

Elliott Greenleaf

Doing Business in Canada

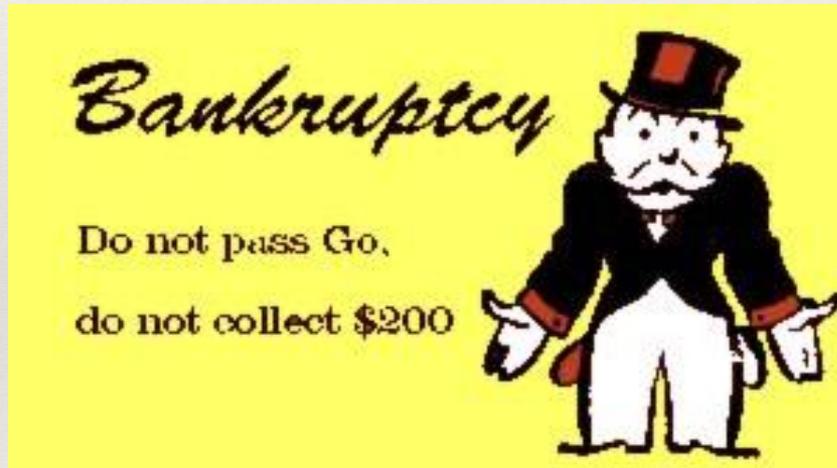
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Types of Insolvency Legal Regimes



Receiverships and Reorganizations

- Receiverships, where the management of the company is transferred to a third party independent fiduciary, are popular in most countries as the primary structure to address insolvency of a company.
- Restructuring, where management remains in control, which is a hallmark of U.S. bankruptcy law, is not prevalent, but has influenced many new reforms, including the Companies' Creditors Arrangement Act (the "CCAA") in Canada.

Chapter 11's Influence

"Based on the idea that a failing business can be reshaped into a successful operation, Chapter 11 was perhaps a predictable creation from a people whose majority religion embraces the idea of life from death and whose central myth is the pioneer making a fresh start on the boundless prairie. So powerful is the idea of reorganization that Chapter 11 has heavily influenced commercial law reform throughout the world."

Elizabeth Warren and Jay Lawrence Westbrook, "The Success of Chapter 11: A Challenge to the Critics," 107 Michigan Law Review 603, 604 (2008).

Practical Differences Between Receiverships and Reorganization

Creditor's Rights

- Receivership - Creditor friendly (caveat - usually means employees or secured creditors, not trade creditors).
- Reorganization - Debtor friendly and economically flexible (caveat - management can restructure, sell as a going concern, or do a combination of strategies, and some strategies favor trade creditors, others do not).

- U.S. Bankruptcy law offers the lowest level of protection for creditors' rights according to one seminal study.
- U.K. Bankruptcy law offers the highest level of protection for creditors' rights (again, the study focused on secured creditors).

- Some have argued that economic conditions and the flexibility of the U.S. Chapter 11 process allows a shift from being Debtor to Creditor friendly (matching up to economic conditions and circumstances).
- In the last twenty years, Canada, Australia, France, Germany, Finland, Norway, Sweden, and, even the U.K. have all adopted chapter 11 style reorganization in whole or in part.

Canada's Legal System

- Canada is a federal dominion of ten provinces and three territories.
- Under the Canadian Constitution areas of responsibility are allocated between the national federal government and the local provincial governments.



Canadian Insolvency

- Bankruptcy and Insolvency Act (the "BIA")
- Companies' Creditors Arrangement Act (the "CCAA")
- Various Provincial Property and Civil Rights

Bankruptcy and Insolvency Act (the "BIA")

- The BIA is the principal federal legislation in Canada applicable to insolvencies.
- It governs both voluntary and involuntary bankruptcies, liquidations, as well as reorganizations.
- It replaced the Canadian Bankruptcy Act in 1992.
- BIA requires a plan to be approved by a majority of creditors in number and two thirds of total claims, which brings it in line with the voting rules under chapter 11.

Liquidations Under the BIA

- The corporation makes a voluntary assignment into bankruptcy;
- One or more of the corporation's creditors obtain a bankruptcy order against the corporation; or
- The corporation seeks to reorganize under the proposal provisions of the BIA and the reorganization fails.

BIA Primarily has Characteristics of a “Receivership Statute” with an Appointed Independent Party, Either a Receiver or a Trustee

- Upon a bankruptcy occurring, a trustee in bankruptcy (Trustee) is appointed and all of the insolvent's property on the date of the bankruptcy (as well as any property the bankrupt acquires after the date of the bankruptcy) vests in the Trustee.
- The Trustee's principal mandate is to liquidate the property of the estate and distribute the proceeds thereof to the creditors of the estate in accordance with the prescribed statutory scheme of distribution as set out in the BIA.

BIA and Receivers

- Secured Lenders often appoint receivers or what they reference as Receiver Managers in Canada.
- Receiver Manager will operate the company until it is sold as a going concern.
- Receivers can be privately appointed or, more often, are appointed by petition to a provincial Court which would rely on provincial statutes for guidance and authority.
- Receiver orders will govern the specific duties and powers of the receiver (such as, sell the company as a going concern or liquidate in pieces and distribute proceeds).

National Receiver

A National Receiver was added with the 2009 Amendments to the BIA which created one Federal statutory scheme for receivers, though provincial practice is fairly standard due to the fact that only Judges who have insolvency experience handle these cases.

Creditors Role Under the BIA

- A creditor's role in the administration of the bankruptcy estate is generally limited to filing a proof of claim with the Trustee subject to procedures under the BIA.
- The Trustee then evaluates the proof of claim and either allows, or disallows the creditor's claim.
- If the claim is disallowed, the creditor may appeal the Trustee's decision to the court.
- If the claim is allowed, the creditor will share in the recovery from any realization on the property of the bankrupt in accordance with the priorities as prescribed under the BIA.

Generally, Under the Scheme of Distribution:

1. **Certain specified amounts owing for wages and pension claims have a statutory priority,**
2. **followed by amounts owing to various government authorities for specific statutory trusts (e.g. Canada Revenue Agency - taxes),**
3. **then secured creditors,**
4. **then certain classes of preferred creditors, and**
5. **lastly, to unsecured creditors.**

Stay and Plan Proposal

- Under the BIA, both secured and unsecured claims are stayed for 30 days when the Debtor issues a notice of intention ("NOI") to file a proposal.
- After 30 days the Debtor has to file a plan or extend the stay for 45 days and thereafter in 45 day increments for a total of five months.
- Once an NOI is submitted there are 21 days until the creditors meeting where a plan will be approved or rejected. This process is similar to the exclusive period given to Debtors under chapter 11, though much shorter.
- One big change, under the BA the stay did not apply to secured creditors.

Companies' Creditors Arrangement Act (the "CCAA")



Companies' Creditors Arrangement Act (the "CCAA")

- The CCAA is specialized companion legislation designed to assist larger corporations to reorganize their affairs through a debtor-in-possession process similar in concept to and in some ways modeled on Chapter 11 of the U.S. Bankruptcy Code.
- Canadian bankruptcy law was reformed in 1992 with the intention of making it more debtor friendly in the same manner as Chapter 11.

CCAA Reorganization, an Alternative to Liquidation

- A debtor may attempt to reorganize or restructure its business and operations under the CCAA and **some provisions under the BIA** instead of liquidation.
- The proposal sections of the BIA are generally used for smaller businesses, the CCAA is intended to facilitate the restructuring of large business entities.
- The CCAA requires the debtor or debtors to be insolvent on either a liquidity or a balance sheet basis and must have indebtedness of at least \$5 million.

CCAA is Flexible and Mirrors some Chapter 11 Characteristics

- Under the CCAA, the debtor retains possession and control of its property and assets in accordance with the Initial CCAA Order granted by the court.
- The debtor is subject to the supervision of the court and the oversight of a court appointed monitor.

Canadian Monitor

- The monitor supervises the business and affairs of the debtor company during its restructuring and reports to the court on the progress and milestones in the restructuring.
- The CCAA requires that a monitor must be a licensed trustee who is not or who has not been affiliated with the debtor company in certain capacities, including having acted as its auditor, within 2 years preceding the CCAA proceedings.
- The monitor is often from a large accounting or consultancy company.
- The monitor provides notice to both Canadian and foreign creditors, usually limited to an initial direct mailing of Canadian Court orders and instructions to review the Monitor's website for further activity.

Injunctions or Stays Under the CCAA



Stay Relief Under the CCAA

- In granting the Initial CCAA Order, the court has the discretion to grant a general stay of any proceedings and the nature and duration of such stay.
- Usually the court grants a stay for not more than 30 days pursuant to which the debtor company's creditors are prevented from:
 - (a) taking any steps to enforce their claims against the debt or company and its property and assets; and
 - (b) commencing or continuing any proceedings against the debtor company or its property and assets.

- After 30 days, the debtor must return to court, on notice to all stakeholders, to obtain extensions of the stay.
- The CCAA contains no restrictions on the number of extensions that may be granted by the court or the maximum time permitted in order for the debtor company to complete its restructuring.
- At each request for an extension, the debtor must confirm that it is proceeding in good faith and with due diligence to submit a restructuring plan to its stakeholders.

CCAA Ipso Facto Prohibition

In addition to the granting of an initial stay of proceedings by the court, the CCAA also specifically provides: that no party can terminate, forfeit, amend, or claim for accelerated payment under any agreement, including a **security agreement**, with a debtor company, **by reason only that proceedings have been commenced under the CCAA.**

Sales

- Under the CCAA there's no requirement that a Plan be filed in order to sell the assets of the company.
- The CCAA is often paid for by a lender who conditions a forbearance of foreclosure on the debtor(s)' collateral on the sale of substantially all the assets of the corporation.

CCAA Claims

- Priority in the form of "charges" over the debtor's property and assets in CCAA proceedings which secures amounts owed to administrative claimants, director(s) and officer(s), interim financing, and critical supplier claims.
- A Plan must include payment of certain wage and pension related claims, if applicable.

Contract Assignment & Disclaimer

- The Court can order the assignment of agreements by the debtor in certain circumstances, without the required consent of the counter party to the agreement (certain financial contracts and collective agreements may not be assigned); and
- Order the disclaimer (like a rejection under U.S. law) of contracts by the debtor company, in certain circumstances (certain financial contracts, collective agreements, financing agreements if debtor company is the borrower and leases of real property or an immovable if the debtor company is the lessor, **may not be disclaimed**).

CCAA Plan Approval

- A majority in number of the creditors, representing two thirds in value of the creditors, or the class of creditors, as the case may be; and
- Be sanctioned by the court.
- Once sanctioned by the court, the plan becomes binding on all creditors to whom the restructuring plan was made.
- There is no exclusivity period under which the debtor company is required to propose a plan of restructuring to its creditors.
- PLAN ISN'T NECESSARY AND IF THE SECURED CREDITOR ISN'T GOING TO BE PAID IN FULL, NO CLAIMS PROCESS.

Plan Rejection

- Under the CCAA, if a restructuring plan is not accepted by a majority of creditors holding the requisite amount of debt, or is not sanctioned by the court;
- The debtor is not automatically declared to be bankrupt requiring liquidation (as is the case under a BIA proposal);
- An unsuccessful restructuring under the CCAA usually results in a liquidation by way of bankruptcy or receivership proceedings initiated by a stakeholder of the debtor, usually a secured lender.

Stick 'Em Up



Avoidance Powers in Canada (Preferences)

The BIA allows a Trustee to declare certain pre-filing transactions void:

1. Unjust preferences; and
2. Transactions where property was sold at less than fair market value (the transaction will either be void or there is a judgment for the difference in what was received and the fair market value).

The look back period is usually 3 months and can go back 12 months if the transaction is not at arm's length.

Avoidance Powers

The trustee can also use provincial preference and fraudulent conveyance actions to recover money for the estate.

Creditors can also bring these actions if the Trustee is unwilling or unable to fund such litigation.

Though the BIA authorizes avoidance powers, usually avoidance proceedings are initiated only when there is a liquidation and not a restructuring.

Cross Border Commerce

Globalization has made it common for businesses to work in several countries.

If a company becomes insolvent, its creditors will be spread across different jurisdictions.

Which Court has the power to administer a bankruptcy in this situation?

Two Approaches to Cross Border Bankruptcies

A. Territoriality

B. Universalism

Territoriality

- Each country's court exercises its power within its own jurisdiction.
- Each country has its own insolvency proceeding.
- Each country is limited to the assets and parties within its borders and each will apply their home country law (which likely favors local creditors).
- Creates a rush to seize all assets and pay off home creditors in each jurisdiction.
- Can also lead to inconsistent rulings in each jurisdiction.

Universalism

- Courts cooperate.
- Ideally one court becomes the primary court administering the insolvency.
- All other courts assist in enforcement of the primary court's orders over the assets in their respective jurisdiction.
- Usually requires a treaty or some accord between various nations.
- Some limits, like all treaties, for situations that run contrary to limited policy exceptions within each secondary court - usually referred to as "ancillary courts."

Cross Border Insolvency

- United Nations Commission on International Trade Law – UNICTRAL.
- Insolvency working group that meets twice a year and identifies issues and offers a wide range of solutions for business entities, excludes analysis of consumers or regulated industries, such as banks.
- Model Law on Cross-Border Insolvency was negotiated by 72 states, 7 inter-governmental organizations and 10 non-governmental organizations.
- Framework to allow cooperation and coordination in insolvency proceedings where assets are located in various jurisdictions.

Legislation enacted by:

Australia (2008), Benin (2015), Burkina Faso (2015), Cameroon (2015), Canada (2005), Central African Republic (2015), Chad (2015), Chile (2013), Colombia (2006), Côte d'Ivoire (2015), Democratic Republic of the Congo (2015), Equatorial Guinea (2015), Gabon (2015), Greece (2010), Guinea (2015), Guinea-Bissau (2015), Japan (2000), Kenya (2015), Malawi (2015), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Niger (2015), Philippines (2010), Poland (2003), Republic of Korea (2006), Romania (2002), Senegal (2015), Serbia (2004), Seychelles (2013), Slovenia (2007), South Africa (2000), Togo (2015), Uganda (2011), United Kingdom of Great Britain and Northern Ireland: British Virgin Islands (2003), Gibraltar (2014), Great Britain (2006), United States of America (2005) and Vanuatu (2013).

Part IV of the CCAA and Part XIII of the BIA

- The 2009 amendments to the CCAA and BIA repealed the prior cross-border insolvency provisions and replaced them with what are now Part IV of the CCAA and Part XIII of the BIA.
- These are a modified version of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency.
- Allows the Canadian Court to recognize foreign proceedings as the main proceeding in an insolvency and recognize a foreign representative in the Canadian Court.

Recognition Process

- An application to the Canadian court for the recognition of a foreign proceeding may be brought by a foreign representative and must be accompanied by various documents which are evidence of the existence of the foreign proceeding and the authority of the foreign representative to bring the application.
- Once the Canadian court is satisfied that the recognition proceeding relates to a foreign proceeding and that the applicant has been appointed as the foreign representative in that proceeding, the Canadian court essentially has no discretion and must recognize the foreign proceeding.
- The Court then must determine whether or not the proceeding is the foreign main proceeding or non-main proceeding.

Recognition as a Foreign Main Proceeding

- The Canadian court is required to grant certain specific relief under section 48 of the CCAA, including a stay of proceedings.
- Once a foreign proceeding has been recognized by the Canadian court, the court has great discretion in recognizing post-recognition orders made in the foreign proceeding, or
- Granting supplemental relief in the Canadian recognition proceedings, provided that the court is satisfied that the orders to be recognized or the relief to be granted, is for the protection of the debtor company's property or the interests of creditors.

Foreign Representative's Duties Under Canadian Law

- Informing the Canadian court as to any substantial change in the status of the foreign proceeding;
- Its authority to act as foreign representative in that proceeding; and
- Publishing a notice in the Canadian media (one or more newspapers) of certain prescribed information about the foreign proceeding.

Information Officer

Common practice in Canadian recognition proceedings for the Canadian court to appoint an Information Officer (similar to a monitor) for the primary purpose of providing objective information to the Canadian court and interested Canadian creditors.

No Discrimination Against Foreign Creditors

The CCAA and BIA do not create a separate category or class for foreign creditors, who have the same rights as Canadian creditors.

Chapter 15

- THE US LEGISLATION AUTHORIZED BY TREATY (UNCITRAL MODEL LAW ON INSOVENCY)



Chapter 15

- Pending foreign proceeding and a duly authorized representative of the foreign proceeding seeking recognition of that proceeding in the United States.
- Foreign representative is usually the receiver, liquidator, or in the case of a Canadian proceeding, the Monitor.
- Recognition provides for the rights and benefits of Chapter 15, including protecting the foreign debtor's U.S. assets from creditors and obtaining access to and relief from the United States courts including enforcement in the U.S. of orders entered in the foreign proceeding.
- Like Canadian law, Chapter 15 recognizes foreign main proceedings and non-main proceedings.

Stay Relief

- The provisions of the United States Bankruptcy Code that provide for the automatic stay applies immediately with the recognition of a foreign main proceeding.
- In a non-main proceeding the foreign representative has to specially request such relief and the Court has the discretion to deny it.

Notice and Provisional Relief

- A recognition hearing is held 30 days from the day of filing a chapter 15 petition.
- During that time, the stay doesn't apply and creditors are free to pursue the U.S. assets of the debtor.
- Most foreign representatives seek temporary injunctive relief known as "provisional" relief.
- The test for injunctive relief is not an easy one and the FR must show that there is a reasonable opportunity for success on the underlying case, irreparable harm if the relief is denied, the effect of the relief on the non-moving party, and whether the relief will be in the public interest.

Notice

- Provisional injunctive relief requires 20 days notice under the Federal Rules of Bankruptcy Procedure.
- Review any initial notice you receive as the practice in other countries might not be to spend money on personal service multiple times, as is the practice in the U.S., especially if there is a less costly alternative after one personal service attempt.
- Provisional and then permanent relief might request to limit notice in this manner.

Foreign Main Proceeding

- Center of main interest.
- Debtor's registered office is presumed to be the COMI.
- Other factors, location of:
 1. debtor(s)' headquarters,
 2. those who manage the debtors,
 3. primary assets,
 4. majority of the debtors creditors, and
 5. jurisdiction where law will be applied in majority of circumstances.

After Recognition

- The authorized representative is then able to proceed to carry out the purpose of the chapter 15, such as sell all the US assets, assignment of leases in the U.S., or sell the U.S. assets along with the foreign assets in the foreign proceeding.
- If the court recognizes a foreign main proceeding, the FP automatically gets the same powers as a U.S. trustee or debtor-in-possession, such as the ability to use cash collateral, sell assets, etc.
- **Big exception is there are no avoidance powers (with one wrinkle).**

Condor Case

- Chapter 15 under section 1521(a)(7) and 1523 prohibit suit by a chapter 15 debtor of any avoidance action.
- If the chapter 15 debtor files an 11 or 7 that changes.
- Exception is the Fifth Circuit decision in *Condor* which allowed a chapter 15 debtor to sue in the U.S. in an ancillary proceeding using foreign avoidance laws available in the main proceeding.
- A SDNY Bankruptcy Court in the *Atlas* case found similar arguments convincing and allowed the same result.

Claims

- Claims are often not filed in the chapter 15 – if it's supporting a foreign main proceeding, likely the claims are filed in the main proceeding.
- Procedures will often require filing in the foreign jurisdiction pursuant to orders in that court.

THANK YOU

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