur;

c) confier l'administration ou la réalisation de tout ou partie des biens du débiteur situés au Canada au représentant étranger ou à toute autre personne;

(d) appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,

(i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and

(ii) to take any other action that the court considers appropriate.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Terms and conditions of orders

273 An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

1997, c. 12, s. 118; 2005, c. 47, s. 122.

Commencement or continuation of proceedings

274 If an order recognizing a foreign proceeding is made, the foreign representative may commence or continue any proceedings under sections 43, 46 to 47.1 and 49 and subsections 50(1) and 50.4(1) in respect of a debtor as if the foreign representative were a creditor of the debtor, or the debtor, as the case may be.

1997, c. 12, s. 118; 2004, c. 25, s. 103; 2005, c. 47, s. 122.

Obligations

Cooperation — court

275 (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

d) nommer, pour la période qu'il estime indiquée, un syndic comme séquestre à tout ou partie des biens du débiteur situés au Canada et ordonner à celui-ci :

(i) de prendre possession de tout ou partie des biens du débiteur mentionnés dans la nomination et d'exercer sur ces biens ainsi que sur les affaires du débiteur le degré d'emprise que le tribunal estime indiqué,

(ii) de prendre toute autre mesure que le tribunal estime indiquée.

Restriction

(2) Si, au moment où l'ordonnance de reconnaissance est rendue, une procédure a déjà été intentée sous le régime de la présente loi contre le débiteur, l'ordonnance prévue au paragraphe (1) doit être compatible avec toute ordonnance qui peut être rendue dans le cadre de cette procédure.

Application de la présente loi et d'autres lois

(3) L'ordonnance rendue au titre de l'alinéa (1)a n'a pas pour effet d'empêcher que soit intentée ou continuée, contre le débiteur, une procédure sous le régime de la présente loi, de la *Loi sur les liquidations et les restructurations* ou de la *Loi sur les arrangements avec les créanciers des compagnies*.

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Conditions

273 Le tribunal peut assortir les ordonnances qu'il rend au titre de la présente partie des conditions qu'il estime indiquées dans les circonstances.

1997, ch. 12, art. 118; 2005, ch. 47, art. 122.

Début et continuation des procédures

274 Si l'ordonnance de reconnaissance est rendue, le représentant étranger en cause peut intenter ou continuer toute procédure visée aux articles 43, 46 à 47.1 et 49 et aux paragraphes 50(1) et 50.4(1) comme s'il était créancier du débiteur, ou le débiteur, selon le cas.

1997, ch. 12, art. 118; 2004, ch. 25, art. 103; 2005, ch. 47, art. 122.

Obligations

Collaboration — tribunal

275 (1) Si l'ordonnance de reconnaissance a été rendue, le tribunal collabore dans toute la mesure possible avec le représentant étranger et le tribunal étranger en cause dans l'instance étrangère reconnue.

TAB 2

PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: *Heijs v. Gerald W. Breuker, as Dutch Trustee*, 2018 PECA 12

Date: 20180619

Docket: S1-CA-1370

Registry: Charlottetown

BETWEEN:

ALJE MARCEL HEIJS

APPELLANT

AND:

**GERALD W. BREUKER, AS DUTCH TRUSTEE IN BANKRUPTCY
FOR THE ESTATE OF ALJE MARCEL HEIJS**

RESPONDENT

Before: Chief Justice David H. Jenkins

Justice Michele M. Murphy

Justice John K. Mitchell

Appearances:

John P. Koch, counsel for the Appellant

Scott M. Barry and Donald J.A. Cameron, counsel for the Respondent

Place and Date of Hearing

Charlottetown, Prince Edward Island

April 19, 2018

Place and Date of Judgment

Charlottetown, Prince Edward Island

June 19, 2018

Written Reasons by:

Justice John K. Mitchell

Concurred in by:

duty of candour and gave the court full facts. Heij's position was squarely before the court by virtue of the fact that his statement of defence and counterclaim were two of the first three documents of the application record placed before the court. We proceed on the basis that the applications judge read and understood all the documents contained in the application record.

- *Foreign proceeding/Foreign non-main proceeding*

[30] The application sought an order recognizing the Netherlands proceeding as a foreign main proceeding or alternatively, a foreign non-main proceeding. The request for a Supplemental Order under s.271 was the same regardless of whether the proceedings were found to be a foreign main proceeding or a foreign non-main proceeding.

[31] The application included the documents specified by s.269 of the **BIA**. Heijs has taken no issue with the validity of these documents. These documents were accepted by the applications judge, as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of that proceeding (**BIA** s.269(3)). There is no issue that the applications judge was satisfied pursuant to s.270(1) that the application related to a foreign proceeding and that the applicant is a foreign representative. Therefore, the applications judge had no option but to make the order recognizing the foreign proceeding (**BIA** s.270(1)).

[32] The only question thereafter is whether the proceeding is a foreign main proceeding or a foreign non-main proceeding. If it is determined to be a foreign main proceeding, an order under s.271 is mandatory; otherwise, such an order would be discretionary.

[33] The **BIA** states that a foreign main proceeding is a foreign proceeding in a jurisdiction where the debtor has the center of the debtor's main interest and a foreign non-main proceeding is a foreign proceeding other than a foreign main proceeding (s.268(1)).

[34] An individual's center of main interest is, by virtue of s.268(2), deemed to be his ordinary place of residence in the absence of proof to the contrary. The **BIA** does not specify whether the court should consider the debtor's ordinary place of residence at the time of the original bankruptcy filing or at the time of the application for recognition.

[35] In this case the applications judge considered both. He concluded that it was a foreign main proceeding. He added, however, that if he was wrong and it was in fact a foreign non-main proceeding, he was exercising his discretion and granting the order sought. The orders sought were a recognition order which recognized the foreign main proceeding and the Trustee as a foreign representative, stayed all proceedings and prohibited Heijs from disposing of any property other than in the ordinary course of

TAB 3

In the Matter of MtGox Co., Ltd.
[Indexed as: MtGox Co., Ltd. (Re)]

Ontario Reports

Ontario Superior Court of Justice,

Newbould J.

October 6, 2014

122 O.R. (3d) 465 | 2014 ONSC 5811

Case Summary

Bankruptcy and insolvency — Foreign proceedings — Japanese company with registered head office in Japan operating online exchange for purchase and sale of bitcoins — Bankruptcy proceedings in respect of company commenced in Japan following loss of large number of bitcoins — Bankruptcy trustee applying under s. 269 of Bankruptcy and Insolvency Act ("BIA") for recognition of foreign bankruptcy proceedings as a foreign main proceeding — Application allowed — Trustee entitled under s. 271 of BIA to automatic stay of actions or proceedings against company in Canada — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 269, 271.

M Ltd., a Japanese company with a registered head office in Japan, operated an online exchange for the purchase and sale of bitcoins. It suspended trading after discovering that approximately 850,000 bitcoins were missing. Bankruptcy proceedings in respect of M Ltd. were commenced in Japan. The bankruptcy trustee brought an application under the *Bankruptcy and Insolvency Act* ("BIA") for a declaration that the Japanese bankruptcy proceedings were a "foreign main proceeding" for the purposes of the BIA and for related relief.

Held, the application should be allowed.

A "foreign main proceeding" is defined in s. 268(1) of the BIA as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. Section 268(2) provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests. The evidence established that M Ltd. had the centre of its main interests in Japan. The Japanese bankruptcy proceeding was a foreign main proceeding. The trustee was entitled under s. 271(1) of the BIA to an automatic stay of actions or proceedings against M Ltd. in Canada.

Cases referred to

Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, [2000] O.T.C. 135, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157, 95 A.C.W.S. (3d) 608 (S.C.J.); *Braycon International Inc. v. Everest & Jennings Canadian Ltd.*, [2001] O.J. No. 511, 26 C.B.R. (4th) 154, 103 A.C.W.S. (3d) 56 (S.C.J.); *Lear Canada (Re)*, [2009] O.J. No. 3030, 55 C.B.R. (5th) 57, 179 A.C.W.S. (3d) 46

and enforce [page468] the judgment of the home country's court. This theory of universalism has not taken hold.

[11] There is increasingly a move towards what has been called modified universalism. The notion of modified universalism is court recognition of main proceedings in one jurisdiction and non-main proceedings in other jurisdictions, representing some compromise of state sovereignty under domestic proceedings to advance international comity and co-operation. It has been advanced by the United Nations Commission on International Trade Law ("UNCITRAL") *UNCITRAL Model Law on Cross Border Insolvency* (the "Model Law"), which Canada largely adopted by 2009 amendments to the *CCAA* and the *BIA*.¹ Before this amendment, Canada had gone far down the road in acting on comity principles in international insolvency. See *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 18 C.B.R. (4th) 157 (S.C.J.) and *Lear Canada (Re)*, [2009] O.J. No. 3030, 55 C.B.R. (5th) 57 (S.C.J.).

[12] In the *BIA*, the Model Law was introduced by the enactment of Part XIII. Section 267 sets out the policy objectives of Part XIII as follows:

267. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;
- (d) the protection and the maximization of the value of debtors' property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.
- (f) *Recognition of foreign proceeding*

[13] Section 269(1) of the *BIA* provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to s. 270(1) of the *BIA*, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign [page469] proceeding and (ii) the applicant is a foreign representative of that proceeding.

[14] A foreign proceeding is broadly defined in s. 268(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

[15] The Japan bankruptcy proceeding is a judicial proceeding dealing with creditors' collective interests generally under the *Bankruptcy Act of Japan*, which is a law relating to bankruptcy and insolvency, in which MtGox's property is subject to supervision by the Tokyo District Court, Twentieth Civil Division. As such, the Japan bankruptcy proceeding is a foreign proceeding pursuant to s. 268(1) of the *BIA*.

[16] Section 268(1) of the *BIA* defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

[17] The trustee has authority, pursuant to the Japan Bankruptcy Act and the bankruptcy order made by the Tokyo District Court in the Japan bankruptcy proceeding, to administer MtGox's property and affairs for the purpose of liquidation and to act as a foreign representative. Thus, the trustee is a foreign representative pursuant to s. 268(1) of the *BIA*.

[18] In the circumstances, it is appropriate to recognize the Japan bankruptcy proceeding as a foreign proceeding.

(b) *Foreign main proceeding*

[19] A foreign proceeding can be a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is recognized as a main proceeding, there is an automatic stay provided in s. 271(1) against lawsuits concerning the debtor's property, debts, liabilities or obligations, and prohibitions against selling or disposing of property in Canada. If the foreign proceeding is recognized as a non-main proceeding, there is no such automatic stay and prohibition and it is necessary for an application to be made to obtain such relief. For that reason, it is advantageous for a foreign representative to seek an order recognizing the foreign proceeding as a main proceeding. The trustee in this case has made such a request.

[20] A foreign main proceeding is defined in s. 268(1) as a foreign proceeding in a jurisdiction where the debtor company has [page470] the centre of its main interests ("COMI"). Section 268(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

[21] In considering whether the registered office presumption has been rebutted, a court should consider the following factors in determining COMI: (i) the location is readily ascertainable by creditors; (ii) the location is one in which the debtor's principal assets and operations are found; and (iii) the location is where the management of the debtor takes place. See *Lightsquared LLP (Re)*, [2012] O.J. No. 3184, 92 C.B.R. (5th) 321 (S.C.J.).

[22] The trustee relies on the following facts in support of his position that the COMI of MtGox is in Japan and not in Canada:

- (1) MtGox has no offices in Canada, there are no Canadian subsidiaries and no assets in located in Canada;
- (2) MtGox is and has always been organized under the laws of Japan;
- (3) MtGox's registered office and corporate headquarters are, and have always been, located in Japan, and its books and records are located at its head office in Japan;
- (4) the debtor's sole director and representative director, Mr. Karpeles, resides, and at all relevant times has resided, in Japan;
- (5) most of the MtGox's bank accounts are located in Japan, including the primary account for operating its business;