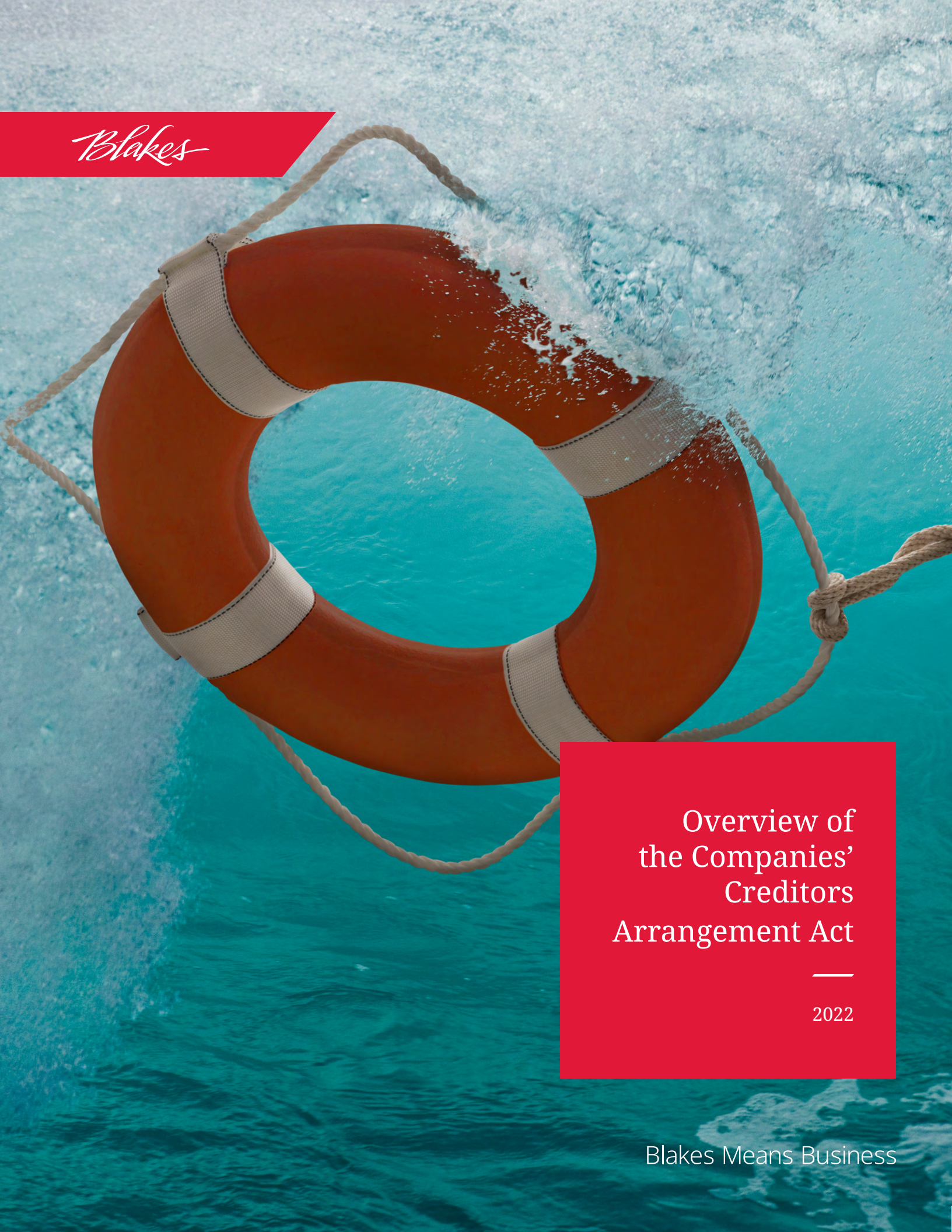

Blakes

Overview of the Companies' Creditors Arrangement Act

2022

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Blakes Overview of the Companies' Creditors Arrangement Act (CCAA)

This overview is intended as an introductory summary to the *Companies' Creditors Arrangement Act*. Specific advice should be sought in connection with particular transactions.
If you have any questions with respect to this guide, please contact our Firm Managing Partner, Bryson Stokes, in our Toronto office at +1-416-863-2179 or bryson.stokes@blakes.com.

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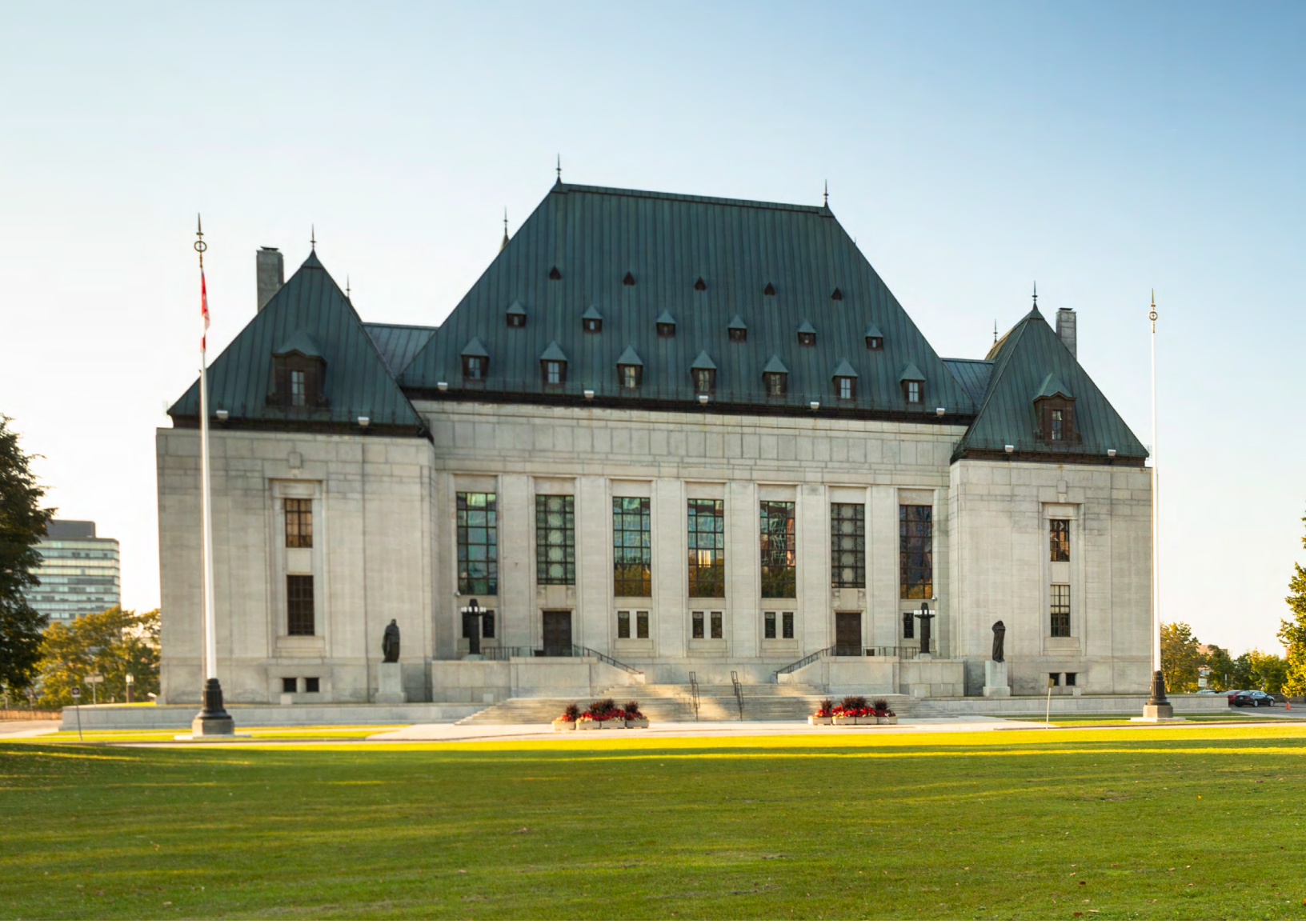


1.0 Introduction

The *Companies' Creditors Arrangement Act* (CCAA) is the principal statute for the reorganization of a large insolvent corporation. The CCAA can also facilitate the sale of an insolvent business. As a federal statute, the CCAA has application in every province and territory of Canada (and purports to have worldwide jurisdiction). The CCAA is generally analogous, in effect, to Chapter 11 of the U.S. *Bankruptcy Code* (U.S. Code), although there are a number of important technical differences.

2.0 CCAA Proceedings

2.1 Qualifying Entities

To qualify for relief under the CCAA, a debtor must:

- Be a Canadian incorporated company or foreign incorporated company with assets in Canada or conducting business in Canada (certain regulated bodies such as banks and insurance companies are not eligible to file under the CCAA but instead may seek relief from creditors under the *Winding-up and Restructuring Act*). Partnerships cannot apply for protection from creditors under the CCAA, but relief has been extended to partnerships in certain circumstances where corporate partners have filed.
- Be insolvent or have committed an "act of bankruptcy" within the meaning set out in the *Bankruptcy and Insolvency Act* (BIA). The CCAA does not contain a definition of insolvency. Courts, however, have referenced and applied the definition of insolvency under the BIA. Accordingly, a debtor company will qualify for relief under the CCAA if it is insolvent on a cash-flow basis (i.e., unable to meet its obligations generally as they become due) or on a balance-sheet test (i.e., has liabilities that exceed the value of its assets). Further, the Ontario Superior Court of Justice has held that a debtor may be considered insolvent if the debtor faces a "looming liquidity crisis" or is in the "proximity" of insolvency even if it is currently meeting its obligations as they become due. It is sufficient if the debtor reasonably anticipates that it will become unable to meet its obligations as they come due before the debtor could reasonably be expected to complete a restructuring of its debt.
- Have in excess of C$5-million in debt or an aggregate in excess of C$5-million in debt if the debtor is part of a filing corporate family.

2.2 Duty of Good Faith

The CCAA requires all interested persons in CCAA proceedings to act in good faith. Where the court finds that an interested person failed to do so, it may make an order that it considers appropriate.

2.3 Commencing Proceedings

Unlike Chapter 11, no separate bankruptcy estate is created upon a CCAA filing, and the CCAA does not allow a debtor company to make an electronic filing to obtain a skeletal stay of proceedings and then subsequently obtain "first day" relief. Instead, a debtor company must seek the granting of an initial order that provides the debtor with a comprehensive stay of proceedings and other relief for an initial 10 days. An order granted in respect of an initial application must be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day stay period. The stay may be extended from time to time provided the debtor company meets the requisite test.

Proceedings under the CCAA are commenced by an initial application to the superior court of the relevant province and not a federal bankruptcy court as in the U.S. In some jurisdictions like Ontario, there are specialized commercial branches of the provincial superior courts before which these applications may be brought. In most instances, the application is made by the debtor company itself (creditors may initiate the process, but this is uncommon). Where the creditor does initiate the proceeding, it is usually with debtor consent.

The applications for an initial order are often brought on an *ex parte* basis or with limited notice to key stakeholders such as senior lenders or bondholders. Initial orders usually contain a "comeback" clause allowing stakeholders an opportunity to seek to vary or amend the terms of the initial order. The burden of justifying the relief sought rests with the debtor company at any "comeback hearing." The first "comeback hearing" is scheduled within the initial 10-day stay period, where an extension of the stay is typically sought by the debtor company.

2.4 Location of Proceedings

Applications for relief under the CCAA may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the debtor company in Canada is situated or, if the debtor company has no place of business in Canada, in any province in which any assets of the company are located.

2.5 Stay of Proceedings

Initial orders typically grant a comprehensive stay of proceedings that will apply to both secured and unsecured creditors and a stay against amending or terminating contracts with the debtor. Stays are typically extended to directors of the debtor in order to encourage those individuals to remain in office and advance the restructuring process.

The stay is subject to certain prescribed limits. For example:

- The stay cannot restrict the exercise of remedies under eligible financial contracts such as futures contracts, derivatives and hedging contracts.
- The stay cannot prevent public regulatory bodies from taking regulatory action against the debtor, although monetary fines are subject to the stay as well as administrative orders framed in regulatory terms but are in substance monetary claims.
- There are restrictions on the length of stays for "aircraft objects" — airframes, aircraft engines and helicopters.
- No order granting a stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods and services delivered after the filling date or payment for the use of leased property (pursuant to a true lease as opposed to financing lease) or licensed property.

Unlike Chapter 11, the stay of proceedings is not automatic and is a function of the court's discretion. The court, however, will typically exercise its discretion to issue an initial stay for up to a maximum of 10 days. An application to the court is required for any extensions. Before an extension can be granted, the court must conclude that circumstances exist that make the extension appropriate and that the debtor is acting with due diligence and in good faith. Unlike the initial 10-day stay, there is no statutory limit on the duration or number of extensions of the stay of proceedings.

2.6 Set-Off

The right of set-off is expressly preserved under the CCAA. Courts have interpreted this right of set-off to permit the right of a debtor company to set off pre-filing obligations against pre-filing obligations. However, the right of a debtor company to set off pre-filing obligations against post-filing obligations is subject to the stay routinely provided in initial orders commencing CCAA proceedings. It is within the discretion of the supervising judge to allow pre- versus post-filing set-off in exceptional circumstances.

2.7 The Monitor

As part of the initial order, the court appoints a monitor, typically an accounting or financial advisory firm with licensed insolvency professionals. The monitor's basic duties are set out in the CCAA but can be expanded by court order. Generally, the monitor plays both a supervisory and an advisory role in the proceeding. In its supervisory role, the monitor oversees the steps taken by the company while in CCAA proceedings, on behalf of all creditors, as an officer of the court. Further, the monitor will file periodic reports with the court, including reports setting out the views of the monitor as required by the CCAA in connection with any proposed disposition of assets or any proposed debtor-in-possession (DIP) financing.

In its advisory role, the monitor will assist management in dealing with the restructuring and other issues that arise and liaise with creditors as a neutral party. In certain cases, such as where the board of directors has resigned or creditors have otherwise lost confidence in management, the monitor's powers can be expanded. By court order, the monitor can be authorized to sell assets, subject to court approval, and direct certain corporate functions. Monitors assuming this role are colloquially referred to as "super monitors." The monitor has statutory authority to pursue fraudulent preferences and transfers at undervalue. Courts have also authorized monitors to pursue litigation against certain parties alleged to have caused harm to the debtor or the debtor's stakeholders. Such authorization can be granted where the courts, among other things, are satisfied that the monitor (rather than the debtor or any creditor) is best placed to pursue such litigation.

2.8 Chief Restructuring Officers

Initial or subsequent orders may also approve the retention of a Chief Restructuring Officer with an extensive mandate to manage the debtor company or a more limited mandate to assist management in the restructuring.

2.9 Creditor Committees

There are no statutorily mandated unsecured creditor committees in Canada as there are in the U.S., although such committees have sometimes been formed by court order on an ad hoc basis. There is no equivalent in Canada to the U.S. Trustee, which provides government oversight in Chapter 11 cases. However, the monitor fulfils certain of the functions that the U.S. Trustee and unsecured creditor committees would fulfil in Chapter 11 cases. The Superintendent of Bankruptcy, a federal government official, has some general oversight powers as well.

2.10 DIP Financing and DIP Charge

In many cases, the court will authorize the debtor to obtain DIP financing and grant super-priority charges over the assets of the debtor in favour of the DIP lender, if the court is of the view that additional financing is appropriate in the circumstances. This may be done in the initial order at the time of the first application or, more commonly, by way of a subsequent order at the first comeback hearing or at a later date. Notice must be given to all pre-filing secured creditors that are likely to be affected by the priority of the DIP charge.

In determining whether to approve DIP financing, the CCAA requires courts to take into account, among other things:

- The expected duration of proceedings
- How the debtor's business and financial affairs are to be managed during the proceedings
- Whether the debtor's management has the confidence of major creditors
- Whether the DIP loan would enhance prospects of a viable plan of arrangement or compromise
- The nature and value of the debtor's property
- Whether any creditor would be "materially prejudiced" as a result of the DIP charge
- The monitor's report on the cash-flow forecast

In addition to the above, where interim financing is sought under an initial order, the court must also be satisfied that the terms of the proposed loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial 10-day stay period.

The CCAA expressly prohibits the securing of pre-filing obligations with the DIP charge. However, "creeping roll-up DIPs," whereby the DIP facility, in effect, refinances a pre-filing credit facility, have been permitted in certain circumstances where affected creditors consent or the court is satisfied stakeholders will not be prejudiced.

At the DIP approval hearing, the debtor company will submit a DIP term sheet or credit agreement for approval, together with projected cash flows and the monitor's report on those cash flows. The monitor will also typically advise the court of its view as to the appropriateness of the DIP (both with respect to quantum and terms).

2.11 Disclosure of Economic Interest

Any interested person in a CCAA proceeding may request the court to order any other interested person to disclose any aspect of their economic interest in respect of the debtor. "Economic interest" is defined to include any security interest or the consideration paid for any right or interest. In deciding to make such an order, the court must consider, among other things, whether:

- The monitor approves the proposed disclosure
- The disclosed information would enhance the prospects of a viable plan being made
- Any interested person would be materially prejudiced as a result of the disclosure

2.12 Adequate Protection

Canada has not adopted the U.S. concept of "adequate protection," which is intended to protect existing lien holders who have become subject to super-priority charges, although Canadian courts may order protective relief to address prejudice to other creditors (e.g., payment of interest, payment of professional fees, etc.). Canadian courts also do not need to grant "replacement liens." A pre-filing secured creditor's security, if granted over after-acquired property (as is typically the case), continues to apply and automatically extends to post-filing assets acquired by the debtor, such as inventory and receivables.

2.13 Other Priority Charges Granted in the Initial Order

Initial orders routinely authorize priority charges over existing lien holders. For example, an administration charge secures payment of the fees and disbursements of the monitor and the monitor's and debtor's legal counsel. A directors' and officers' charge secures the debtor's indemnity to the directors and officers against post-filing claims and provides such directors and officers with the protection and assurance necessary to secure their continued involvement throughout the CCAA proceedings. The charge in favour of directors and officers is only available to the extent that these individuals do not have (or if the debtor cannot obtain) adequate insurance at a reasonable cost to cover such liabilities. Accordingly, a practice has developed of providing in the initial order that the secured indemnity can only be called upon to the extent the directors and officers do not have insurance coverage. Along with the DIP charge, these priority charges will typically rank ahead of claims of pre-filing secured creditors, provided that notice is given to any such secured creditors likely to be affected by the priority charges.

2.14 Disclaimers

The CCAA permits the disclaimer or resiliation (the equivalent of disclaimer under civil law in Quebec) of agreements. A disclaimer is akin to a contract rejection under Chapter 11. However, the debtor is not required to elect to either accept or reject certain "executory contracts" (other than aircraft leases) or real property leases, as is the case under Chapter 11. Any steps by counterparties to assert damage claims in respect of agreements that are disclaimed by the debtor are stayed by the initial order. As with rejected contracts under Chapter 11, counterparties to disclaimed agreements can assert a claim for damages on an unsecured basis and will be entitled to share in any distribution on a *pro rata* basis along with other unsecured creditors.

2.15 Assignments

The CCAA provides a process for the assignment of contracts, with court approval, despite contractual restrictions on assignment. However, a condition of any such forced assignment is that pre-filing monetary defaults are cured.

2.16 Treatment of Intellectual Property Licences

The CCAA provides protections for licensees of intellectual property, including trademarks, analogous to section 365(n) of the U.S. Code. Accordingly, a disclaimer or disposition does not affect a licensee's right to use intellectual property — including any right of exclusivity — during the term of the licence, as long as the licensee continues to perform its obligations in relation to the licensed intellectual property.

2.17 Disclaimers

The initial order typically stays a party to any contract or agreement for the supply of goods or services from terminating the agreement. The initial order and the terms of the CCAA protect these suppliers by providing that no party is required to continue to supply goods or services on credit or otherwise advance money or credit to a debtor. Accordingly, although a supplier cannot terminate its agreement as a result of the CCAA stay of proceedings, the supplier is not required to honour its obligations to supply post-filing unless it is paid in advance or cash on delivery (COD) for those post-filing obligations or is designated a critical supplier (discussed below).

Unlike Chapter 11, which provides for an "administrative priority claim" for post-petition suppliers, if the supplier to a CCAA debtor elects to provide goods or services on credit and does not have the benefit of a critical supplier's charge, that supplier is afforded no specific priority under the CCAA for its post-filing supply. Accordingly, it is important for post-filing suppliers to ensure that they receive cash (in advance or COD) payments or are otherwise fully protected by a court-ordered charge or some other form of financial assurance as security, such as a deposit for payments or a letter of credit issued by a third party.

2.18 Critical Suppliers

Where a vendor provides goods or services that are considered critical to the ongoing operation of the debtor, the court may declare the vendor a "critical supplier" and order the vendor to continue to provide goods or services on terms set by the court that are consistent with the existing supply relationship or that are otherwise considered appropriate by the court. As part of such critical supplier order, the court is required to grant a charge over all or any part of the debtor's property to secure the value of the goods or services supplied under the terms of the order, which charge can be given priority over any secured

creditor of the debtor. Any creditors likely to be prejudiced by the court-ordered charge must be given notice of the application to declare a vendor a critical supplier.

Despite these provisions in the CCAA, which can compel supply without any pre-filing payments, decisions in Ontario have authorized pre-filing payments to critical suppliers when continued supply could not be guaranteed without such authorized payments.

2.19 Avoidance Transactions

The CCAA contains provisions for the review of certain pre-filing transactions, including preferences, "transfers at undervalue," and certain types of payments made by a corporation to its creditors or its equity holders. These provisions were previously only available in a bankruptcy proceedings under the BIA (i.e., in Chapter 7-type proceedings) but are now incorporated by reference from the BIA into the CCAA.

The monitor in CCAA proceedings (but not the debtor) is empowered to challenge transfers at undervalue or preferential payments unless a plan of arrangement provides otherwise.

A "transfer at undervalue" is a disposition of property or provision of services by the debtor company for which no consideration was received by the debtor company or for which the consideration received by the debtor company was conspicuously less than the fair market value of the consideration given by the debtor. If the parties are dealing at arm's length, the monitor must establish that (i) the transfer at undervalue took place within one year of the initial bankruptcy event, (ii) the debtor company was insolvent or would be rendered insolvent by the transaction and (iii) the debtor company intended to defraud, defeat or delay a creditor.

When the transferee and the debtor company are not at arm's length, the relevant period of review is five years prior to the initial bankruptcy event, but, the criteria differs depending on when in the five year window the impugned transaction occurred. If the parties are not dealing at arm's length and the transaction occurred within one year of the bankruptcy event, all the monitor must establish is the fact of the transaction and the inadequate consideration. The monitor does not have to establish any requisite intent. If the impugned transaction took place between years two and five, the monitor must meet the insolvency requirement and the requisite intention requirement.

If a court determines that a transaction was a transfer at undervalue, the transaction may be voided or the monitor may seek judgment for the difference between the value of consideration received by the debtor company (if any) and the value of consideration given by the debtor company.

A preference is a payment made to a pre-filing creditor that meets certain criteria. Where the creditor is dealing at arm's length with the debtor company, the monitor must establish that the impugned transaction took place within three months prior to the initial bankruptcy event and that the debtor company had a view to giving that creditor a preference over another creditor. Where the creditor is not dealing at arm's length with the insolvent person, the monitor must establish that the impugned transaction took place within one year prior to the initial bankruptcy event and that the debtor company had a view to giving that creditor a preference over another creditor. If the transaction had the effect of giving a preference, there is a rebuttable presumption that it was made with a view to giving the creditor a preference. If a court determines that a transaction was a preference, such transaction may be voided.

The court may find the directors of the debtor company jointly and severally liable for transactions that include:

a. the payment of a dividend (other than a stock dividend), or the redemption or purchase for cancellation of shares of the capital stock of the corporation, and

b. the payment of termination pay, severance pay or incentive benefits or other benefits to a director, an officer or any manager of the business and affairs of the corporation, within the year prior to the initial bankruptcy event.

To establish liability, the court must find that any of the aforementioned transactions rendered the debtor corporation insolvent or occurred at a time when the corporation was insolvent. The directors do, however, have a due diligence defence available to them. In respect of executive compensation, the court must also find that the payment was conspicuously over the fair market value of the consideration received by the corporation and was made outside the ordinary course of business. The directors may avoid liability for these payments by establishing that the payments were not in contravention of the applicable statutes or that they protested against the making of such payments, in accordance with applicable law.

3.0 CCAA Plans

3.1 Effect of Plans

Like their Chapter 11 counterparts, plans of compromise or arrangement can, among other things, compromise and settle claims by providing for:

- Payment of a percentage of the face value of a claim
- Conversion of debt into equity of the restructured debtor that may require a concurrent plan of arrangement under the applicable federal or provincial business corporations statute (depending on the jurisdiction of the debtor's incorporation) or a newly created corporate entity designed to be a successor to the debtor's business
- The creation of a pool of funds or securities to be distributed to the creditors of the debtor
- A payment scheme whereby some or all the outstanding debt will be paid over an extended period, or
- Some combination of the foregoing

Plans may offer different distributions to different classes of creditors. However, the plan must treat all members within a class equally.

Plans may be filed by the debtor, any creditor, a trustee in bankruptcy or a liquidator of the debtor. As a matter of practice, plans are almost always filed by a debtor but can be filed by a creditor usually with the debtor's consent. The CCAA does not provide for an "exclusivity" period in which only the debtor may file a plan, as is the case under Chapter 11.

3.2 Claims Subject to Compromise

The claims of both secured and unsecured creditors may be compromised in a plan. The CCAA requires approval of the Crown — the federal or applicable provincial government — of any plan that does not provide for the payment, within six months, of all amounts owed to the Crown in respect of employee source deductions. Plans must also provide for the payment of certain pension and wage claims.

The CCAA also provides that plans can compromise claims against directors, subject to certain limitations. For example, claims that relate to contractual rights of one or more creditors and claims based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by directors are not subject to compromise.

3.3 Third-Party Releases

Courts have held that CCAA plans can provide for releases in favour of third parties being parties other than the CCAA debtor itself and its directors and officers. Third-party releases are available where, among other things, they are necessary and essential to the restructuring of the debtor, the claims to be released are rationally related to the purpose of the plan, the plan could not succeed without the releases and the parties that are the beneficiaries of the releases contribute in a tangible and realistic way to the plan.

3.4 Claims Process

There is no mandatory time frame in the CCAA in which affected creditors must prove their claims. If it is anticipated that a distribution will be made to unsecured creditors in a plan or following a sale of assets, the debtor will typically seek a claims procedure order that establishes a process to submit and determine creditor claims and a "claims bar date," after which claims not submitted in the process will be barred and extinguished forever. There may be a separate bar date for "restructuring claims" arising from the disclaimer, breach or termination of contracts after the filing date. The claims procedure order also establishes a process to resolve disputed claims, often including the appointment of a claims officer, to address any disputes in an arbitration-style summary process. The monitor typically administers the claims process in consultation with the debtor.

3.5 Post-Filing Interest

The U.S. Code provides that interest that is unmatured as of the filing does not form part of either a secured or unsecured claim. Under the CCAA, however, post-filing interest accrues on secured claims, but an Ontario decision held that post-filing interest does not form part of unsecured claims unless unsecured claims are paid in full.

3.6 Creditor Approval

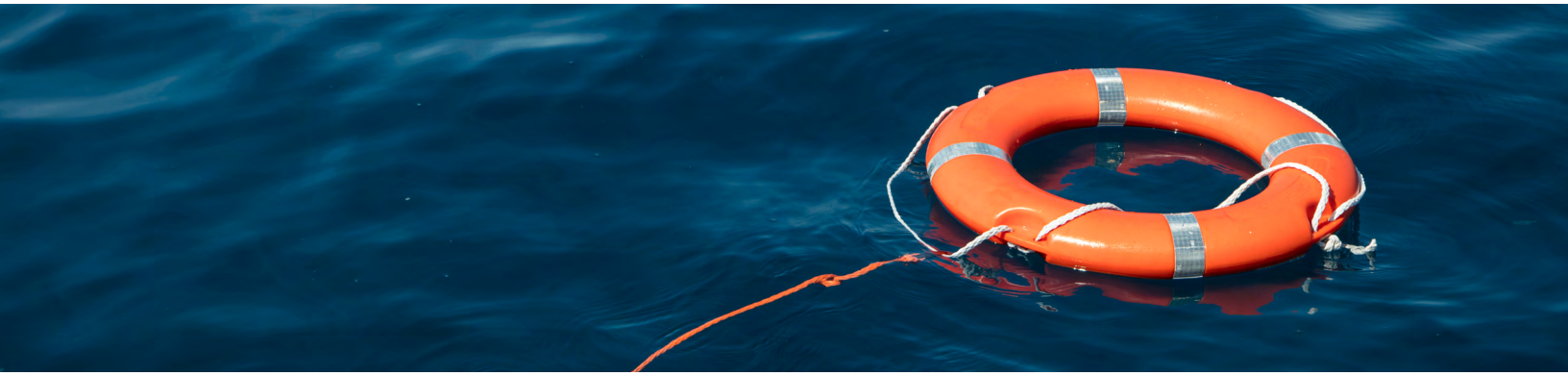
Creditors are separated into different classes based on the principle of "commonality of interest," which is analogous to the requirement in the U.S. Code that claims in a particular class be "substantially similar." Although unsecured creditors will typically be placed in a single class, certain unsecured creditors, such as landlords, may be classified in a separate class based on a different set of legal rights and entitlements than other unsecured creditors. The plan must be passed by a special resolution, supported by a double majority in each class of creditors: 50 per cent plus one of the total number of creditors voting in the class and 66-2/3 per cent of the total value of claims voting in each class.

3.7 Cram-Down

Unlike under Chapter 11, there is no concept of "cram-down" in Canada. Instead, each class of creditors to which the plan is proposed must approve the plan by the requisite majorities.

3.8 Court Approval

Once the plan is approved by the creditors, it must then be submitted to the court for approval. This proceeding is known as the sanction hearing and the equivalent of the confirmation hearing under Chapter 11. The court is not required to sanction a plan even if it has been approved by the creditors. However, creditor approval will be a significant factor in determining whether the plan is "fair and reasonable" and, thus, deserving of the court's approval.



4.0 Going-Concern Sales

4.1 Sales Process

Like sales conducted pursuant to section 363 of the U.S. Code, the CCAA permits the sale of a business by the debtor with court approval. Sale approval and vesting orders are available to give the purchaser the necessary comfort that it will acquire the purchased assets free and clear of any liens and encumbrances.

Generally, the sales process is approved by the court with the support of the key stakeholders, including DIP lenders, who have significant influence over the debtor's sales process. The debtor will also require the support of its monitor. Courts also frequently approve the retainer of a financial adviser or investment bank to conduct the sales process on behalf of the debtor.

The CCAA provides factors that a court is to consider in determining whether to approve a sale outside of the debtor's ordinary course of business. The court must be satisfied, among other things, that the sales process is fair and reasonable in light of all the circumstances.

4.2 Quick Flip or Pre-Pack Sales

It is also possible for a company to run a sales process that would be typically run in a CCAA proceeding and actually identify a successful bidder or stalking-horse bidder, before the CCAA proceeding begins. In these circumstances, the primary purpose of the CCAA proceeding would be to obtain court approval of the transaction or commence an abbreviated sales process to determine if there are any overbids, in the case of a stalking horse, and then distribute proceeds pursuant to a court order or plan. Prior to approval, the court will require assurance that the proposed monitor had an oversight or supervisory role in the pre-filing sales process or has otherwise reviewed the process and is satisfied that it is reasonable. The proposed monitor would have to proffer evidence that the sales process was consistent with what is typically approved by courts in CCAA cases. These "quick flip" proceedings often appeal to debtor companies, purchasers and lenders because they can save expense and time. As the purpose of the proceeding is to implement a going-concern solution (rather than to identify one), the stigma and potential disruption associated with formal insolvency proceedings can also be reduced.

4.3 Credit Bidding

There is no CCAA equivalent to section 363(k) of the U.S. Code, which expressly authorizes a secured creditor to credit bid its debt. However, courts have routinely authorized credit bids in Canada.

4.4 Reverse Vesting Orders

Instead of a traditional vesting order, if certain criteria are met, a CCAA court also has the authority to issue a reverse vesting order or RVO which allows for the transfer of liabilities and/or unwanted assets out of the debtor company into a newly formed entity (ResidualCo) or existing subsidiary, prior to acquisition of the shares of the existing debtor company by a purchaser. It is the "reverse" of a conventional vesting order because the desired assets stay in the debtor entity, and the unwanted liabilities and unwanted assets are vested out into another entity so that the debtor company (and its desired assets) can be acquired by a purchaser free and clear of the unwanted liabilities and unwanted assets. RVOs have been increasingly used to facilitate restructurings in situations where the debtor company possesses valuable attributes, such as governmental licenses and permits or tax losses, which would be difficult or impossible to transfer in a conventional asset sale.

4.5 Distribution of Proceeds

A sale approval and vesting order will provide that creditors will have the same priority against the proceeds that they had against the assets prior to the sale. Following court approval of the sale and closing, the court will authorize the distribution of the net proceeds to creditors in accordance with their priorities (discussed below). If there are surplus funds available for unsecured creditors following payment to secured creditors, it is common to seek leave of the court to bankrupt the debtor and have any surplus proceeds distributed by a trustee in bankruptcy in accordance with the priorities set out in the BIA. The debtor company may also elect to file a plan of arrangement or compromise that provides for the distribution of proceeds ofsale to secured and unsecured creditors.

5.0 Priorities

5.1 Secured Creditors

The CCAA does not contain a priority scheme for the distribution of proceeds of realization. As noted above, security interests in sold collateral and the relative priority of those security interests are preserved in the proceeds of sale as a result of the sale approval and vesting order. There are, however, certain priority claims that rank in priority to secured creditors, in addition to the claims of the beneficiaries of the court ordered priority charges, discussed above.

For example, claims for unpaid wages and unpaid pension contributions effectively have super-priority against proceeds realized in a CCAA as they do under a BIA liquidation. That is, these claims have to be satisfied prior to any distribution of proceeds of a CCAA sale, and their payment has to be provided for in any CCAA plan. The priority of these claims is discussed below.

5.2 Employee Remuneration Charge

The BIA provides a priority for certain workers (the priority does not apply to officers or directors of the debtor company), up to a maximum of C$2,000 per employee, for unpaid wages (including vacation pay but not including severance and termination pay) earned up to six months before the appointment of a receiver or initial bankruptcy event. The priority is secured by a charge over the debtor company's current assets that are essentially inventory and receivables. To the extent that a receiver or trustee pays the worker's claim, the secured claim is reduced accordingly. The obligation to pay accrued but unpaid wages effectively has the same priority against proceeds realized in a CCAA sale or a CCAA plan, as any plan must provide that these priority claims are satisfied.

The *Wage Earner Protection Program Act* establishes a program run by the federal government through which employees entitled to claim a priority for unpaid wages are compensated directly by the government, to a maximum of approximately C$8,000 as of 2022 The government is subrogated to the rights of the unpaid employee for amounts paid under this program and receives a priority claim against the current assets of the debtor company in the amount of the compensation actually paid out, to a maximum amount of C$2,000 per employee. Any balance that exceeds this amount does not have priority over secured creditors.

5.3 Pension Claims

The BIA provides a priority for amounts deducted and not remitted and for unpaid regularly scheduled contributions (i.e., not special contributions or the underfunded liability itself) to a pension plan by creating a priority charge, equal to the amount owing, over all of the debtor company's assets. As with the case with unpaid wages, the obligation to fund unpaid regularly scheduled pension contributions has a priority against proceeds in a CCAA sale, and any plan must provide for the payment of these priority claims.

If a pension plan has been wound up and is not continuing and the wind up triggers a wind-up deficit, the obligation to fund the deficit may have priority over certain types of secured creditor claims, pursuant to provincial legislation. Any such priority is reversed in a bankruptcy (equivalent to Chapter 7).

5.4 Payroll Taxes

Before distributions are made to creditors in a CCAA proceeding, certain other statutorily mandated priority claims, such as employee source deductions or "payroll taxes" (i.e., income tax withholdings, unemployment insurance premiums and Canada Pension Plan premiums) must also be paid.

6.0 Cross-Border Recognition

6.1 UNCITRAL Model Law

Like Chapter 11, the CCAA provides for the coordination of cross-border insolvencies. The relevant CCAA provisions are based on the UNCITRAL Model Law on Cross-Border Insolvency, similar to Chapter 15 of the U.S. Code.

6.2 Commencing Recognition Proceeding

A foreign representative may apply to a Canadian court for recognition of a foreign proceeding in respect of which he or she is a foreign representative. Prior to such appointment, a proposed foreign representative may seek an interim order that provides for a stay of proceedings to protect the assets of the debtor company for the period of time between the commencement of a foreign proceeding and the date on which a foreign representative is appointed by the foreign court, after which it may seek full recognition of the foreign proceedings.

6.3 Foreign Representative

A foreign representative is a person or body, including one appointed on an interim basis, who is authorized in a foreign proceeding in 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.

As a result of the second criteria, a debtor company itself can be a foreign representative, provided it has been duly authorized to act as such. Among other things, a foreign representative is required to inform the Canadian court of any substantial change in the status of the recognized foreign proceeding and any substantial change in the foreign representative's authority to act.

6.4 Foreign Proceeding

A foreign proceeding is a judicial or an administrative proceeding held in a jurisdiction outside Canada that deals 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 or liquidation. Chapter 11 proceedings qualify as foreign proceedings.

6.5 Scope of Discretion in Recognizing Foreign Proceeding

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding. There is no discretion in this regard. However, the court does have discretion as to what relief is granted in connection with the recognized proceedings. In addition, the order granting recognition will specify whether the proceeding is a "foreign main proceeding" or a "foreign non-main proceeding."

6.6 Foreign Main Proceedings

A foreign proceeding will be a "main" proceeding if it is taking place in the jurisdiction that is the debtor's centre of main interest (COMI). There is a rebuttable presumption that the debtor company's registered office is its COMI. In recognizing a foreign main proceeding the court shall make an order (a) granting a stay of proceedings until otherwise ordered by the court and (b) restraining the debtor company from selling assets in Canada outside the ordinary course of business. The recognition order, however, shall be subject to any terms the court sees fit. Such recognition orders must also be consistent with any order that may be made under the CCAA.

6.7 Foreign Non-Main Proceeding

A foreign "non-main" proceeding is defined in the negative: a foreign non-main proceeding is a foreign proceeding that is not a foreign main proceeding. Unlike chapter 15, there is no requirement that a debtor company have an "establishment" in the foreign jurisdiction for the proceeding to qualify as a "non-main" proceeding. If the court recognizes the foreign proceeding as a non-main proceeding, the stay is not automatic. However, the court may, at its discretion, order a stay if it is necessary for the protection of the debtor's property or the interests of creditors.

6.8 Obligations of Canadian Court

If an order recognizing a foreign proceeding is made, the court is required to cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation include, among other things, the appointment of a person to act at the direction of the court — typically referred to as an "information officer" having similar reporting obligations as a monitor in a CCAA case — and the coordination of concurrent proceedings regarding the same debtor company.

6.9 Applying Foreign Rules

Nothing in the CCAA prevents the court, on application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assisting foreign representatives that are not inconsistent with the provisions of the CCAA.

Also, nothing in the CCAA prevents the Canadian court from refusing to do something that would be contrary to public policy. Under Chapter 15 of the U.S. Code, the analogous provision refers to anything that is "manifestly" contrary to public policy. This suggests that the U.S. courts are directed to be even more accommodating than their Canadian counterparts when called upon to determine what is contrary to public policy.

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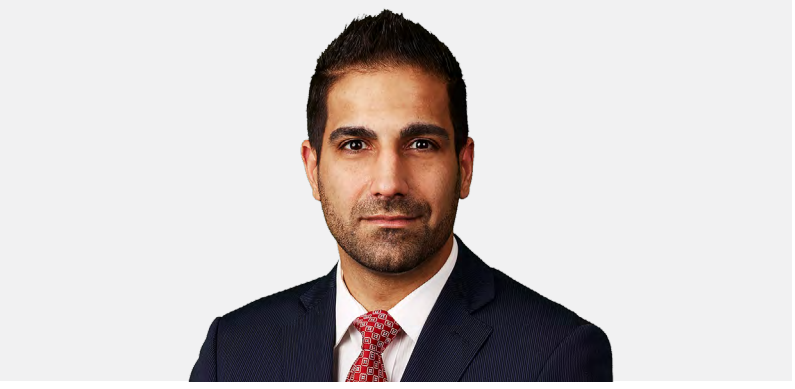

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