SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF SAINT-FRANÇOIS

No.: 450-11-000167-134

DATE: October 9, 2013

IN THE PRESENCE OF: THE HONOURABLE GAÉTAN DUMAS, J.S.C.

IN THE MATTER OF THE ARRANGEMENT RELATING TO:

MONTRÉAL, MAINE & ATLANTIC CANADA CO. / (MONTRÉAL, MAINE & ATLANTIQUE CANADA CIE)
Debtor/Respondent
And
MONTREAL MAINE & ATLANTIC RAILWAY LTD
And
LMS ACQUISITION CORPORATION
And
MONTRÉAL MAINE & ATLANTIC CORPORATION
Third parties
And
RICHTER ADVISORY GROUP INC.
Monitor
And
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
Petitioner

JUDGMENT

JD 2364

[1] The Court is seized of a "motion to lift the stay of proceedings granted in favour of Montréal Maine & Atlantic Railway" (MMA).

[2] Said motion was heard jointly with an identical motion filed before Honorable Justice Louis Kornreich, Judge for the Maine Bankruptcy Court, who is in charge of the case of MMA's parent company located in the United States.

[3] By its motion, Travelers asks permission to file a motion for declaratory judgment before the "United States District Court of the District of Maine".

[4] This motion is contested by the trustee representing MMA in Canada and by the trustee representing MMR, MMA's parent company in the United States.

[5] The joint hearing was held under a cross-border insolvency protocol approved by the undersigned and Honorable Justice Kornreich on September 9, 2013.

[6] All are in agreement that the Québec courts have jurisdiction to hear the motion for declaratory judgment that Petitioner Travelers intends to file. Indeed, article 3150 of the *Civil Code of Québec* states:

> "Les autorités québécoises ont également compétence pour décider de l'action fondée sur un contrat d'assurance lorsque le titulaire, l'assuré ou le bénéficiaire du contrat a son domicile ou sa résidence au Québec, lorsque le contrat porte sur un intérêt d'assurance qui y est situé, ou encore lorsque le sinistre y est survenu.
>
> A Québec authority has jurisdiction to hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec."

[7] However, even though this court has jurisdiction to hear the motion for declaratory judgment, Travelers wants the Court to lift the stay of proceedings order to allow it to present its motion before the District Court of Maine.

[8] A dispute has arisen between Travelers and MMA regarding the coverage and the scope of the coverage granted to MMA under an insurance policy issued on April 19, 2013[1].

[9] The main dispute between the parties concerns insurance for lost profits which Travelers seemingly issued by mistake.

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[1] See exhibit C-1;

[10] Travelers pleads that, with the exception of MMA Canada, all of the insured parties under the American insurance policy have their places of business and their operations in the United States.

[11] However, notwithstanding the fact that the other companies covered by the insurance policy have their places of business in the United States, none of them have brought any claims against Travelers.

[12] Is any reminder needed that the facts leading to a motion being filed under the *Companies' Creditors Arrangement Act* (CCAA) concern a railway accident which occurred on July 6, 2013 in the Town of Megantic.

[13] According to MMA's own pleadings in its motion under the CCAA, this railway accident destroyed the downtown area of the Town of Megantic and caused the death of 47 people. MMA admits its responsibility for this tragic accident.

[14] Even though Travelers admits that Québec Superior Court has jurisdiction to hear its motion for declaratory judgment, it is pleading that the US District Court of Maine would be better placed to hear its motion. To this end, it is pleading that the balance of convenience sways in favour of a hearing before the District Court. In fact, without saying so, the petitioner is pleading the doctrine of *forum non conveniens*.

[15] It pleads, first of all, that the potential witnesses, including its own employees, reside in the United States. It also pleads that this court could not subpoena American witnesses, including its own employees, to force them to testify in Canada.

[16] This is a fairly minor problem. Indeed, the cross-border protocol stipulates that the US Bankruptcy Court could issue such subpoenas if needed. Moreover, during the hearing, Honorable Justice Kornreich confirmed that subpoenas could be issued rapidly and that they could also be executed promptly.

[17] The debtor's claim against Travelers is an asset of the debtor. Travelers pleads that it is the American parent company which would have had a loss of income, not the Canadian company. In so doing, Travelers is overlooking the fact that there is a significant difference between a loss of income and receivables which could be insured.

[18] Regardless of what MMA planned to do with its money, that contributes nothing to resolve the dispute. It was an insured party designated in the policy and it is the one which has suffered a loss.

[19] Moreover, the Court does not need to delve into the merits to decide on the present motion. MMA has a claim against Travelers. The Court does not need to ask whether the claim is well founded to decide whether it has jurisdiction.

[20] Travelers' main argument is that the legislation governing its insurance policy would be Maine law. But, as recently reiterated by the Court of Appeal[2]:

> "[100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception."

[21] This is why the Court of Appeal in the Stormbreaker decision instructs us:

> "[101] C'est l'opinion de Guillemard, Prujiner et Sabourin[22]
>
> > Il est surprenant que l'application d'une loi étrangère par le tribunal, qui est l'essence même du droit international privé, puisse justifier un déclinatoire de compétence au profit de l'autorité dont il s'agit d'appliquer la loi. D'autant plus que le Code civil du Québec a introduit des dispositions de nature à faciliter la preuve du droit étranger (voir l'article 2809 C.c.Q.) et que les droits dont il était question dans les décisions rapportées n'étaient guère exotiques.
>
> [22] *Supra*, note 12, p. 945."

[22] To this, it must also be added that even if the foreign court is able to rule on the dispute, that is not the first criterion for declining jurisdiction. For this reason, the Court of Appeal in Stormbreaker recalled:

> "[79] Cela ressort du texte même de l'article 3135 *C.c.Q.* et de l'enseignement de la Cour suprême dans Spar Aerospace Ltée c. American Mobile Satellite Corp. de 2002 :
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> > 69 ...deux éléments essentiels ressortent du texte de l'art. 3135 : sa nature exceptionnelle et l'exigence qu'un autre État soit mieux à même de trancher le litige (voir E. Groffier, *La réforme du droit international privé québécois : supplément au Précis de droit international privé québécois* (1993), p. 130).
> >
> > 70 Ces deux caractéristiques de la doctrine du *forum non conveniens*, énoncées à l'art. 3135, sont conformes à l'exigence de common law énoncée par la Chambre des lords dans l'arrêt de principe *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] 1 A.C. 460, p. 476, et par notre Cour dans les arrêts *Amchem*, précité, p. 919-921, et *Holt Cargo*, précité, par. 89. [...]

[2] Stormbreaker Marketing c. Weinstock, 2013 QCCA 269, cited in another recent decision of the Court of Appeal in Droit de la famille - 132433, 2013 QCCA 1529 (decision of 12 September 2013).

[80] Les auteurs sont du même avis.

[81] Prujiner, Guillemard et Sabourin font la réflexion suivante quant à l'interprétation que devrait recevoir l'article 3135 du *Code civil du Québec* :

> L'article 3135 du Code [...] fait de l'exigence « que les autorités d'un autre État [soient] mieux à même de trancher le litige » une condition nécessaire mais non suffisante pour un déclinatoire de compétence. Le seul fait que les tribunaux d'un autre État soient mieux placés à l'égard d'un litige donné n'a rien d'exceptionnel et se présente chaque fois que le Québec n'est pas le for naturel de litige. Décliner sa compétence sur cette seule base ignore donc l'exigence du Code « exceptionnellement ». [...]

(...)

[86] En bref, le Code civil ne permet au tribunal de décliner compétence qu' « exceptionnellement ». Comme toute décision, celle-ci doit être motivée, ce qui n'est pas le cas dans le jugement attaqué. Il y a donc lieu d'analyser les circonstances de l'affaire pour déterminer si cette seconde condition est satisfaite."

(footnotes omitted)

[23] This should put a definite end to the debate, but there is more.

[24] The observation of the Supreme Court in Sam Lévy & Associés inc. c. Azco Mining Inc.[3] must also apply under the CCAA :

> "76 En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un «contrôle unique» (Steward précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un «étranger à la faillite» a le fardeau de démontrer l'existence d'un «motif suffisant», justifiant que le syndic doive accourir dans plusieurs ressorts.
>
> **76** In the present case, we are confronted with a federal statute that prima facie establishes one command centre or "single control" (Stewart, supra, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions."

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[3] 2001 3 R.C.S. 978.

[25] The Supreme Court reiterated this principle very recently in the AbitibiBowater[4] ruling, stating:

> "[21] Une des caractéristiques principales du régime créé par la *LACC* est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.
>
> **21** One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise."

[26] Consequently, the Court believes that Travelers has not satisfied its burden of demonstrating that the stay of procedures should no longer apply to it.

[27] Let us add that the Bankruptcy Court is a court of equity and that the notion of equity is interpreted as conferring on the Bankruptcy Court all powers to dispose of disputes or a difficulty even when the law contains no specific provision that is likely to apply[5].

[28] The case law cited by Travelers, which it wished to use by analogy, can be of no help to it.

[29] Indeed, these decisions dealt with lifting a stay to allow a third party to sue the bankrupt's insurer. In fact, they constitute a typical example of a motion to lift a stay of proceedings where a person wants to sue a bankrupt's insurer. In that situation, it is pointless for the case to proceed before the bankruptcy court because often that has no impact on the administration of the bankruptcy. In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company.

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[4] Newfoundland and Labrador v. AbitibiBowater Inc., [2012] 3 S.C.R. 443.

[5] See re: La Société Pétrochimique Kemtec inc., 1994 R.J.Q. 1345.

Without the shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction.

[30] As for Travelers' argument that the order pronounced by Justice Castonguay has no extraterritorial effect, this court does not accept it.

[31] We must first note that the Court does not have to decide whether the present judgment and that of Justice Castonguay are enforceable in the United States. That is not the question before the Court.

[32] However, we know that Québec courts have jurisdiction and that Travelers does business in Québec. It should also be noted that this question is somewhat theoretical, given that a cross-border protocol has been adopted by this Court and the US Bankruptcy Court.

[33] In the event of doubt regarding a stay of proceedings, this protocol would allow the US Bankruptcy Court to order a stay of proceedings, just as this Court would for the parent company if proceedings were brought against it in Canada.

[34] This would simply be an application of the legal courtesy (comity) recognized in both our countries[6].

[35] Even if the order pronounced by Justice Castonguay were not enforceable outside Québec, the fact remains that the decisions of Québec courts will be enforceable against Travelers. Indeed, according to the information given by its counsel, it also does business in Québec. The extraterritorial effect of Justice Castonguay's order is therefore immaterial to this case.

[36] Add to this the fact that the cross-border protocol stipulates:

> "Where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts."

[37] The US Bankruptcy Court is prepared to allow Travelers specific limited relief from stay so that the U.S. debtor may be a party to a declaratory judgment proceeding in this Court.

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[6] Reflections on Comity and Sovereignty – Ten years later, in *Janis P. SARRA, Annual Review of insolvency Law 2012*, Toronto, Carswell, a division of Thompson Reuters Canada Ltd, page 1.

[38] It seems to us that the present decision achieves the objective of section 44 of the CCAA, which states:

> "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 coopération 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 affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les compagnies débitrices;
>
> *d*) protéger les biens des compagnies débitrices et en optimiser la valeur;
>
> *e*) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.
>
> 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 debtor companies;
>
> (*d*) the protection and the maximization of the value of debtor company's property; and
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> (*e*) the rescue of financially troubled businesses to protect investment and preserve employment."

FOR THESE REASONS, THE COURT:

[39] **DISMISSES** the motion filed by Travelers, entitled "*motion to lift the stay of proceedings*";

[40] **THE WHOLE WITH COSTS**.

GAÉTAN DUMAS, J.S.C.

Mail list lawyers

Date of hearing: October 1, 2013