distinctions with a difference: comparison of restructurings under the CCAA with chapter 11 law and practice

introduction

In Canada legislative authority is divided between the federal and provincial governments by subject matter. "Bankruptcy and insolvency" is a matter of federal jurisdiction, while "property and civil rights" is generally within the jurisdiction of the provinces.

Federal statutes for the most part deal with the allocation of a debtor's property and assets in circumstances of insolvency. Federal laws also create statutory super priorities, deemed trusts and liens relating to employee remittances for income taxes, employment insurance and the Canada Pension Plan that may impact on the debtor's property and secured creditor rights in relation to both federal and provincial businesses.

Contracts that create security interests and property rights are mainly governed by provincial jurisdiction. Provincial laws also create statutory liens and deemed trusts that may impact on the allocation of property in an insolvency administration[1]. Laws governing labour and employment and registered pension plans are largely under provincial jurisdiction, with the exception of certain industries over which the federal government has jurisdiction.

As such, a combination of federal and provincial laws is applicable in a Canadian insolvency process. The two principal federal insolvency statutes are the *Bankruptcy and Insolvency Act* (the

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[1] Certain artificial statutory trusts and statutory liens created by provincial legislation are rendered ineffective in a formal Bankruptcy under the Bankruptcy and Insolvency Act (the Canadian equivalent of chapter 7 of the Bankruptcy Code), if the legislated statutory priorities conflict with the scheme of priorities allowed under the BIA. A proceeding under the CCAA, however, is not a Bankruptcy.

“BIA”) and the *Companies’ Creditors Arrangement Act* (the “CCAA”). In some cases, the *Winding-Up and Restructuring Act* may apply. In a creditor enforcement proceeding, the property of a debtor may also be dealt with by a receiver[2].

The most typical types of proceedings or processes to deal with an insolvent debtor are (i) a reorganization under the CCAA pursuant to which a restructuring plan (a “Plan”) may be filed; (ii) a reorganization under the BIA pursuant to which a plan of compromise or arrangement (a “Proposal”) may be filed; (iii) a liquidation process (“Bankruptcy”) under the BIA; and (iv) private or court-supervised receivership under provincial law or pursuant to the BIA.

Most reorganizations in Canada are conducted under the BIA or CCAA. The BIA is typically used for less complicated restructurings in respect of which a Proposal can be filed within six months of the proceeding being commenced (after which time the court is unable to grant any further extensions of the stay of proceedings). The CCAA is used for more complex restructurings and those requiring more time to be completed. The majority of cross-border restructurings are administered under the CCAA. What follows therefore is primarily focused on restructuring proceedings administered under the CCAA, with some comparisons between law and practice under the CCAA to proceedings under title 11 of chapter 11 (“Chapter 11”) of the United States Code, 11 USC §§ 101 et seq (the “Bankruptcy Code”).

CCAA reorganizations

general

The CCAA is the statute of preference for more complicated restructurings, particularly when the court may be called upon to make orders and deal with circumstances that are novel and complex. While the CCAA has been called the Canadian equivalent of Chapter 11 of the Bankruptcy Code and recent amendments to the CCAA (the “Insolvency Reforms”) now make it more similar to Chapter 11, there still remain material differences in legislative approach and practice.

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[2] A receiver with local (provincial) authority may be privately appointed or appointed by order of a court under provincial law. The BIA also provides for the appointment of an interim receiver or receiver, in certain circumstances, who will have jurisdiction across Canada.

A growing body of jurisprudence has refined and defined the application of the CCAA's very general provisions and created a fair amount of certainty regarding how it will be applied. The breadth and scope of orders made under the CCAA, reflects the broad discretion exercised by Canadian courts under the CCAA to make orders suited to dealing with the complexities inherent in a restructuring scenario.

The CCAA is a debtor-in-possession ("DIP") regime. A filing under the CCAA does not create a new estate. As the debtor is the same entity before as it is after the filing, existing contracts, security and liens are not impaired merely by the occurrence of a filing. A filing under the CCAA does not result in an "automatic" stay of proceedings. Rather, a stay of proceedings and other filing protections are established by court orders. While not required, it is typical for the same judge to supervise a CCAA case from its inception to conclusion.

A Monitor is an officer of the court (the "Monitor") that is appointed in every CCAA case. Among other responsibilities, the Monitor has responsibility for monitoring and reporting to the court on the cash-flow forecasts, business and financial affairs of the debtor. The Monitor must be a trustee who is appointed or licensed under the BIA.

statutory requirements for filing under the CCAA

The CCAA applies only to insolvent companies including income trusts (and not to individuals, partnerships or non-corporate entities)[3]. To qualify, the debtor alone or together with affiliated debtor companies, must be subject to total claims exceeding $5 million. CCAA proceedings are begun with an application to the court for an "initial order", supported by an affidavit.

The initial order (as originally made, or as expanded during the case, the "Initial Order") typically contains a broad stay of proceedings and other protective relief in relation to the debtor and its property. The Initial Order provides for the appointment by the court of the Monitor, often approves interim financing arrangements and related security and may approve continuing use of a centralized cash management system. The Initial Order

[3] While partnerships are not a "debtor company" as defined under the CCAA, the corporate general partners of a partnership will often be a CCAA applicant and orders made in a CCAA case will routinely apply to a partnership, including stay relief.

will permit a debtor to make ordinary course payments, pay employee wages, including pre-filing wages, pay professional advisors and statutory creditors, may permit some payment of pre-filing obligations to critical vendors (this is not a uniform practice) and, subject to compliance with the CCAA, which may require further orders of the court to be sought, may give the debtor the right to downsize, terminate employment, vacate leased premises (in accordance with the order), disclaim certain kinds of agreements, and pursue restructuring and refinancing initiatives. The Initial Order usually creates a charge over the debtor's property and assets to secure obligations of the debtor to pay its professional advisors and the Monitor and its advisors (an "Administration Charge") and to secure indemnities given to directors and officers (a "Directors' Charge").

In a large number of restructuring cases the Initial Order is not accompanied by the filing of a Plan, nor does it provide for the calling of meetings of creditors to consider the Plan, although there is nothing that would preclude such provisions being included, for example to expedite a "pre-packaged" or pre-arranged Plan negotiated prior to the filing. While the initial stay of proceeding cannot exceed 30 days, it can be extended, indefinitely, by further court orders. The initial application under the CCAA often is made with notice only to existing secured creditors and major stakeholders.

stay of proceedings

The stay of proceedings provided for in the Initial Order is typically extremely broad. It will often stay existing secured creditors and has even been used to stay the rights and activities of third parties who are not creditors. A stay is also usually granted in favour of directors and officers of the debtor, in their capacities as such. A stay cannot be granted against a non-debtor who is obligated under a letter of credit or guarantee in relation to the debtor.

The duration of extensions to the original stay period will be in the discretion of the court, but typically will run for several months or be tied to milestones relevant to the case. The CCAA provides that the stay does not oblige any person to make a further advance of money or credit to the debtor, and does not prohibit a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the stay of proceeding is ordered.

control and monitoring

The Monitor has certain statutory monitoring and reporting activities in relation to the business and financial affairs of the debtor and relating to certain activities proposed by the debtor, such as interim financing, termination and assignment of contracts and out of the ordinary course of business asset sales. The Monitor is required to publish notice of the CCAA proceeding in one or more newspapers in Canada and make the Initial Order and a list of creditors, with the estimated amount of their claims, publicly available, to review and report on the reasonableness of the debtor’s cash-flow statement and other amounts prescribed by the CCAA or as ordered by the Court, and to attend court proceedings and meetings of creditors. Court orders will often direct the Monitor to provide information to secured lenders, supervise a sales process, assist the debtor with the development of a plan and related negotiations with stakeholders, supervise and assist with a claims filing and resolution process and oversee the calling and administering of meeting(s) of creditors to vote on a Plan. While there currently is no electronic database maintained by the Court, the Monitor maintains a public website where case information, proceedings and reports are posted.

creditors committees

The CCAA does not expressly permitting the formation of committees of creditors or equity holders. There is some precedent in larger or more complex cases for the formation of committees (formal and informal or ad hoc), but it is not always the case that such committees will receive funding from the debtor for their professional advisors. One of the changes introduced under the Insolvency Reforms is to provide a statutory charge to secure the fees and expenses of the legal and financial advisors of an “interested person”, if the court is satisfied that such security is necessary for their effective participation in the proceeding.

Representative counsel have been appointed by courts in several cases to represent the interests or viewpoints of groups of creditors, particularly groups of employees or former employees, retirees and pensioners, in circumstances where the formal representation of such groups was considered important to the restructuring.

Ad hoc or informal committees of bondholders regularly participate (and are given standing to be heard) in CCAA proceeding, including at court hearings.

Canadian courts will usually provide standing to Canadian counsel for an official committee of unsecured creditors that has been appointed in a related Chapter 11 case. This can be a useful mechanism for the Committee to ensure that it receives up-to-date information regarding the Canadian proceeding and that its viewpoint (or that of the U.S. debtor) is reflected in the Canadian process.

use of cash collateral and interim ("DIP") financing orders in CCAA proceedings

The CCAA does not restrict the use by the debtor of cash collateral or working capital assets held as security. As a practical matter, DIP financing arrangements often will impose those types of constraints by requiring the debtor to comply with certain covenants and cash flow projections/budgets. The security of existing creditors will continue to be effective, even following a CCAA filing, in relation to post-filing property and assets.

The Initial Order imposes a broad stay of proceedings, in most cases precluding existing secured creditors from enforcing their security. Nothing prevents an existing secured creditor from applying to the court for relief from the stay, to restrict the length of the stay or to restrict the debtor's activities on the basis that the failure to grant relief will result in its secured position being permanently impaired. In practice, however, courts are reluctant to lift a stay to permit a secured creditor to enforce its security, without first giving a debtor who is perceived to be proceeding in good faith and with due diligence some opportunity to restructure. This is particularly so in circumstances where the secured creditor's security does not appear to be diminishing.

The CCAA Court may grant a party who agrees to provide interim financing post-filing ("DIP Financing") a charge over some or all of the property and assets of the debtor by the CCAA court that ranks ahead or "primes" the security of an existing secured creditor. The motion for an order seeking approval for such a priming charge (a "DIP Charge") is to be made on notice to the secured creditors who are likely to be affected by the DIP Charge. In deciding whether to order a DIP Charge, the court is to consider, among other things (i) the period during which the debtor is expected to be subject to the restructuring proceedings,

(ii) how the debtor's business and financial affairs are to be managed during the restructuring proceedings, (iii) whether the debtor's management have the confidence of the debtor's major creditors, (iv) whether the DIP financing would enhance the prospects of a viable Plan being made; (v) the nature and value of the debtor's property, (vi) whether any creditor would be materially prejudiced as a result of the DIP Charge, and (vii) any report of the Monitor relating to the reasonableness of the debtor's cash flow statement. There is no express requirement for adequate protection of an existing secured creditor in circumstances where a DIP Charge is being sought.

A recent decision of the Ontario Court of Appeal held that a court-approved DIP Charge did not have priority over deemed trust obligations arising pursuant to the Ontario Pension Benefits Act ("PBA"), despite the order of the lower court granting priority over trusts, "statutory or otherwise". 4 The Court of Appeal also ruled that the priority of the statutory trusts under the PBA extended not only to unpaid contributions accrued and due at the date of wind-up of a defined benefit plan, but also to the entire deficiency amount owed on wind-up of such plan. This case signals the need to ensure there is sufficient disclosure to the CCAA Court of the existence of the pension plan obligations at the time a DIP Charge is beings sought, for notice to be given to pension plan members affected of the proposed DIP Charge and for the DIP lender to require, as a term of its commitment to lend, that the CCAA Court specifically invoke the doctrine of paramountcy when ordering that a DIP Charge created pursuant to the CCAA has priority over a deemed trust.

Any security or charge granted in relation to interim financing may not secure an obligation that exists before the order creating the charge is made. Canadian courts have also begun to more carefully scrutinize interim financing orders that propose to grant security over the assets of a Canadian debtor relating to guarantees by a Canadian debtor of the obligations of a non-Canadian debtor.

contract disclaimer (rejection)

The CCAA now permits a debtor company to disclaim (reject) certain agreements, with the resulting damage claims being dealt with under the Plan. The CCAA stipulates the process to be

[4] *Indalex Limited*, (Re), 2011 ONCA 265. Leave to appeal to the S.C.C. is being sought.

followed by the debtor and the test to be applied should the other party to the contract (the "counterparty") apply for an order that the agreement not be disclaimed. Agreements that can be disclaimed are not limited to executory contracts (the CCAA contains no such restriction). The disclaimer provisions do not apply to eligible financial contracts, collective bargaining agreements, financing agreements where the debtor is the borrower or a lease of real property where the debtor is the lessor. The debtor may not give notice unless the Monitor approves of the proposed disclaimer. Upon receipt of a disclaimer notice, the affected party may apply to the court for an order prohibiting the debtor from disclaiming the agreement. In deciding whether to make such an order, the court is to consider (i) whether the Monitor approved the disclaimer, (ii) whether the disclaimer would enhance the prospects of a viable Plan being made, and (iii) whether the disclaimer would likely cause significant financial hardship to a party to the agreement.

impact of a disclaimer on the other party's continued use of intellectual property

The Insolvency Reforms include protections for persons granted a right to use intellectual property pursuant to an agreement. A disclaimer does not affect such party's right to use the intellectual property, including the right to enforce the exclusive use of the intellectual property during the term of the agreement, including any period for which the party extends the agreement as of right, provided that such party continues to perform its obligations under the agreement in relation to the use of the intellectual property. Intellectual property is not defined and this section is not limited to executory contracts.

assignment of contracts

The Insolvency Reforms introduced a statutory mechanism to permit the court to order the assignment of the debtor's rights and obligations under a contract (with some exceptions). On application by a debtor made on notice to every party to the agreement and the Monitor, the court may make an order assigning the rights and obligations of the debtor under the agreement to any person who is specified by the court and agrees to the assignment. The court is to consider the following factors in deciding whether to make the order: (i) whether the Monitor approves of the proposed assignment, (ii) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations, and (ii) whether it would be appropriate to assign the rights and obligations to that person. The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement – other than those arising by reason of the company's insolvency, the commencement of the CCAA proceeding or the debtor's failure to perform a non-monetary obligation – will be remedied on or before a date to be fixed by the Court. It is not clear, at this time, whether practices akin to those used in a Ch. 11 case relating to the assignment of contracts and payment of cure costs will be followed as a model5.

Certain agreements, such as eligible financial contracts, collective agreements, or agreements entered into after the CCAA proceedings have been commenced cannot be assigned.

ipso facto clauses and other restrictions on third party rights

The CCAA now expressly prohibits a person from enforcing clauses in agreements which purport to terminate or amend any agreement ("ipso facto clauses"), including a security agreement, or from claiming an accelerated payment or a forfeiture of the term under an agreement, including a security agreement, by reason only that the debtor has commenced restructuring proceedings under the CCAA or is insolvent (the "Third Party Restrictions"). Parties cannot contract out of the Third Party Restrictions. The Third Party Restrictions do not apply in the context of receiverships.

The Insolvency Reforms now explicitly restrict the termination or amendment of a lease by a lessor by reason only that the Debtor has not paid rent in respect of any period before the commencement of the CCAA proceedings, the initiation of the CCAA proceeding or the insolvency of the debtor.

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[5] In the CCAA case involving White Birch Paper Company and affiliated debtors, the Court made an order approving of the assignment of all contracts that were to be conveyed to the purchaser of the business pursuant to a court-approved asset purchase agreement. The motion for court approval of the asset purchase agreement and proposed contract assignments was brought on less than 48 hours notice to contract counterparties. In the end, the order made by the Court (the "Sale Approval Order"), provided that in the case of contracts in respect of which monetary defaults were owing, the assignments would not be effective until the "Cure Cost" payable in relation to such contract was paid. The Sale Approval Order also provided that the amount of the Cure Cost payable would be as agreed between the purchaser and the counterparty to the contract, failing which such amount could be determined by the Court, upon motion made by either such party.

The Third Party Restrictions do not apply to eligible financial contracts or prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer if otherwise authorized. Public utilities are also statutorily prevented from discontinuing service to a debtor in a restructuring under the CCAA because the debtor has not paid for services rendered, or goods provided, prior to commencement of the CCAA proceeding, because proceedings were commenced under the CCAA or that the Debtor is insolvent.

Parties to an agreement, or a public utility, may seek an order that these provisions of the CCAA do not apply to them, if they can satisfy the Court that their operation would likely cause them "significant financial hardship". The Third Party Restrictions are not to be construed as prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of the CCAA proceeding or to require the further advance of money or credit.

eligible financial contracts

Eligible financial contracts ("EFCs") are currently prescribed by regulation to include a variety of derivative and other financial agreements. Derivative agreements are defined as including financial agreements whose obligations are derived from, referenced to, or based on, one or more underlying reference items, such as interest rates, indices, currencies, commodities, securities or other ownership interests, credit or guarantee obligations, debt securities, climatic variables, bandwidth, freight rates, emission rights, real property indices and inflation or other macroeconomic data.[6]

Under the CCAA, no order may be made staying or restraining the exercise of any right to terminate, amend or claim any accelerated payment under an EFC or staying the enforcement by

[6] Derivative agreements include (a) a contract for differences or a swap, including a total return swap, price return swap, default swap or basis swap, (b) a futures agreement, (c) a cap, collar, floor or spread, (d) an option; and (e) a spot or forward. EFCs also include: (a) an agreement to (i) borrow or lend securities or commodities, (ii) clear or settle securities, futures, options or derivative transactions, and (iii) act as a depository for securities; (b) a repurchase, reverse purchase or buy-sellback agreement with respect to securities or commodities; (c) a margin loan in so far as it is in respect of a securities account or futures account maintained by a financial intermediary; (d) any combinations of the above agreements; (e) a master agreement in respect of a derivative or other prior referenced financial agreement and a master agreement in respect of any such master agreement; (f) a guarantee or indemnity or reimbursement obligation with respect to liabilities under any of the prior agreements; and (g) an agreement relating to financial collateral including any form of security or security interest in collateral and a title transfer credit support agreement with respect to any of the prior referenced agreements.

a counterparty of security over financial collateral held as security in relation to an EFC. A transfer, charge or payment made in connection with financial collateral will not be presumed to be a fraudulent preference under the BIA. This is significant for restructurings under the CCAA by virtue of new provisions that could permit the challenge of fraudulent preferences on a CCAA proceeding.

Where an EFC is terminated after the CCAA filing, the setting off of obligations between the debtor and the solvent counterparty to the EFC is permitted. If the result of the net position is that an amount is owed by the debtor, such creditor shall be deemed to have a claim against the debtor in the proceeding. No order may be made under the CCAA that would have the effect of subordinating financial collateral held in respect of an EFC.

creditor remedies

A CCAA filing effectively stays most creditor-initiated remedies during the restructuring process, unless the initial order, or a subsequent order, lifts the stay in relation to such creditor.[7]

The primary remedies of an objecting creditor are to seek to terminate the stay of proceedings, in its entirety, on the grounds that the restructuring has no hope of success or that the debtor has acted improperly, or to request that the stay be lifted or modified in relation to the creditor on the grounds of extreme hardship.

Obtaining relief from the stay at the early stages of a CCAA proceeding, assuming that the debtor is acting in good faith and has a prospect of restructuring, it is very much an uphill battle. In some instances, orders may be made temporarily lifting the stay to permit a creditor to preserve its rights, for example to initiate a proceeding or make a filing which if not made could result in that creditor losing a right of action. Such orders typically provide that further actions by the creditor are stayed.

provisions affecting suppliers

The CCAA provides that parties are not prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration, or from requiring the

[7] There are limited exceptions for eligible financial contracts (as noted above).

further advance of money or credit in the context of a restructuring proceeding.

The Insolvency Reforms now permit a debtor to apply, on notice to secured creditors who are likely to be affected, for an order declaring a person to be a critical supplier to the debtor (the "Critical Supplier Provisions"). If the court is satisfied that the supply of goods or services by that person is critical to the debtor's continued operations, the court may make an order requiring the person to supply goods or services specified by the court to the debtor, on any terms and conditions that are consistent with the supply relationship, or that the court considers appropriate. If the court makes such an order, the court must also grant a charge over all or part of the property of the debtor in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order. The court may order that this charge rank in priority over the claim of any secured creditor of the debtor. In all likelihood such a charge, if it is ordered, would be ordered to rank subsequent in priority to the Administration Charge, the Directors' Charge and, very possibly, the DIP Charge.

Unlike the provisions of the CCAA dealing with ipso facto clauses, the Critical Supplier Provisions in the CCAA do not state that the designation of a party as a critical supplier supersedes the provisions of the CCAA that provide that no order under the CCAA may prohibit a person from requiring immediate payment for goods and services supplied after the commencement of CCAA proceedings or requiring the further advance of money or credit. The implication is that the Court will address such issues in its order, if it determines the person to be a critical supplier. The Critical Supplier Provisions do not mandate payment of pre-filing obligations owed to the critical supplier, nor do they preclude the debtor from making such payments. The CCAA does not contain repossession (reclamation) rights for suppliers under the CCAA, nor does it include administrative expense provisions equivalent to s. 503(b)(9) of the Bankruptcy Code.

statutory protections for wage claims and pension plan obligations under the CCAA

The CCAA provides employees with certain protections for unpaid wages ("Employee Preferred Claims") and regular (not special) pension plan contributions ("Regular Contributions"), both in the event that a Plan is filed or the business is sold. Employees may also be entitled to compensation pursuant to the Wage Earner Protection Program Act.

asset sales

The Insolvency Reforms introduced a prohibition on the sale or other disposition of assets by a debtor outside the ordinary course of business, unless court approval is first obtained. The court may authorize such sales, even where shareholder approval is not obtained. The debtor must give notice of the motion for authorization for a sale to the secured creditors who are likely to be affected by the proposed sale. In deciding whether to grant the authorization for the sale, the court is to consider, among other things (i) whether the process leading to the proposed sale was reasonable in the circumstances, (ii) whether the Monitor approved the process leading to the proposed sale, (iii) whether the Monitor filed with the Court a report stating that the proposed sale is, in the opinion of the Monitor, more beneficial to the creditors than a sale under Bankruptcy , (iv) the extent to which creditors were consulted, (v) the effects of the proposed sale on creditors and other interested parties, and (vi) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Prior to approving the sale, the Court must now be satisfied that the Debtor can and will make any payments with respect to the Employee Preferred Claims or Regular Contributions that would have been required to be made in order to obtain Court approval of a Plan or a Proposal.

If the proposed sale is to a related party, the Court may authorize the sale, after considering the factors listed above, only if the Court is also satisfied that (i) good faith efforts were made to sell the assets to an unrelated party, and (ii) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale.

Canadian courts during the course of a CCAA proceeding often approve of asset sales out of the ordinary course of business outside of a Plan. Under the CCAA, courts routinely make vesting orders conveying title to the purchased assets free and clear of liens and encumbrances.

A traditional Canadian-style sales process is very different from, and less transparent than, a section 363 sale process. Bids and purchase agreements are often solicited on a confidential (nonpublic basis), purchase agreements recommended to the court for approval are quite often sealed from the public record, stalking horse bids and public auctions, while becoming more common, are not the norm, and prospective purchasers in a sealed bid process are rarely given the opportunity to submit a higher or better offer at or immediately prior to the hearing of the motion to approve of the transaction for which approval is sought. Maintaining the integrity of the sales process approved by the court is a principle strongly adhered to by most Canadian courts. Canadian courts are reluctant to override a transaction recommended by the debtor and Monitor, provided that the sales process followed is found to have fairness and integrity.

A traditional Canadian-style sale transaction may proceed quickly through the following stages (not necessarily in strict order): (i) submission of non-binding letters of intent or expressions of interest; (ii) due diligence; (iii) submission of binding agreements and deposits; (iv) negotiations by the debtor and/or Monitor with one or more interested parties (which parties are requested to put in their highest and best offers, without knowledge of the other offers received or their terms); (v) the selection of the preferred purchaser; (vi) an application to the court for approval of the proposed purchase agreement (which agreement is often sealed and not made part of the public record); and (vi) court approval of the purchase transaction, without an auction.

Where there is a desire or need to conduct a single or a coordinated sales process in the context of a cross-border proceeding, it is becoming increasingly frequent for Canadian courts to permit Canadian debtors to sell assets pursuant to bid and auction procedures more commonly employed in a sale under section 363 of the Bankruptcy Code. This may even be the case in a purely domestic Canadian proceeding where the universe of prospective bidders is anticipated to include U.S. bidders who are familiar with the process used in a section 363 sale.

equity claims

The CCAA now contains provisions to make it clear that the claims of persons relating to an equity interest ranks subordinate to debt claims. This includes not only claims with respect to dividends or similar payments or return of capital, but also monetary losses resulting from the ownership, purchase or sale of an equity interest or claims for contribution or indemnity relating to any of these. For voting purposes, if applicable, creditors with equity claims are to be placed in the same class in relation to such claims and may not, as members of that class, vote at any meeting, including to approve of a Plan, unless the court otherwise orders.

claims and classification

Creditors may be divided into classes to vote on a Plan. If this is done, the debtor is to apply to court for approval of the proposed creditor classifications prior to the meeting. Creditors may be included in the same class if their interests or rights are sufficiently similar, taking into account enumerated factors that include the nature of the debt obligation, the nature and rank of security held, the remedies available to such creditors and the extent to which those creditors would recover by exercising such remedies.

voting and court approval

Voting on the Plan is on a class basis. For the plan to be binding on a class it must be approved of by a majority in number representing two-thirds in dollar value of the creditors, or class of creditors, voting on the Plan (in person or by proxy). Claims can be accepted initially for voting, but not payment, purposes. Disputed claims are usually subjected to an expedited claims resolution process approved by the court, which claims resolution process sometimes does not conclude until after the Plan is approved. A creditor related to the debtor may vote against, but not in favour of, a plan.

Court approval (sanction) of the Plan is also required after all classes of affected creditors have voted in favour of the plan. A court has the discretion not to sanction a plan if it is not satisfied with the fairness or reasonableness of the process or the Plan itself. Courts are generally reluctant to refuse to sanction a Plan that has been endorsed by the creditors.

corporate plans of arrangements as an alternative

Changes to the equity structure of the debtor can be made through a plan filed under the arrangement provisions of the applicable provincial or federal corporations' law statute (a "corporate plan of arrangement"). A corporate plan of arrangement can effect a restructuring of the balance sheet of a debtor, that otherwise wishes to continue to meet its obligations to employees, trade and ordinary creditors (hence relying on such legislation, which is only available to solvent corporations, to more efficiently recapitalize and/or restructure by issuing notes, converting debt to equity, etc.). The court, as part of such an application, will require a meeting to be held of the security holders whose rights are being affected to approve of the corporate plan of arrangement. Prior to granting its approval, the court will review the proposed corporate plan of arrangement to ensure that it is fair and reasonable. This mechanism can be an expeditious and more cost effective way of proceeding in circumstances where the debtor wishes to effect a recapitalization transaction and/or compromise significant debt securities, but is not otherwise in need of financial or operational restructuring.

Corporate arrangement provisions are also sometimes employed in conjunction with a restructuring under the CCAA, where the debtor's goals may be to recapitalize and restructure the balance sheet, reduce and compromise other debt obligations and to otherwise restructure its business operations. In such instances, there is precedent for a corporate plan of arrangement being put in place in conjunction with or as part of a CCAA Plan, without there being any vote of equity holders.

recognition of foreign insolvency proceedings

The Insolvency Reforms bring the CCAA in closer conformity to the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"). The new provisions (the "Foreign Insolvency Provisions") do not adopt the Model Law in its entirely, nor do they completely mirror the provisions of Chapter 15 of the Bankruptcy Code.

A foreign proceeding is defined in the Foreign Insolvency Provisions as a judicial or administrative proceeding, including an interim proceeding, in a jurisdiction outside of Canada dealing with a 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.

A foreign "main proceeding" is defined as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests. This is similar to the definition under Chapter 15.

A foreign "non-main proceeding", however, is defined under the Foreign Insolvency Provisions as a proceeding that is not a foreign main proceeding. There is no requirement, as exists under

Chapter 15, for the debtor to have an establishment in the jurisdiction in which the foreign proceeding was commenced.

To gain recognition, a foreign representative may apply to the Court for recognition of a foreign proceeding in Canada. If the Court is prepared to recognize the foreign proceeding, the recognition order is to specify whether the foreign proceeding is being recognized as a foreign main proceeding or a foreign non-main proceeding.

The Court may make an order recognizing the foreign proceeding and staying proceedings that may be taken against the debtor in Canada, as well as making other orders recognizing the authority of a foreign representative and coordinating the foreign proceeding with the Canadian proceeding. Under the CCAA, the Court is required to order a stay of proceedings, on terms and conditions it considers appropriate, if the proceeding is recognized as a foreign main proceeding. In the case of an order recognizing a non-main proceeding, the court also has the discretion to make a stay order.

The Court may, if it is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, also make any order that it considers appropriate, including if the proceeding is a foreign non-main proceeding, an order for relief that is available in a foreign main proceeding, and an order respecting the examination of witnesses, the taking of evidence and the delivery of information concerning the debtor and its property, business and financial affairs. Under the CCAA, the Court may make orders authorizing the foreign representative to monitor the debtor's business and affairs in Canada for the purpose of reorganization.

The Foreign Insolvency Provisions do not prohibit the court from refusing to do something that would be contrary to public policy. This is in contrast to the language of Section 1506 of the Bankruptcy Code, which imposes an arguably higher threshold by the use of the phrase "manifestly contrary to the public policy of the United States." (emphasis added).

While the Foreign Insolvency Provisions are new, they appear broad enough to permit Courts to continue to recognize and give effect to foreign proceedings in a manner that is consistent with orders made in CCAA cases pre-dating the Insolvency Reforms.

preferences and transactions at under value

Significantly, the Insolvency Reforms provide that the sections of the BIA dealing with preferential transactions and transfers at undervalue ("TUV") apply, "with any modifications that the circumstances require", in respect of a compromise or arrangement under the CCAA, unless the compromise or arrangement provides otherwise. A TUV is defined as a disposition of property or provision of services for which the Debtor receives no consideration or consideration that is conspicuously less than the fair market value of the consideration given by the Debtor. The CCAA provides that the BIA references to the trustee in bankruptcy[8], are to be read, in the CCAA context, as being references to the Monitor, presumably conferring rights similar to those afforded to a trustee in bankruptcy upon the Monitor, unless the Plan provides otherwise. It is not clear whether these provisions can or will be applied in a CCAA case in which a Plan is never filed under the CCAA.

The Monitor may apply for an order declaring a TUV to be void, or for an order that the other party(s) privy to the transaction pay to the Debtor the difference between the value of the consideration received by the Debtor and the value of the consideration given by the Debtor. For a transfer to be attacked, it must first be established that the transfer was made to an arm's length or non-arm's length party and that it was made at undervalue. The BIA provisions permitting a creditor to take such actions where the trustee in bankruptcy will not, has also been incorporated into the CCAA.

In the case of an arm's length transfer at undervalue, it must be proven that (i) the transfer occurred within 1 year of the day on which the proceeding under the CCAA commenced, (ii) the Debtor was insolvent at the time or was rendered insolvent by the transfer, and the Debtor intended to defraud, defeat or delay a creditor.

To set aside a TUV to a non-arm's length party, it must be proven that the transfer (i) occurred within one year of the day on which the proceeding under the CCAA commenced, or (ii) occurred within five years of the day on which the proceedings under the CCAA commenced where (a) the Debtor was insolvent at the time

[8] The trustee in bankruptcy is the official who administers a Bankruptcy under the BIA.

of the transfer or was rendered insolvent by it, or (b) the Debtor intended to defraud, defeat or delay a creditor.

The provisions dealing with preferential transactions make a distinction between transactions between arm's length creditors and those who are not at non-arm's length. Remedies are available to make void a transfer of property or provision of services, a charge on property or payment made, an obligation incurred or a judicial proceeding suffered or taken (any of same, a "Voidable Transaction") by an insolvent person in favour of an arm's length creditor that occurs three months before the CCAA proceeding is commenced, where such Voidable Transaction is made with a view to giving such creditor a preference. It is presumed, absent evidence to the contrary, where a Voidable Transaction has the effect of giving a creditor a preference, that it is made, incurred, taken or suffered with a view to giving such creditor a preference – even if made, incurred, taken or suffered, under pressure – and evidence of pressure is not admissible to support the transaction.

Where a Voidable Transaction benefits a creditor who is not dealing at arm's length with the debtor, all the Monitor need to prove is that such transfer or payment had the effect of preferring one creditor over another. In such case, the applicable review period is 12 months.

The ability to avoid pre-filing transaction did not previously exist under the CCAA and it remains to be seen how frequently, and in what manner, these provisions are utilized in a CCAA proceeding.

other material differences between proceedings under the CCAA and chapter 11

While law and practice are becoming increasingly similar in restructurings conducted under the Bankruptcy Code and the CCAA, it is worthwhile to note some of the remaining distinctions. Under the CCAA there is no:

- New estate created upon the initiation of the proceeding.
- Provision for adequate protection.
- Restriction on the use and disposition by a debtor of cash collateral or the ordinary use by the debtor of property subject to existing security.

- Provision precluding pre-filing security from encumbering after-acquired property.
- Express statutory authority for the creation of committees of unsecured creditors (or equity holders), or imposing the disclosure requirements of Rule 2019 of the Federal Rules of Bankruptcy Procedure. It remains to be seen whether the amendments made to expand the scope of an Administration Charge will open the door, in appropriate circumstances, to the funding of a court-ordered creditors' committee.
- Administrative expense claims including for persons who supply goods and services post-filing. As noted, the Critical Supplier Provisions permit a court to grant liens in favour of vendors post-filing who are deemed critical suppliers and ordered to continue to supply the debtor company.
- Ability to reject collective bargaining agreements.
- Statutory cram-down mechanism.
- Absolute priorities rule.

co-ordinating cross-border proceedings

Cross-border proceedings involving affiliated debtors within a corporate group have become common. Understanding the issues and dynamics material to a cross-border restructuring is critical to the effective management of a troubled situation and the execution of a successful restructuring strategy.

Some cross-border proceedings will involve main (plenary) cases filed in relation to the same debtors, or in relation to different, but affiliated debtors. Others may involve a foreign main proceeding conducted in one jurisdiction, together with a recognition (ancillary) proceeding involving the same debtor being conducted in the other. The most effective and efficient structure to use will depend on the legal issues and challenges that are unique to each restructuring. Procedural cross-border protocols dealing with the co-ordination and harmonization of cross-border proceedings, including claims processes, have also become more common. There can be unique complexities in cross-border restructurings, making it essential for advance planning with experienced cross-border specialists.

concluding observations

By reason of developing jurisprudence and legislative changes, restructuring law and practice under the CCAA is becoming more similar to that under Chapter 11. Court proceedings continue to be more streamlined in Canada, with many motions within a CCAA proceeding being scheduled and heard on relatively short notice. Generally, Canadian courts adopt a pragmatic and flexible approach to the challenges that are inevitable in a complex restructuring, seeking at all times to balance the interests of competing stakeholders.

The absence of a formal committee of unsecured creditors currently means that unrepresented unsecured creditors generally do not have the same "seat" at the table as secured creditors and other stakeholders. This fact, combined with the willingness of many courts to make orders on very short notice, sometimes means that the "voice" of unsecured creditors is not expressed at hearings that deal with material issues that may affect unsecured creditors. Above all, Canadian restructuring law and practice continues to evolve to meet the exigencies and challenges inherent in the restructuring of domestic and cross-border businesses.

The recent decision in Ontario establishing priority for wind-up deficiency claims has created considerable uncertainty in circumstances where an underfunded defined benefit pension plan exists. This has given rise to the need for additional due diligence by secured lenders at the point of origination of a new loan and when a borrower becomes insolvent. The implications of these developments on future restructurings in Ontario are not yet clear. For lenders holding pre-existing security over accounts and inventory, a liquidating bankruptcy under the BIA may provide a better recovery than a CCAA restructuring where there are large unfunded pension plan deficiencies. This could create an interesting dynamic for a debtor seeking to restructure.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.