Chapter 15 In Practice:
The Canadian Perspective and the MuscleTech Story

Derrick C. Tay*
Jennifer Stam**

Ogilvy Renault LLP
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800
Toronto, Ontario M5J 2Z4, CANADA
www.ogilvyrenault.com

INTRODUCTION

Since the adoption of the Model Law on Cross-Border Insolvency[1] in 1997, the restructuring community has been watching to see who would adopt the Model Law (or versions of it) into their existing insolvency legislation. Starting in 2000, a number of countries including Eritrea, Japan, Mexico, Poland, Romania, Serbia, South Africa, Montenegro, British Virgin Islands and most recently Great Britain began adopting the Model Law.[2]

In October 2005, the United States ("US") also jumped on the Model Law bandwagon, enacting Chapter 15 ("Chapter 15")[3] of the US Bankruptcy Code (the "Code").[4] As we watched from Canada, questions arose as to how the new Chapter 15 would differ from its predecessor, Section 304 of the Code, and whether the ALI Guidelines[5] and Cross-Border Protocols[6] would now become distant memories. Now a year later, we have seen how it has been implemented by the Courts in a number of instances including the first commercial Canada-US cross border insolvency proceeding, namely, the *MuscleTech* proceedings which are discussed in detail below.

---

* Derrick Tay is the leader of the insolvency and restructuring group of Ogilvy Renault LLP and has extensive experience in cross-border insolvencies, including acting for Babcock & Wilcox Canada Ltd. in its Section 18.6 proceedings and for the Iovate Group in the *MuscleTech* proceedings. He also acted for Grace Canada Inc., The Loewen Group Inc. and Teleglobe Inc. in each of their cross-border insolvency proceedings.

** Jennifer Stam is an associate with the insolvency and restructuring group of Ogilvy Renault LLP.

[1] U.N. Comm'n on Int'l Trade Law, Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3 <www.uncitral.org> ["Model Law"].
[2] < http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>.
[3] The full text of Chapter 15 can be found at www.chapter15.com.
[4] 11 U.S.C. ["*US Bankruptcy Code*"].
[5] The American Law Institute, Transnational Insolvency: Transnational Cooperation Among the NAFTA Countries – Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.
[6] Examples of protocols adopted in cross border proceedings can be found at www.iiiglobal.org/international/protocols.html.

To date, Canada has not enacted a version of the Model Law although it is currently being contemplated as part of the proposed Bill C-55.[7] Instead, the existing cross-border insolvency provisions found in Section 18.6 of the *Companies' Creditors Arrangement Act* (Canada) ("CCAA")[8] continue to govern the ability of Canadian courts to grant ancillary relief in connection with foreign insolvency proceedings.

A BRIEF OVERVIEW OF THE LEGISLATION

The Canadian Legislation

Section 18.6 of the CCAA consists of eight short subsections providing an outline of circumstances in which a Canadian court may provide ancillary relief in the context of "foreign proceedings". The inclusion of Section 18.6 created a legislative process through which a debtor, foreign representative or other interested party could seek ancillary relief where a recognized foreign proceeding had been commenced in another jurisdiction.

Subsections (2) and (4) are the two primary operative subsections of Section 18.6, both of which provide that a court may grant relief in order to facilitate or provide assistance to foreign proceedings. The full text of these two subsections is as follows:

> **Powers of court**
>
> (2) The court may, in respect of a debtor company, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.
>
> **Court not prevented from applying certain rules**
>
> (4) Nothing in this section prevents the court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.

Typically proceedings will be commenced by way of an issuance of a notice of application for a determination under either subsection 18.6(2) or subsection 18.6(4) that the applicant is entitled to relief under Section 18.6. Once the Canadian court has found that the applicant is entitled to relief under Section 18.6 in respect of a "foreign proceeding", the court has wide discretion in the types of orders that it can grant by virtue of subsection 18.6(3), which states, "an order of the court under this section may be made on such terms and conditions as the court considers appropriate in the circumstances."[9]

---

[7] Chapter 47, S.C. 2005.
[8] R.S.C. 1985, c. C-36, as amended ["*CCAA*"]. See also Sections 268-275 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.
[9] *CCAA*, *supra*. note 8.

When Section 18.6 was added to the CCAA, it was done with the intent to codify, at a federal level, the principles of comity and cooperation and the judicial trends of promoting international business and commerce which were established at common law. As such, the use of Section 18.6 enables a debtor to make one application for foreign recognition, whereas under common law, it would have to make separate provincial applications.

The first real consideration of Section 18.6 was in *Babcock & Wilcox Canada Ltd.* ("*Babcock*").[10] Babcock & Wilcox Canada Ltd. ("B&W Canada") was the operating entity of The Babcock & Wilcox Company ("Babcock"), a Delaware corporation. In February 2000, Babcock and a number of its US affiliates (the "Babcock Companies") filed for protection under Chapter 11 of the Code. By the time of their filing, the Babcock Companies had become subject to extensive litigation based on its historical manufacture and sale of products containing asbestos. At the time Babcock commenced its Chapter 11 proceedings, B&W Canada was not subject to any asbestos claims in Canada. However, for a variety of reasons, the B&W Companies wanted to obtain some level of protection for its Canadian subsidiary and to ensure that at the end of the US proceeding any protection given to the Canadian subsidiary would be recognized in Canada.

In an application brought before the Ontario Superior Court of Justice (the "Ontario Court"), B&W Canada applied under Section 18.6 for recognition of the US proceedings in Canada and for the implementation of a limited stay of proceedings against it in Canada restraining any asbestos actions against B&W Canada. Perhaps B&W Canada's greatest challenge in this application was the fact that it was solvent. B&W Canada argued, however, that notwithstanding its solvency, subsection 18.6(4) of the CCAA operated to allow it to get the protection that it sought.

The Ontario Court held that it was open to B&W Canada to make its application under subsection 18.6(4). Accordingly Justice Farley ordered there to be a stay against asbestos suits brought in Canada against B&W Canada.[11] In making this ruling, the Ontario Court laid down several general principles for how Section 18.6 should be used with respect to cross-border insolvencies. They can be summarized as follows:[12]

(a) encouragement of comity and cooperation between the courts of various jurisdictions;

(b) respect for the overall thrust of foreign bankruptcy and insolvency legislation, unless it is substantially different from bankruptcy and insolvency legislation in Canada;

(c) equal treatment for all stakeholders regardless of where they reside;

---

[10] (2000), 18 C.B.R. (4th) 157 (Ont. Sup. Ct. Jus.) ["*Babcock*"].

[11] The order also explicitly included a clause that would permit any potential claimant to apply to the court to have the stay lifted (the "Come-Back Clause"). The Come-Back Clause was designed such that any interested party could later argue that its claim should properly be heard in Canada.

[12] *Babcock*, *supra* note 10 at pp. 167-8.

(d) companies should be permitted to reorganize on a global level. To the extent it is possible and practical, one jurisdiction should take charge of the principal administration of the enterprise's reorganization;

(e) the extent of the court's involvement will vary on a case by case basis. In determining the appropriate level of involvement, the court should take into consideration factors such as the geographical connection between the court and the debtor as well as the court's jurisdictional ability to address the debtor's legal issues;

(f) where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis; and

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction; and

(g) as effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, and such stakeholders should be afforded the option to come back to the court to speak to any granted order.

The inclusion of these principles in *Babcock* is significant for a number of reasons. First, they clarified circumstances in which Section 18.6 could be applied in connection with international insolvencies. Second, they concisely summarized common law principles of recognition that had been in existence even prior to the enactment of Section 18.6. Third, and perhaps most importantly, they clearly indicated that where circumstances dictated, it was appropriate for the Ontario Court to acknowledge the primary jurisdiction of another court in the context of insolvency proceedings.

Since *Babcock* there have been a number of subsequent applications under Section 18.6 of the CCAA. In fact, in the years since B&W Canada commenced its proceedings, Canadian courts have relied on Section 18.6 to, among other things, (a) permit a Canadian company with primarily US operations to file a plan of arrangement in the US only;[13] (b) prevent the seizure of assets in Canada owned by a US debtor subject to Chapter 11 proceedings;[14] (c) recognize a preliminary injunction under Chapter 11 in order to provide relief to US debtors in Canada;[15] (d) implement a stay of proceedings against third party co-defendants to litigation affecting a Section 18.6 applicant;[16] and (e) appoint representative counsel to act in Canada on behalf of Canadian claimants in US Chapter 11 proceedings.[17] The principles set out in *Babcock* still continue to be relevant in determining whether to grant relief and indicate that the Model Law principles of comity and cooperation already exist in Canadian legislation.

---

[13] *Re The Loewen Group Inc.* (December 7, 2001) Toronto, 99-CL-3384 (Sup. Ct. Jus.) and (2002), 32 C.B.R. (4th) 56 (Sup. Ct. Jus.). See also *Re Laidlaw Inc.* (2003), 39 C.B.R. (4th) 239 (Sup. Ct. Jus.).
[14] *Re Matlack Inc.*, [2001] O.J. No. 6121 (Sup. Ct. Jus.) (QL).
[15] *Re Grace Canada Inc.*, [2005] O.J. No. 4868 (Sup. Ct. Jus.) (QL).
[16] *Ibid*.
[17] *Re Grace Canada Inc.* (February 8, 2006) Toronto, 01-CL-4081 (Sup. Ct. Jus.).

The US Legislation

Adopted in 2005, Chapter 15 was enacted to facilitate international cooperation in cross-border insolvency proceedings.[18] It is apparent on its face that the drafters of the new legislation intended Chapter 15 to closely follow the Model Law. In fact, it would seem that many of the differences between Chapter 15 and the Model Law were primarily to integrate the new legislation into the other existing provisions of the Code.

In order to commence proceedings under Chapter 15, a "petition for recognition of a foreign proceeding" must be filed which, among other things, appoints a foreign representative. The foreign representative may then apply for the recognition of a foreign proceeding in the US.[19] As part of the recognition process, once the Court is satisfied that there is a valid foreign proceeding, Chapter 15 provides that the US Court must make a determination as to whether the foreign proceeding is a "main" or "non-main" proceeding. This determination will be made based on whether the court finds that the subject debtor has its "centre of main interest" (or "**COMI**") in the foreign jurisdiction.

The significance of determining whether a foreign proceeding is a "main" or "non-main" proceeding is evident in the relief that will be granted as a result of that finding. Where a court finds that a foreign proceeding is a "main" proceeding, Section 1520 provides that automatic injunctive relief will be provided in the US. On the flipside, where a foreign proceeding is found to be "non-main", the court will have complete discretion in the relief, if any, it grants.

Even where a foreign proceeding is found to be "main", the US Court still preserves its discretion in granting any additional relief requested in the US. In deciding whether to grant "additional assistance", courts are directed to consider whether such assistance, while consistent with the principles of comity, will reasonably assure:

(a) just treatment of all holders of claims against or interests in the debtor's property;

(b) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(c) prevention of preferential or fraudulent dispositions of property of the debtor;

(d) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by Chapter 15; and

(e) if appropriate, the provision of an opportunity for a fresh start of the individual that such foreign proceeding concerns.[20]

The inclusion of these principles is a clear preservation of part of the old Section 304.[21] The inclusion of these guidelines in Chapter 15 demonstrates, in part, the intention of the drafters

---

[18] *US Bankruptcy Code, supra.* note 4 §1501-1532.
[19] *US Bankruptcy Code*, *supra* note 4 at §1504.
[20] *US Bankruptcy Code*, *supra* note 4 at §1507.

that similar principles should be considered in granting additional relief under Chapter 15 as were considered in granting relief under Section 304. They also indicate that the nature of the relief granted by US courts will be broader or narrower than that specifically mandated by the language of the Model Law depending on the circumstances.

Section 1506 sets out a potentially significant exception to when a US Court may refuse to grant relief under Chapter 15. This exception states that a court may refuse to grant relief where such relief would be "manifestly contrary to the public policy of the United States". This public policy exception mirrors the provisions of the Model Law. The application of the public policy exception has recently been considered in the *MuscleTech* proceedings and is discussed in greater detail below.

Ultimately, although there are certain apparent differences between the new Chapter 15 and its predecessor, the principle of providing a formal mechanism for recognition of foreign proceedings has not changed. Now over a year into its adoption, we are beginning to see the results of Chapter 15 in practice. The following discussion of the *MuscleTech* proceedings highlights some of the issues that have arisen to date.

MUSCLETECH

Background

MuscleTech Research and Development Inc. ("MuscleTech") was a privately held corporation that was incorporated under the laws of the Province of Ontario in 1997. For a number of years, MuscleTech and certain of its affiliates (collectively, the "MuscleTech Group") was involved in the manufacture and sale of various health and weight-loss supplements, some of which included ephedra, but ceased selling such products in 2002.

Around 2004, product liability litigation related to the sale and manufacture of products containing ephedra increased exponentially. This increase in litigation coincided with the US government's public announcement of its intention to ban the use of ephedra in the US. MuscleTech, along with many others, found themselves subject to massive litigation spanning several US States.

By the time much of this litigation had been commenced, the MuscleTech Group had undergone a corporate restructuring, whereby its remaining active business was transferred to other entities owned by its corporate parent, Iovate Health Sciences Group Inc. ("Iovate"). However, the MuscleTech Group, along with its principals, Iovate and other third parties who did have active businesses and assets, were named as defendants in a number of actions in the US. These actions were generally grouped into two categories, namely, products liability actions for sale, manufacture and advertising of products containing ephedra (the "Products Liability Claims") and also class actions for false advertising regarding products containing prohormone (the "Prohormone Claims").

---

[21] The factors outlined in the new §1507 were previously found in §304(c) of the *US Bankruptcy Code*.

The CCAA Application

Although the MuscleTech Group was able to continue business for a period of time it was clear that the cost of defending the litigation made it difficult for it to continue to meet its obligations as they came due. Accordingly, on January 18, 2006, the MuscleTech Group applied for and was granted protection pursuant to Section 11 of the CCAA.[22]

In granting the relief sought, Justice Farley observed:

> the courts of Canada and the US have long enjoyed a firm and ongoing relationship based on comity and commonalities as to, *inter alia*, bankruptcy and insolvency.[23]

In anticipation of the pending Chapter 15 petition to be heard in the US, the Ontario Court noted those factors present in the circumstances that would point toward the MuscleTech Group's COMI being located in Ontario. They are as follows:

(a) each of the members of the MuscleTech Group was incorporated in Ontario;

(b) each of the members of the MuscleTech Group had Ontario mailing addresses;

(c) the principals, directors and officers of the MuscleTech Group were residents of Ontario;

(d) all decision-making and control in respect of the MuscleTech Group, including product development, took place at the MuscleTech Group's premises located in Ontario;

(e) the MuscleTech Group's principal banking arrangements were conducted in Ontario through one of the major Canadian financial institutions; and

(f) all administrative functions associated with the MuscleTech Group and all of the employees that perform such functions, including general accounting, financial reporting, budgeting and cash management, were conducted and situated in Ontario.[24]

In addition to seeking protection for itself, on its initial application, the MuscleTech Group also sought, and the Canadian Court granted, protection for other non-applicant third parties including, the Iovate Group and other entities that had been named in the litigation (the "Third Party Defendants"). Protection was sought with respect to the Third Party Defendants as they were also named in the litigation involving the MuscleTech Group and in order for any

---

[22] (January 18, 2006), Toronto, 06-CL-6241 (Ont. Sup. Ct. Jus.) ["*MuscleTech*"]. See the endorsements of Justice Farley given on January 18, 2006 and February 8, 2006. All Canadian filings in the *MuscleTech* proceedings can be found at http://www.rsmrichter.com/restructuring.aspx.
[23] *Ibid.* at para. 4.
[24] *Ibid.*

solution to be successful, it was necessary for interim protection to be granted to the Third Party Defendants so that a global solution could be reached.

The Chapter 15 Application

The application for insolvency protection in Canada was made primarily because MuscleTech was an Ontario corporation and the majority of the MuscleTech Group's operations were out of Ontario. However, all of the Products Liability Claims and Prohormone Claims had been commenced in the US. As the Canadian Court's protection only extended as far as the Canadian border, it was necessary for the Canadian Court to seek the assistance of the US Court to give effect to its order in the US.

As such, immediately upon being granted relief under the CCAA, RSM Richter Inc., the court-appointed monitor (the "Monitor") filed petitions in the Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") pursuant to Chapter 15 commencing ancillary proceedings and applied for a temporary restraining order and preliminary injunction (collectively, the "Adversary Proceeding"). Temporary relief was granted by the Bankruptcy Court although subsequently the reference to the Chapter 15 proceedings and the Adversary Proceeding were withdrawn and all matters were transferred to the Southern District Court of New York (the "NY District Court").[25] On March 2, 2006, the NY District Court heard the recognition hearing and granted an order recognizing the Canadian proceedings as foreign main proceedings.

The recognition of the Canadian proceedings as foreign "main" proceedings meant that automatic relief was provided to the MuscleTech Group. However, a determination as to whether relief would be granted to the Third Party Defendants remained in the discretion of the NY District Court. After considering the arguments put forward, the Court exercised its discretion and granted protection to the Third Party Defendants. The extension of the protection in the US to the Third Party Defendants is a good example of a situation in which the US court may recognize foreign main proceedings and also be asked to exercise its discretion to grant additional relief. In these circumstances, had the discretionary relief not been granted, achieving a global resolution for its claims would have been considerably more difficult, if not impossible, for the MuscleTech Group and the Third Party Defendants.

Subsequent Developments

Since the commencement of the proceedings in both Canada and the US, a number of interesting developments have occurred in the *MuscleTech* proceedings which are worth noting.

<u>The Products Liability Committee</u>

Shortly after the commencement of the proceedings, a products liability plaintiffs' committee (the "PL Committee") was formed on behalf of claimants with Products Liability Claims. On February 8, 2006, the Canadian Court granted an order providing representative

---

[25] *In re RSM Richter Inc. v. Aguilar* (*In re Ephedra Prods. Liab. Litig.)* (January 20, 2006) 04 MD 1598 (JSR), 06-10092, 06-1147 (S.D.N.Y.) and attached hereto as Schedule "1".

status to the PL Committee and appointed representative counsel in Canada. Similar relief was granted by the NY District Court. Although this would have been somewhat unusual in Canadian proceedings, the MuscleTech Group consented to this relief as being the most efficient way of dealing with Products Liability Claims.

The Claims Resolution Procedure and Issues of Public Policy

At the same time, the MuscleTech Group began a claims process to be implemented in both Canada and the US. On March 2, 2006, the MuscleTech Group sent out a call for claims in both Canada and the US. All claimants who were being represented by the PL Committee filed individual claims.

Once the claims had been filed, the Products Liability claimants underwent an intra-plaintiff mediation in order to determine how individual claimant's claims would be valued as between themselves. During this process, four (4) claimants (the "Other Claimants") opted to remove themselves from the larger group of claimants.

On June 8, 2006, the MuscleTech Group sought approval of a claims resolution procedure in Canada. Both the PL Committee and the Other Claimants had notice of the motion for approval of the process. At the time of the hearing, counsel for the PL Committee appeared on behalf of all of the Products Liability claimants including the Other Claimants. Counsel agreed to the proposed process on behalf of the majority of the claimants and, with respect to the Other Claimants, read a statement to the Canadian Court indicating that the Other Claimants did not approve of the proposed resolution procedure. On that date, the Canadian Court granted an order (the "CRP Order") approving the proposed procedure.

Subsequently, on June 16, 2006, the Monitor sought recognition of the CRP Order in the Chapter 15 proceedings. At that hearing, the Other Claimants objected to the approval in the US, citing Section 1506 and claiming that the claims resolution procedure was "manifestly contrary to the public policy of the United States in that it deprive[d] the objectors of due process and trial by jury".[26] After a subsequent hearing during which written and oral argument was considered by the NY District Court, on July 12, 2006, the NY District Court granted the Monitor's motion subject to certain amendments being approved by the Canadian Court. Those amendments were approved in Canada on August 1, 2006.

On August 11, 2006, Judge Rakoff issued an opinion and order approving the amended CRP Order so as to implement it in the US. In his opinion, Judge Rakoff immediately dismissed the Other Claimants' "due process" argument stating any possible argument that the Other Claimants may have had on that basis that been resolved with the amendments to the CRP Order.

Judge Rakoff then went on to consider the second objection related to the trial by jury issue. Judge Rakoff found that Chapter 15, and specifically Section 1506, does not prevent a US court from "giving recognition and enforcement to a foreign insolvency procedure for liquidating

---

[26] In *re RSM Richter Inc. v. Aguilar* (In *re Ephedra Prods. Liab. Litig.*) 2006 U.S. Dist. LEXIS 57595 (S.D.N.Y.) and attached hereto as Schedule "2".

claims simply because the procedure alone does not include a right to a jury".[27] In making this ruling, Judge Rakoff considered the incorporation of the word "manifestly" in Section 1506 and observed that it was clear that Congress had intended its use of the word "manifestly" to indicate that the "public policy exception [should be restricted] to the most fundamental policies of the United States".[28] He went on to observe that federal courts are often faced with making such decisions and have routinely found that it cannot be said that "every solution of a problem is wrong because we deal with it otherwise at home".[29] Ultimately, Judge Rakoff found that it was clear that a "fair and impartial verdict" can be achieved in the absence of a jury trial and that the proposed claims procedure "plainly affords claimants a fair and impartial proceeding".[30]

As a result of this finding, it would seem that the public policy exception found in Section 1506 will not be used by the courts lightly. Moreover, it would seem clear that a procedure for the resolution of claims in the context of a restructuring will not be refused approval in the US for the sole reason that it does not provide for a trial by jury.

Prohormone Claims

MuscleTech's claims procedure contemplated that all claimants were to file individual claims (as opposed to representative claims). Notwithstanding this fact, four "representative" plaintiffs (the "Representative Plaintiffs") filed Prohormone Claims in the procedure that purported to be not only on their own behalf, but on behalf of "all other similarly situated persons".[31] Although they had been served with MuscleTech's motion for approval of the claims process and had not objected at that time, in late July 2006, motions were brought before the Canadian Court for a determination as to whether the Prohormone Claims were a nullity as a result of the fact that they were not entitled to file group claims.

The Prohormone Claims all originated as class action claims in the US. None of the claims had been previously certified in the US and none of the Prohormone Plaintiffs had moved to lift the stay of proceedings in order to have his or her respective claim certified as a class claim. Additionally, the Prohormone Claims were virtually the only ones that had been filed on a "representative" basis in these proceedings. Even those claimants with Products Liability Claims had filed individual claims.

Justice Mesbur first considered whether the CCAA permitted representative claims to be filed. She noted that the CCAA itself was silent on this issue and that, to date, no Canadian court had allowed a plaintiff in an uncertified class action to file a proof of claim on its own behalf and on behalf of others.[32] Instead, Justice Mesbur noted, the furthest a Canadian Court had gone was to lift a stay of proceedings in order to allow a class to file certification materials.[33]

---

[27] *Ibid*. at *87.
[28] *Ibid*. at *88-89.
[29] Quoting Ackermann v. Levine, 788 F. 2D at 842, *Ibid*. at *91.
[30] *Ibid*. at *94.
[31] *Re MuscleTech Research and Development*, [2006] O.J. No. 3300 (S.C.J.) (QL) and attached hereto as Schedule "3".
[32] *Ibid*. at paras. 27, 34 and 41.
[33] *Ibid*. at para. 34.

Justice Mesbur went on to consider whether she should exercise the Canadian Court's inherent jurisdiction to allow the Prohormone Claims to be filed. After considering the evidence before her, Justice Mesbur concluded that the interests of potential claimants had been adequately protected and that she should not, in these circumstances, exercise her discretion. In coming to this conclusion, Justice Mesbur noted:

> If members of the Representative Plaintiff's proposed class had wished to file proofs of claim, they had as much notice and opportunity to do so as anyone else. . . . Not a single 'similarly situated' person other than [the Representative Plaintiffs] filed a proof of claim. They easily could have. They did not. I cannot conclude that the absence of additional claims implies the process was somehow unfair or flawed. To the contrary, the absence of even a single additional claim suggests that there may be no other claimants at all.[34]

Finally, Justice Mesbur concluded that to allow the Prohormone Claims to be filed would be "prejudicial" to the claims procedure and would "impair the integrity of the CCAA process".[35]

Current Status of the *MuscleTech* Proceedings

Throughout the proceedings, the MuscleTech Group and the Third Party Defendants have worked to try and reach a settlement with the PL Committee as well as the Other Claimants. As a result, settlements have been reached with all of those Products Liability claimants still represented by the PL Committee as well as one of the Other Claimants. The remaining three (3) Products Liability Claims are being adjudicated through the claims resolution procedure set out in the CRP Order.

In August 2006, the three (3) remaining Other Claimants brought motions before the Canadian Court seeking, *inter alia*, an order to vary the CRP Order and to appoint an inspector (at their expense) in the *MuscleTech* proceedings. All motions were dismissed by the Canadian Court.[36] As such, the proceedings and, in particular, the claims resolution procedure continue with respect to those remaining Products Liability Claimants as set out in the CRP Order.

CONCLUSION

It remains to be seen how the implementation of Chapter 15 in the US will differ from the application of Section 304 before it. Some have stated that the most important aspect of Chapter 15 was the gesture of adopting the Model Law. Similarly, if the Model Law is ultimately adopted in Canada, it may well be that in practice there will be little substantive difference between the application of that regime and the current Section 18.6 of the CCAA.

---

[34] *Ibid*. at para. 39.
[35] *Ibid*. at para. 44.
[36] (October 13, 2006) Toronto 06-CL-6241 and attached hereto as Schedule "4".

Schedule “1”

Schedule “2”

Schedule “3”

Schedule “4”