

CITATION: In The Matter of Voyager Digital Ltd., 2022 ONSC 4553
COURT FILE NO.: CV-22-00683820-00CL
DATE: 20220804

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF VOYAGER DIGITAL LTD.

APPLICATION OF VOYAGER DIGITAL LTD. UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: Kimmel J.

COUNSEL: *Stuart Brotman, Daniel Richer, and Aubrey Kauffman*, for the Applicant Voyager Digital Ltd.

Miranda Spence, Steve Graff, Anthony O'Brien and Garret Hunter, for Francine De Sousa (proposed class action plaintiff)

Linc Rogers and Caitlyn McIntyre for Alvarez Marsal, the Proposed Information Officer

HEARD: July 19, 2022

ENDORSEMENT
(INITIAL RECOGNITION AND SUPPLEMENTAL ORDER)

[1] Following a hearing on July 12, 2022, an endorsement was released on July 13, 2022 that established the issues for determination at this July 19, 2022 hearing. For ease of reference the court's brief July 13, 2022 endorsement was as follows¹:

[1] Voyager Digital Ltd. ("VDL") is incorporated and has its registered office at a law firm in British Columbia. Its shares are listed for sale on the Toronto Stock Exchange ("TSX"). Its subsidiaries in the United States operate a cryptocurrency brokerage, and custodial

¹ Defined terms from the July 13, 2022 endorsement shall have the same meaning in this endorsement.

and lending services. VDL maintains that the centre of its main interests (“COMI”) is in the United States (“US”).

[2] VDL (together with other US affiliates) commenced a case for relief under Chapter 11 of title 11 of the United States Code (The “Chapter 11 Case”) in the United States Bankruptcy court for the Southern District of New York (the “US Bankruptcy Court”) on July 5, 2022. On the First Day Hearing on July 8, 2022, the U.S. Bankruptcy Court granted certain Orders (the “U.S. Orders”) and appointed VDL as the foreign representative of VDL. VDL seeks recognition of the U.S. Orders and various other relief set out in a proposed Initial Recognition Order and proposed Supplemental Order.

[3] VDL sought, as part of the Initial Recognition Order, a declaration that the proceeding before the US Bankruptcy Court (the “Foreign Proceeding”) is a “foreign main proceeding” within the meaning of s. 45(1) of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”).

[4] The requested relief for an Initial Recognition Order and Supplemental Order proceeded on an unopposed basis, save and except with respect to the request for the court to declare that the Foreign Proceeding is a “foreign main proceeding” for purposes of Part IV of the CCAA. Counsel appearing for certain possible investors and counsel for a proposed representative plaintiff in a recently commenced proposed class action in Ontario (the “opposing counsel”) each advised the court that they required some additional time to formulate their position and file evidence and/or submissions in respect of the court’s determination of whether the Foreign Proceeding is a “foreign main proceeding” or a “foreign non-main proceeding” for purposes of Part IV of the CCAA (the “question”).

[5] At the request of the opposing counsel, the court’s determination of this question was adjourned to a hearing scheduled for 2:00 p.m. on Tuesday July 19, 2022 in Toronto, *via* video conference. The following timetable was ordered with respect to the material for this hearing:

- a. Any proponent of the position that the Foreign Proceeding is a “foreign non-main proceeding” shall deliver their material by Thursday July 14, 2022;
- b. The applicant and any parties supporting the applicant’s position that the Foreign Proceeding is a “foreign main proceeding” shall deliver their material by Saturday July 16, 2022;
- c. Reply material, if any to be delivered by Sunday July 17, 2022;

d. All materials to be filed with the court and uploaded onto CaseLines by 12:00 p.m. on Monday July 18, 2022.

[6] The amended Initial Recognition Order and Supplemental Order (that allow for the future determination of this question *nunc pro tunc*) are granted and shall issue, with my reasons to follow.

[2] This endorsement contains the court's reasons for granting the Initial Recognition Order and Supplemental Order, and for the court's determination of the "question" after taking into account the written and oral submissions presented in connection with the July 19, 2022 hearing.

[3] In answer to the "question", I find that the Foreign Proceeding is a "foreign main proceeding" for purposes of Part IV of the CCAA.

The Participating Stakeholders

[4] VDL is not an operating company. VDL is not seeking interim financing at this time and, consequently is not seeking any charge or security related to interim financing on its properties, assets, or undertakings. The material filed on this application discloses that it has no secured creditors that will be affected by the priority Administration Charge that is granted under the paragraph 18 of the Supplemental Order (in favour of counsel to the Foreign Representative, the Information Officer and counsel to the Information Officer). VDL did not identify any stakeholders who it was required to serve with this application, pursuant to the CCAA or otherwise.

[5] However, just prior to the commencement of this application a proposed class proceeding was commenced in the Ontario Superior Court of Justice seeking, among other things, relief under the *Securities Act* R.S.O. 1990 c. S-5 and the *Class Proceedings Act*, 1992, S.O. 1992, c 6, as amended, in which VDL, its Ontario-based director, and its Ontario-based former employee are named as defendants (the "De Sousa Action").

[6] The proceedings involving VDL in the U.S. Bankruptcy Court were a matter of public knowledge. Counsel for the plaintiff in the De Sousa Action requested to be served or notified in connection with the Chapter 11 Case. Such counsel were served with this application. The application also came to the attention of counsel hoping to be retained by certain other investors in VDL.

[7] These opposing counsel appeared on July 12, 2022. They also appeared on July 19, 2022 after being given the opportunity to make further written and oral submissions on the "question" in accordance with the court's July 13, 2022 endorsement.

[8] No one else asked to be notified of insolvency proceedings in Canada, appeared or took any position in connection with the relief sought by this application aside from the participants identified in this endorsement. Opposing counsel speculate that there may be other creditors of VDL whose claims are not significant enough to warrant them retaining counsel and/or appearing.

Legal Analytical Framework for Recognition Orders

[9] Comity mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability, and fairness. Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings to avoid multiple proceedings, inconsistent judgments, and general uncertainty. See *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238, at paras. 41,42 (“*Hollander*”).

[10] Part IV of the CCAA establishes the applicable process for the administration of cross-border insolvencies, with a view to promoting cooperation and coordination with foreign courts. Sections 46 and 47 of the CCAA provide as follows:

Application for recognition of a foreign proceeding

46 (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 company that are known to the foreign representative.

Order recognizing foreign proceeding

47 (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.

[11] The determination of whether a foreign proceeding is a foreign main proceeding or a foreign non-main proceeding is a factual question. These, and related, terms are defined in s. 45 of the CCAA as follows:

45 (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*)

foreign main proceeding means a foreign proceeding in a jurisdiction where the debtor company has the centre of its 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 creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. (*instance étrangère*)

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

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

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

Centre of debtor company's main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

[12] One of the other important considerations that has been emphasized by Canadian courts in dealing with insolvency proceedings is the need for consistency and fair treatment of all creditors across multiple jurisdictions under a single proceeding model. See *Hollander* at para. 42 and *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para. 22.

[13] This is viewed to be consistent with the preferred "modified universalism" approach that is propounded in much of the Canadian jurisprudence dealing with cross-border insolvencies, described as follows:

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.

See *MtGox Co. Ltd (Re)*, 2014 ONSC 5811, at para.11 ("*MtGox*").

Analysis

Recognition of the Foreign Proceeding Under s. 46 and 47 of the CCAA

[14] There is no question that VDL has been named the Foreign Representative in a Foreign Proceeding. The requirements for recognizing the Ch. 11 proceedings involving VDL before the U.S. Bankruptcy Court as a foreign proceeding under ss. 46 and 47 of the CCAA are clearly satisfied and not disputed. Nor was the granting of the stay under the Initial Recognition Order

opposed, although such an order would be mandatory if the Foreign Proceeding is found to be a foreign-main proceeding, but only discretionary if it is found to be a foreign non-main proceeding.

Where is the COMI of VDL Under s. 45 of the CCAA

[15] The “question” to be decided by the court in this case is whether the Foreign Proceeding is a foreign main proceeding or foreign non-main proceeding under s. 45 of the CCAA. This is dependent on where VDL’s centre of main interests (COMI) is, as defined under s. 45 of the CCAA.

[16] The applicant maintains that the Foreign Proceeding is a foreign main proceeding because the centre of VDL’s COMI is in the US. The applicant argues that there is ample proof in this case to rebut the presumption under s. 45(2) of the CCAA that its COMI is the local of its registered office in British Columbia.

[17] The opposing counsel argue that VDL’s COMI is in Canada, but do not appear to be insisting that it is in British Columbia, only that it is not in the US.

[18] The parties agree on the test to be applied to determine whether the location in which the proceeding has been filed is VDL’s COMI. This involves initial consideration of the following three primary factors:

- a. the location in which the Foreign Proceeding has been filed is readily ascertainable by creditors;
- b. the location in which the Foreign Proceeding has been filed is one in which the debtor's principal assets or operations are found; and
- c. the location in which the Foreign Proceeding has been filed is where the management of the debtor takes place.

See *Zochem Inc. (Re)*, 2016 ONSC 958, at para 22 (“*Zochem*”).

[19] The applicant focuses on the location of the underlying operations of the VDL enterprise cryptocurrency business, all of which are in the US. The applicant also focuses on the fact that all the officers and senior management, and all but one of the directors, of VDL are residents and located in the US.

[20] Opposing counsel instead focus on the business of VDL as the “parent” company, raising funds on the TSX, which activity they argue is operationally situated in Canada. On the theory of opposing counsel, the operating businesses in the U.S. that are funded by the fruits of VDL’s business in Canada, are secondary businesses to VDL’s main business.

[21] All participating parties also agree that, when these primary factors do not point to a single jurisdiction as the COMI of the debtor, other factors may need to be considered. When determining the COMI of a Canadian entity operating as part of a larger corporate group, courts have considered, among other factors:

- a. the location where corporate decisions are made;
- b. the location of employee administrations, including human resource functions;
- c. the location of the company's marketing and communication functions;
- d. whether the enterprise is managed on a consolidated basis;
- e. the extent of integration of an enterprise's international operations;
- f. the centre of an enterprise's corporate, banking, strategic and management functions;
- g. the existence of shared management within entities and in an organization;
- h. the location where cash management and accounting functions are overseen;
- i. the location where pricing decisions and new business development initiatives are created; and
- j. the location of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

See *Hollander*, at para 33; *CHC Group Ltd (Re)*, 2016 BCSC 2623 at para 11, citing *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 115 at para. 7 ; *Massachusetts Elephant & Castle Group, Inc (Re)*, 2011 ONSC 4201 at paras 26-31 (“*Elephant & Castle*”).

[22] While the decision making and management at the corporate group level is a relevant consideration, the analysis of VDL’s COMI must still be undertaken at the entity level. See *MtGox*, at para. 11; *Hollander*, at para. 30; *Elephant & Castle*, at para. 20.

[23] In all cases, however, the court must not lose sight of what it is attempting to determine: “... the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor’s true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.” See *Lightsquared LP, Re*, 2012 ONSC 2994, at para. 26 (“*Lightsquared*”); see also *Zochem* at paras. 23-25.

The Primary Factors

[24] The location of the U.S. Bankruptcy Court where the Foreign Proceeding was filed is readily ascertainable to stakeholders. VDL is clearly managed in the US. However, the location of its principal assets and operations could arguably be a question of perspective and how its creditors and other stakeholder perceive the nature of VDL’s business as a holding company.

[25] Opposing counsel primarily argue that investors and other stakeholders in the shares and securities issued by VDL have an expectation of VDL’s business being conducted in and from Canada, and particularly emphasize the description of VDL’s core business by its CEO as: “VDL

serves only as a publicly-traded holding company whose sole function is to raise capital from public markets by listing on the TSX." While this may be a relevant consideration, I consider it to be only the start of the analysis.

[26] In a case involving a public company, a logical place to look for the objectively ascertainable expectations of shareholders and other stakeholders as to the location of a company's principal assets and operations is its publicly filed documents, such as the short form shelf prospectus dated August 17, 2021 (the "Prospectus") used for VDL's public offering.

[27] The opposing counsel point to statements in the Prospectus indicating that VDL's "... securities have not been, and will not be, registered under the United States Securities Act of 1933, as amended (the "U.S. Securities Act"), or the securities laws of any state of the United States... and may not be offered, sold or delivered, directly or indirectly, in the United States except pursuant to an exemption from registration under the U.S. Securities Act and applicable U.S. state securities laws."

[28] However, these prescriptive statements about the registration and sale of VDL's securities do not paint the full picture. The Prospectus referred to and relied upon by opposing counsel not only clearly states that VDL's "principal place of business is in the United States", but it also includes the following statements:

At page 22 of the Prospectus:

The Company is a corporation formed under the laws of British Columbia, Canada; however its principal place of business is in the United States. Most of the Company's directors and officers, the Company's auditors, and the majority of the Company's assets, are located in the United States.

The narrative on this page goes on to indicate that service of claims against the non-resident directors, officers, employees etc. of VDL could be difficult, as could be the pursuit and/or enforcement of claims against them in the U.S.

At page 8 of the Prospectus:

The Company [earlier defined as VDL] is a technology company involved in the business of developing and commercializing a digital platform focused on enabling users to buy and sell digital assets (cryptocurrencies) in one account across multiple centralized or decentralized marketplaces that unite and match buyers and sellers of cryptocurrencies. Voyager is a licensed digital asset Money Services Business that provides investors with a turnkey solution to trade digital assets. References in this prospectus, including the documents incorporated by reference herein, to the Company being licensed or registered refer to its status as a Money Services Business in the United States under FinCEN, a bureau of the United States Department of the Treasury. The Company has implement [sic] procedures in order to prevent residents in the provinces and territories of Canada from become [sic] clients or customers of its crypto-asset trading and investing business, these measures include KYC procedures and geofencing the availability of the Voyager app.

To the best of the Company's knowledge, the Company does not have any clients or customers who are ordinarily resident in, or have immigrated to, Canada.

[29] There is no question that VDL's decision making takes place in the US. Even before the one Canadian employee and officer of VDL left in June 2022, that was the situation. VDL does not have, and never had, any physical premises in Canada. Operationally, the entirety of the cryptocurrency business is run out of the US. Although the COMI of VDL must be analyzed at the entity level, the existence of a corporate group operating through foreign subsidiaries cannot be ignored. See *Hollander*, at para. 34.

[30] The Prospectus contextualizes VDL's business and is an objective source from which to ascertain the reasonable expectations of VDL's stakeholders. It clearly indicates the locale of VDL's principal assets and operations and management to be the U.S.

[31] Opposing counsel argue that there would be corporate records at VDL's head office in Vancouver and that VDL is subject to the Canadian securities' regulatory regime as a reporting issuer with shares listed on the TSX. These are disclosed in the Prospectus and do not, in my view, displace the US. as the more readily ascertainable principal place of VDL's business, operations, and management.

The Secondary Factors

[32] If there was any doubt about the US as the more readily ascertainable principal place of VDL's business, an analysis of the applicable secondary factors either supports or is neutral to that the same conclusion. There is little that points to Canada as the principal place of the self-described cryptocurrency business of VDL.

[33] Opposing counsel points out that two of VDL's subsidiaries, one in Canada and one in the US, have been granted Money Services Business ("MSB") registrations with Canada's Financial Transaction and Reports Analysis Centre of Canada ("FINTRAC"), suggesting that this may be paving the way for operations in Canada. However, there is no suggestion of any activity undertaken in Canada that is reliant upon the MSB registrations, just speculation by opposing counsel that these registrations may lead to future prospective activity in Canada. This is not a current indicia of the primary seat of VDL's business being located in Canada.

[34] Opposing counsel further speculate that there could be creditors of this securities business who did not appear on the application but for whom the court should not presume an expectation that the principal place of business of VDL is in the US. However, this speculation runs against the disclosure contained in the Prospectus about the locale of VDL's business, operations and management and does not displace that disclosure in the absence of any concrete evidence to the contrary.

[35] Having regard to the facts and evidence before the court at this time, I find that the proceedings before the U.S. Bankruptcy Court correspond with where "the debtor's true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings." See *Lightsquared*, at para. 26; see also *Zochem* at paras. 23-25. The legitimate expectations of third parties dealing with VDL and its subsidiaries would consider the US to be the principal seat of VDL's business.

[36] This case is similar to *Probe Resources Ltd (Re)*, 2011 BCSC 552, at paras. 2-3 and 24-25 and 28, in which the British Columbia Supreme Court found a publicly listed Canadian parent holding company of an oil and natural gas business operating through US subsidiaries (with nominal assets located in Canada and all of its operations, other than administration and organization matters, located in the US) to have its COMI in the US.

[37] I find in all of the circumstances of this case that the COMI of VDL is in the US and that the Foreign Proceeding in the U.S. Bankruptcy Court should be recognized on that basis, as a foreign main proceeding. Accordingly, I find that the presumption in s. 45(2) of the CCAA has been rebutted in respect of VDL.

Policy Considerations

[38] The test for determining the COMI of a debtor is not a balancing of prejudices. However, s. 61(2) of the CCAA applies and provides as follows: "Nothing in [Part IV of the CCAA] prevents the court from refusing to do something that would be contrary to public policy."

[39] Opposing counsel make two foundational policy assertions, that: (i) if the Foreign Proceeding is recognized as a "foreign main proceeding", Canadian securities regulators and police would be prohibited from carrying out their investigative functions, and (ii) if the Foreign Proceeding is recognized as a "foreign main proceeding", Ms. De Sousa (the proposed representative plaintiff in the proposed class action) and the equity holders she wishes to represent (and possibly other Canadian stakeholders) will be excluded from participating in the restructuring proceedings of VDL.

[40] In *MtGox* (at para. 25), relied upon by opposing counsel, the trustee wanted ongoing litigation to be enjoined in Canada, to give priority to the protections afforded in the Japan bankruptcy proceeding. There was no prohibition against ongoing investigations by regulators or police. There is nothing to indicate whether there was, in fact, any Canadian police, regulatory or criminal authority involvement after the stay was granted in *MtGox*, and if not why. The suggestion by opposing counsel that this was the result of the court's recognition of the foreign proceeding in Japan as a foreign main proceeding is not supported.

[41] Furthermore, the Supplemental Order issued by this court on July 12, 2022 in this case expressly exempts from the stay the exceptions to the automatic stay contained in Bankruptcy Code section 362(b), which exceptions include:

- a. (1) the commencement or continuation of a criminal action or proceeding against the debtor; and
- b. (25) under subsection (a), of -- (A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

[42] Thus, there is no basis for the suggestion in this case that there is a public policy concern that the finding that the Foreign Proceeding before the U.S. Bankruptcy Court is a foreign main proceeding will preclude any Canadian regulatory or police investigations of VDL.

[43] There is similarly no factual basis for the contention of opposing counsel that a finding that the Foreign Proceeding in this case is a foreign main proceeding will preclude Canadian equity holders or other stakeholders of VDL from participating, or lead to their inequitable treatment, in the restructuring proceedings of VDL.

[44] During oral argument, further speculative concerns about the terms of a future proposed plan and the possibility of effective substantive consolidation were also raised.

[45] Much emphasis was placed on the speculative concern that the U.S. Bankruptcy Court would not agree to the appointment of representative counsel for class action shareholders or other uniquely situated Canadian stakeholders, whereas there is precedent for so doing in CCAA proceedings, when warranted. First, I note that it is not guaranteed that representative counsel would be appointed even if the Foreign Proceeding was declared to be a foreign non-main proceeding and there was to be a parallel CCAA proceeding in Canada.

[46] But, a more direct rebuke to the suggestion that there would be no role opportunity for representative counsel to represent uniquely situated Canadian stakeholders in the Foreign Proceeding is found in the example of a precedent (brought to the court's attention by the applicant) for recognizing and carving out a role for representative counsel on behalf of Canadian stakeholders in a different type of U.S. bankruptcy proceeding: See *Re LTL Management LLC*, (SCJ Court File No. CV-21-00673856-00CL).

[47] The Information Officer that has been appointed by the court in this case supports the position of VDL and is appropriately situated, by virtue of the powers, authority, duties, and responsibilities that it has been given pursuant to the Supplemental Order, to keep the court of apprised of any concerns that are specific to Canadian stakeholders that may arise in the context of future recognition orders sought from this court.

[48] The concerns raised by opposing counsel, at some level, seem to presume that the Information Officer will fail to recognize and bring concerns to the court's attention in the future, or that the "reporting" role of the Information Officer is too limited and would need to be expanded to include monitoring and making recommendations to the court.

[49] Counsel for the Information Officer did not necessarily accept the suggested limitations on the role of the Information Officer. The role of the Information Officer was described by its counsel to include identifying points of prejudice or potential asymmetry with respect to the treatment of Canadian stakeholders for the court's consideration. It was suggested that this must be done contextually when there is a plan or some other proposal under consideration that affects those stakeholders. The court can and should be able to rely upon the Information Officer to carry out this role. It is presumptuous for opposing counsel to suggest or assume that the Information Office will not carry out this role and its duties to the best of its abilities.

[50] But, more importantly and appropriately, counsel for the Information Officer noted that the speculative concerns raised do not affect the factual determination of the COMI of VDL, which is in the US, and the court's determination that the Foreign Proceeding is a foreign main proceeding as the CCAA mandates in such circumstances. The noted concerns are more

appropriately addressed if and when they, or other concerns, actually arise in the context of future requests for recognition orders in this proceeding.

[51] If there are valid public policy concerns that are raised in connection with future requests for recognition orders, they may be considered by the court under s. 61(2) of the CCAA at that time. To speculate about those concerns and attempt to pre-emptively address them now at the stage of the Initial Recognition Order and Supplemental Order in the context of the determination of the “question” of whether the Foreign Proceeding is a foreign main or foreign non-main proceeding would be premature.

[52] I do not find there to be any existing identified public policy concerns that lead me to exercise the court’s jurisdiction under s. 61(2) of the CCAA to refuse to make the finding that the US is the COMI of VDL and/or to refuse to make the declaration that the Foreign Proceeding is a foreign main proceeding under part IV of the CCAA.

[53] The court’s findings and orders made at this time do not preclude the future examination of legitimate public policy concerns that may arise in connection with future requests for recognition orders in connection with the Foreign Proceeding.

[54] Nor do they preclude any party from applying to vary or amend the Initial Recognition Order pursuant to paragraph 9 thereof, including for a request to expand the duties and powers of the Information Officer.

Final Determination of the Question

[55] The only immediate and mandated effect of a determination that the Foreign Proceeding as a foreign main proceeding is that the stay is mandatory (whereas it would have been a discretionary order if I had determined it was a foreign non-main proceeding). In either event, the stay has already been ordered. To that extent, I find myself in the same place as Newbould J. was when he said in *Zochem* (at para. 26):

In this case it is perhaps an academic exercise to decide if the foreign proceeding is a main or non-main proceeding because it is appropriate for a stay to be ordered in either event. However, I am satisfied that for our purposes the applicants have established that the foreign proceeding is a foreign main proceeding. The court's declaration that the Foreign Proceeding is a foreign main proceeding is made *nunc pro tunc* to the date of the Initial Recognition Order and Supplemental Order, July 12, 2022.

A handwritten signature in black ink, appearing to read "Kimmel J.", with a stylized, cursive script.

Kimmel J.

Date: August 4, 2022