



NATIONAL JUDICIAL INSTITUTE
INSTITUT NATIONAL DE LA MAGISTRATURE

Canada - Bankruptcy & Insolvency

April 23, 2021

Presentation originally prepared by Christopher Besant – Gardiner
Roberts LLP

Session Overview

A1. Overview of the Canadian insolvency process

A2. Key features of the Canadian Reorg/Liquidation Process



Overview of the Canadian Insolvency Process

Processes and Origins

- **Liquidation, Receivership and Reorganization**
- UK origins of Liquidation processes; US influences on Reorganization processes

Fragmented Framework:

- Companies Creditors Arrangements Act (Fed) - (“CCAA” - Large court customized restructurings and interim sales)
- Bankruptcy and Insolvency Act (Fed) - (“BIA” - Bankruptcy Liquidations and Short form Proposals and federal receiverships)
- Court of Justice Acts (Prov) - (“COJA”)
- Winding Up and Restructuring Act (Fed) - (Financial institutions and Insurance companies)
- Farm Debt Mediation Act (Fed)- (mediation/postponement system for agricultural businesses)
- Federal or Provincial business corporations act - The Canada Business Corporations Act (“CBCA”) (if federal), Ontario Business Corporations Act (“OBCA”), or other such provincial statute.

Regulatory Structure

- **Regulators**
- **Fed Ministry of Innovation, Science and Economic Development** - Bankruptcy policy
- **Fed SBO (Office of the Superintendent of Bankruptcy Canada)** - licenses Accountants to act as Trustees/Monitors
- Insolvency Regulator not activist rule maker; more focus on licensing issues re: trustees
- **Fed Ministry of Finance/OSFI** - financial/insurance institutions rescue/solvency oversight
- **Provincial Financial Institution Oversight** (smaller institutions)

Regulatory Structure

- **Officers of the Court** - Role of Accountants, Lawyers, and CROs
- **Accountants**
 - Trustees
 - Receivers
 - CCAA Monitors
- **Lawyers:** As counsel to debtor, directors, monitor, receiver - special responsibilities
- **CROs:** Evolution into an official role



Key Features of the Canadian Reorg/ Liquidation Processes

Key Features Of The Canadian Reorg/Liquidation Processes

1. Requirements to File for Insolvency (CCAA/BIA)

- *Insolvency*
- *\$5 million in debt to access CCAA (but not BIA)*
- *assets or office in the jurisdiction*

2. No Obligation to File/Insolvent Trading Remedies

- No obligation to file, but directors open to oppression remedy attack for insolvent trading

3. Automatic Stays in Reorganizations vs. Liquidations

- CCAA - has court ordered comprehensive stay with regulatory carve outs
- Recent amendments reduce the maximum length of the initial stay period under an initial order from 30 days to 10 days
- Amendments also restrict the relief during the initial stay period to only that which is “reasonably necessary” for the continued operations of the debtor in the ordinary course
- *BIA Proposals* - has automatic statutory stay with regulatory carve outs
- *BIA bankruptcy liquidation* - only stays unsecured but not secured
- *Court Receivership* – has court ordered stays.

Key Features Of The Canadian Reorg/Liquidation Processes Cont'd

4. DIP financing

- DIP financing now possible by statute (with Court Order) under both CCAA and BIA reorganizations systems
- Interim financing of court receiverships done by court order
- Recent amendments limit relief during the initial stay period (maximum 10 days)
- Court required to limit financing to the “reasonably necessary” threshold during the initial stay period

5. Post Filing Supply Protection Limited

- No Administrative Priority, but no obligation to extend credit

Key Features Of The Canadian Reorg/Liquidation Processes Cont'd

6. Preference Challenges – Reorganizations vs. Liquidations

- BIA bankruptcy liquidations permit challenges to preferences and under value transactions
- CCAA also permits challenges unless the Plan of Arrangement provides otherwise
- Recent amendments broaden reviewable transactions to include a review of compensation paid to directors, officers or managers of the debtor

7. Scope of Restructuring Powers

- Assumption of Contracts
- Disclaimer of Contracts
- Collective Agreements
- Pension Plans

Key Features Of The Canadian Reorg/Liquidation Processes Cont'd

Reorganization Sequence in CCAA/BIA Restructurings

- **CCAA**
 - **Initial Court Order with Stay over all Assets**, appoints Monitor, grants Admin Charges, includes **DIP Finance Order**, confers Restructuring Powers on debtor
 - **Recent amendments** reduce the maximum length of the initial stay period under an initial order from 30 days to 10 days
 - **Amendments** also restrict the relief during the initial stay period to only that which is “reasonably necessary” for the continued operations of the debtor in the ordinary course
 - **Suppliers** (Critical Vendor deals permitted)
 - **Extension** orders after 10 days and periodically thereafter;
 - **Downsizing and Contract Rejection**
 - **Interim Asset Sales**

Key Features Of The Canadian Reorg/Liquidation Processes Cont'd

Reorganization Sequence in CCAA/BIA Restructurings

- **CCAA**
 - **Claims Bar Process**
 - **Plan Negotiations** with creditors and committees
 - **Plan Disclosure, Voting and Classification** Order (Secured, Unsecured, Unaffected Classes, Discretionary Subclasses)
 - **Recent amendments** provide that any interested person may apply to Court for an order requiring disclosure of Interested Persons' "Economic Interest" in CCAA proceedings
 - **Exit Financing** Orders -conditional on plan approval
 - **Creditor Vote** (majority in number and 2/3 by value of each class/subclass)
 - **Court Approval**
 - **Plan Implementation/Closing**
- **BIA** similar process.
- Pension Plans

Key Features Of The Canadian Reorg/Liquidation Processes Cont'd

9. Governance

- Debtor Stays in Possession
- Board remains in place.

10. Scope of Discharge on Emergence from Restructuring

- CCAA Release can extend to directors, officers, employees and advisors.
- BIA Proposal release not as broad.

11. Distribution: Priority Waterfall: Reorganization vs. Liquidation

- **CCAA/BIA Proposal:** Court Ordered Charges, Unaffected Claims, Superpriority (Governmental, Wage and Pension Contribution Claims, and certain statutory liens), Secured, Unsecured.
- **BIA Liquidation/Receivership:** Superpriority, Secured, Trustee Expenses, Preferred (landlords, wages, etc), Unsecureds.
- **Equity at the bottom of both systems:** has no vote unless corporate reorganization steps also required

12. Amendments Impose a Statutory Duty of Good Faith in BIA and CCAA Proceedings

- Amendments do not provide a standard of “good faith”
- Court has discretion.