



Fall | 22



# INTERNATIONAL LAWYERS NETWORK



**FOGLER RUBINOFF LLP**

Bankruptcy, Insolvency & Rehabilitation Proceedings in Canada

**ILN RESTRUCTURING & INSOLVENCY GROUP**



This guide offers an overview of legal aspects of bankruptcy, insolvency and rehabilitation in the requisite jurisdictions. It is meant as an introduction to these market places and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations, and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.



## KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER CANADIAN LAW

### 1. Canada's Political and Legal System

Canada has a Federal constitution that was significantly overhauled in the early 1980's, which has had modifications since, including the creation and implementation of the 1982 Canadian Charter of Rights and Freedoms. Canada places a high value on 'rule of law' concepts in Anglo-American legal traditions. It has both a Federal and Provincial political and legal systems, subject to common in various jurisdictions, and civil law in Quebec. The Canadian Parliament is responsible for Federal laws, and various provincial Legislatures enact local legislation in their jurisdictions. The Province of Quebec implements its Civil Code, largely derived from the French Napoleonic Code origins and amended over time, in its legislature, called *Assemblée nationale du Québec*. There are courts with both Federal and Provincial jurisdiction who make rulings within their jurisdiction, resulting in a general body of common law (with civil law in Quebec), in either official language: English or French, or sometimes in both. The legal principle of 'paramountcy' is applied, whereby Federal statutes are intended to prevail over Provincial statutes when their terms and applications conflict.

### 2. Canadian Insolvency Regime

Insolvency and bankruptcy laws are generally in the federal domain. Provincial and regional laws are used to implement and interpret issues falling within this domain. There is no single law or statute governing corporate, commercial, or institutional restructuring, bankruptcy or insolvency. Insolvency professionals with standing in insolvency proceedings in Canadian courts are usually either licensed lawyers or accounting professionals, with appropriate accreditation.

There are multiple applicable Canadian insolvency and restructuring statutes, listed below. The first two (BIA and CCAA are collectively called the "**Acts**") comprise the main statutory framework for individual and corporate insolvencies, restructuring, and bankruptcies in Canada. Stays of proceedings are implemented to allow re-organisations, restructuring, or liquidations to occur in the best interests of stakeholders in an orderly fashion. The Acts are regulated by the federally regulated Office of the Superintendent of Bankruptcy, to whom provincial Official Receivers submit their report.

#### **Applicable statutes in Canada:**

i. The *Bankruptcy and Insolvency Act* (Canada) ("**BIA**"); This is the main federal statute for personal or 'consumer' bankruptcies. It also has a broader section for both higher net-worth personal bankruptcies and larger corporate and commercial bankruptcy or restructuring opportunities. BIA contains rules for both liquidations or debtor-centric restructuring and reorganisation (generally called 'proposals'), with both creditor remedies (including receiverships), and 'debtor in possession' ("**DIP**") remedies. A statutory priority waterfall for claims against the estate of an insolvent person or entity exists for secured and preferred creditors, thereby implementing rules for dealing with those priority claims in multiple scenarios. DIP proceedings generally occur in situations in which the debts of the debtor are below CAD5,000,000. It is analogous to Chapter 7 of the U.S.A. *Bankruptcy Code* (the "**Code**"), but has many differences beyond the scope covered here.

ii. *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**"); This is the principal federal restructuring and recovery insolvency statute for DIP debtors. It is tremendously flexible in



scope and application. CCAA evolved from a largely unused and very brief statute conceived the 1930's, but has been extensively used and changed since that time. It is currently used mainly for the restructuring of large commercial enterprises with aggregate debt owing in excess of CAD5,000,000. While analogous to Chapter 11 of the Code, CCAA differs in many material respects, not the least of which are the generally increased speed and lower costs in most scenarios. CCAA remains as a very brief as a statute, and all aspects in play have not been codified. It allows wide powers of judicial discretion used for quickly changing fact scenarios. Cases coming within its wide scope have received a considerable display of jurisprudential flexibility and expediency in many cases, due to the lack of codified rules and procedures.

iii. Personal Property Security Act/Civil Code in each Province (collectively, "**PPSA**"); Each province outside Quebec have enacted statutes relating to property rights in assets and security, to partially replace a pre-existing patchwork of common law that preceded them. They also allow for the appointment of receivers both in and out of court. PPSA contain attachment, perfection, and priority rules in collateral that were initially modelled on the *Uniform Commercial Code* used in US States (collectively, "**UCC**"), but do nevertheless have significant differences. For instance, the PPSAs are mainly notice registry systems, not title based. There are also differences in UCC Article 9 procedures and accommodation for security interests in cash collateral, and other

iv. Rules of Court/Rules of Practice ("**Rules**"); These apply in all provinces other than Quebec, and have direct and indirect influences on judgements and rulings regarding enforcement and interpretations of under applicable statutes. For instance, where it is

found to be 'just or convenient', courts may appoint receivers for interests including secured creditors.

v. The *Winding Up and Restructuring Act* ("**WURA**"); This has been used infrequently, and is for the restructuring and reorganisation or liquidation of certain entities, mainly banks and insurance or trust companies. Most recently it was used for a Canadian owned German regulated Bank called *Maple Bank*. Under most recent financial upheaval in financial markets in Canada and abroad, it will likely assume a more prominent role than has unfolded in its recent past.

vi. Corporate Statutes; These include multiple statutes in both the federal and provincial domains, such as the *Canada Business Corporations Act* ("**CBCA**") and the various provincial counterparts. These are significant because they allow courts to authorise fundamental changes in corporate structure in distressed scenarios. They contribute to balance sheet refreshments through such arrangements where debt can be converted to equity including through implementation of distress preferred share arrangements as may be approved in Canadian insolvency proceedings.

### **3. The Acts: Basics**

#### **BIA**

Applications for bankruptcy orders filed by the debtor, or by creditors. When filed by creditors, there can be proceedings contesting the filing, to be heard by the bankruptcy courts. Otherwise, liquidations ensue once the trustee in bankruptcy is appointed under a bankruptcy order, and that person is usually an accredited accounting professional. That trustee in bankruptcy acts in the estate, effectively on behalf of secured and preferred creditors. Secured creditors holding perfected security interests take outside of the bankruptcy estate



to the extent of the value of their collateral held, and will file claims in the estate for unpaid residual amounts of debt not recovered from realization of their specific collateral held.

To avoid bankruptcy, proposals may be filed by debtors under notices of intention ("**NOI**"). These are not initially bankruptcy filings. An accountant is engaged as "Proposal Trustee" to oversee and review the affairs of the debtor, and to report to the court in all proceedings. On filing the NOI, the time starts ticking. Initially, a 30 day stay is granted, and can be extended up to a maximum of six months by the court, to enable the debtor to file a Plan. Time is granted to compose a Plan, which is distributed to creditors for a vote. There is a 'double majority' vote that occurs with approved creditors, in which a majority of both numbers and total of outstanding debt thresholds must be met to pass the vote. If the vote of creditors approves the Plan, court approval is thereafter required. If timelines are not met, or a Plan is neither presented nor approved by creditor vote and court approval, then there is an automatic deemed bankruptcy. At that point, the proposal trustee becomes the trustee in bankruptcy, and liquidation ensues.

All assets bankruptcy estates are subject to a 5% levy, payable to the Superintendent in Bankruptcy.

### **CCAA**

Qualified applicants are usually applicants being corporate entities who are insolvent, or who have committed an act of bankruptcy under the BIA. Total claims against that debtor must exceed CAD5,000,000 before that debtor may commence a CCAA filing. Proceedings are initiated by court applications. Filings for 'first day orders' are done by application of the debtor to the applicable court. There may be an initial order implementing a statutory stay of proceedings, but it is granted for a very short

period of time on restricted terms and conditions (colloquially called the 'skinny order'), in effect for no more than ten days. The applicants must return to court within that time period with another application for the full form of court orders giving broader protections to the Applicant.

Monitors are deemed to be officers of the Court, and as such are the eyes and ears of the Court in the proceedings. The debtors auditors are excluded from being appointed as Monitor. They are ideally positioned to act in the 'best interests of the general body of creditors'. Their views and recommendations are submitted to the courts in formal reports, which are generally given a high degree of factual and professional deference. Once appointed to oversee the CCAA estate in the first day orders, Monitors coordinate multiple roles. Those include the review of financial information, filing of statutory reports, review of debtor forecasts and plans, implementation of a sale process, and assisting in the drafting of a Plan of Reorganisation. Plans, once approved by creditors in a double majority vote, must also be sanctioned by a Canadian court.

Plans of Reorganisation can include sale processes, such as 'stalking horse' bidding procedures for all or part of the business, assets and operations of the debtor, or a broader group of companies and partnership entities connected to the debtor. They may also include full or partial liquidations of their assets, termination of contracts, key employee retention plans, settlement of debts and charges amounting to a balance sheet restructuring. Monitors interact with officers, directors, and management of the debtor and their counsel. They are also responsible to conducting all statutory proceedings, including any votes of creditors or other stakeholders, outside of the court proceedings.



Assets disposed of in CCAA proceedings are not subject to any bankruptcy levies.

### **Stays of Proceedings**

Under the BIA, statutory stays of proceedings are initiated on issuance and filing an order for bankruptcy, or and NOI. Under CCAA, statutory stays are initiated by the courts in first day orders, and continue under the directions of the court. Stays of proceedings can be implemented for groups of companies domestically, within the ambit of the Canadian courts. For cross border groups, the continuing cooperation of foreign courts is required, with varying results from case to case.

### **Cross Border Proceedings**

Coordination of cross-border proceedings with foreign courts is encouraged and implemented on a regular basis. Canada adopted the UNCITRAL model law on cross border insolvency in 1997, with changes specific to Canada at and after that time. This is done under Part IV of the CCAA and Part XIII of the BIA, for both recognition of foreign proceedings in Canada, and for recognition of the orders of Canadian courts in foreign proceedings. Canadian courts can exercise jurisdiction over non-Canadian entities and assets if the 'centre of main interest', known as COMI is in Canada. These are always questions of fact, and can be hotly contested at the outset of proceedings. Cross border cooperation of foreign courts with Canadian courts has occurred in multiple cases, including under Chapter 15 proceedings under the Code.

### **Officers and Directors**

Generally, directors and officers of corporations have statutory duties to act honestly and in good faith with a view to the best interests of the corporation (including under the CBCA). Directors of an entity entering proceedings under the Acts must continue to generally act in

the general best interests of that debtor. They must exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. Officers have similar duties including remittance obligations to government authorities. While there are duties to 'stakeholders', such as government entities, creditors and employees, there is no specific duty on directors or officers to look after the interests of shareholders. Unlike other jurisdictions, such as Australia, Germany, and France, there are no 'trading while insolvent' liabilities or exposures while the debtor is undergoing a restructuring while also operating its business. Remedies sought for breach of such duties, in the absence of fraud, are generally fact based proceedings, within these general principles.

### **4. The Acts: Changing Rules and Best Practices**

On November 1, 2019, the Acts were amended to achieve better accountability and transparency in Canadian insolvency proceedings.

### **Disclosure of Economic Interests**

The CCAA was amended to allow interested persons to apply for a court order requiring a person to disclose any "economic interest" in the debtor company. An "economic interest" includes a claim, eligible financial contract, an option, a mortgage, charge, lien, other security interest, the consideration paid for any right or interest, or any other prescribed right or interest. The court must consider whether the information sought would enhance the prospects of a compromise or arrangement for the debtor company and whether any interested person would be materially prejudiced by the disclosure.

The purpose of this may be aimed at leveling the playing field in the administration of estates. Possible scenarios where disclosure might be



particularly important are (i) where claims are traded at discount values to purchase blocking votes or (ii) where related parties or parties with undisclosed collateral interests bid on assets of the insolvent estate.

### **Pension Funding and Obligations**

To protect the interests of retirees and pensioners, the Acts were amended to require that funds earmarked for registered disability savings plans be added to funds in RRIF plans and RRSP so that they are exempt from seizure under the BIA. The CBCA was simultaneously amended to require that directors take into account the financial interests of retirees and pensioners in board deliberations of CBCA companies on the eve of insolvency. Provincial business corporations statutes are expected to be similarly amended.

### **Director and Officer Compensation Clawbacks**

The amendments expose directors to more scrutiny on the eve of insolvency. The courts may "look back" into payments (including termination pay, severance pay, incentive and other benefits) made to directors, officers, and other managing personnel in the year preceding the initial bankruptcy event. If the payments were made when the corporation was insolvent or rendered the corporation insolvent, exceeded the fair market value of the consideration received by the corporation, or were outside the ordinary course of business, the court may issue judgments against the directors personally, as may be appropriate.

### **Third Party Releases**

Court ordered releases within CCAA Plans of Arrangement are now a mainstay of sanction orders. In many cases, it is management and board members who benefit. Directors and officers will usually insist on these in return for avoiding mass resignations during the reorganisation of the insolvent entity.

### **Procedural Changes**

Stays of proceedings will be granted if "reasonably necessary" for the continued operations of the debtor companies. The initial stay period is reduced from 30 days to 10 days. As well initial relief in first day orders will only be granted if "reasonably necessary". These amendments will help ensure that orders granted at the commencement of insolvency do not over-reach, and are fair to other creditor interests. Certain relief like new funding (DIP financing orders) and pre-baked solicitation proceedings for the sale of assets, which may prejudice stakeholders who had no notice of insolvency proceedings, may now be challenged earlier.

### **Use of French in Quebec based Proceedings**

Recently, Bill 96 was passed in the Province of Quebec that appears to seek a radical shift to the use of the French language in all business documents created in that jurisdiction. The regulations and enforcement of these requirements to affirm French as the only official language is yet to be determined in insolvency court proceedings, which are currently conducted mainly in English. This is something to be aware of in drafting security documents, and picking the 'applicable law' jurisdiction in commercial and lending agreements. As this develops, it could create significant practical issues in proceedings domiciled in the Province of Quebec.

### **Intellectual Property Rights**

Intellectual property ("IP") licensees in Canada can now maintain their use of IP during and following the commencement of insolvency proceedings. This will include protection of such rights when IP is sold in an insolvency proceeding. The IP affected is not specifically defined in the Acts, so other Canadian caselaw and statutes will fill that need.



### **Statutory Duty of Good Faith**

In *Bhasin v Hrynew*, the Supreme Court recognized a general duty of honest performance in contractual dealings which has been broadly applied. Canadian courts must now consider good faith and disclosure of economic interests to enhance their jurisdiction in restructuring matters. Parliamentary debates preceding the amendments suggest that they were intended to protect the public from the effects of high-profile corporate bankruptcies like *Nortel* and *Sears* where many Canadian employees lost their pensions. A statutory duty to act in good faith will now apply to all participants in Canadian insolvency proceedings. Although debtors previously had a duty to act in good faith, the statutory duty now applies to all parties. This amendment is consistent with developments in the common law. In *Century Services Inc v Canada (Attorney General)* the Supreme Court of Canada stated that "the requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority". A statutory duty of good faith is also consistent with British and American insolvency statutes and will therefore be useful in cross-border proceedings.

### **No Equitable Subordination in Canada so Far**

The doctrine of equitable subordination is an American legal doctrine that allows a court to subordinate a creditor's claim and ranking in an insolvency proceeding where that creditor has acted badly, in the determination of the court. Canadian courts have resisted its application in over an extended period of time in 20 different insolvency proceedings. However, it remains as an attractive equitable doctrine to be applied as a potential course of redress. Recent statutory implementation of the duty of good faith in Canada appears to have provided another

reason to not apply this doctrine in Canadian proceedings to address the bad behavior of certain creditors. However, this doctrine has not yet been definitively shut off by the highest Canadian courts, to date.