Insolvency Proceedings – Which to Choose and How to Use Them

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INTRODUCTION

The company is in financial trouble. You've spoken to the bank and it is no longer prepared to provide any further funds or support the company. Worse, it's just called its loan. The landlord is also threatening to shut the doors, since it is owed back rent. Your trade suppliers want their merchandise back. The Crown wants the unpaid corporate taxes that go back several years. Your employees want to be sure that they will be paid at the end of the week. You want the business to survive and continue. You figure that the company just needs a bit of breathing room and everything can be put back on track. What can the company do?

Or, you're a secured creditor and you're owed money. Should you appoint a receiver over the company's assets, or seek one through the courts? Should you commence a bankruptcy application, or just sue to get your money back?

In each case, the question arises – what should you do? The debtor in question appears to be in financial difficulties, and the need for a legal proceeding of some sort appears clear. The question is, which proceeding to use?

As is often the case in complex factual situations, the answer is, it depends. There are several different legal proceedings available to debtors and creditors, and the question of which one to choose will depend on the facts, what you want, and often more importantly, what you can realistically hope to achieve.

This paper will review some of the options available to debtors and creditors when considering the different available insolvency proceedings, and provide some guidance as to what to choose and when.

RESTRUCTURING

If the objective is to save the company, you are likely looking at a restructuring. That is, you're looking for a proceeding that will buy the company some time so that it can put together a plan to restructure its affairs that will save the company that it can then present it to its creditors for support. This can be done privately, without the need for a proceeding, or, depending on the circumstances, via a formal legal proceeding.

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Private Restructuring

Private or informal restructurings occur where the debtor company tries to restructure itself, with or without professional assistance. A company may restructure or reorganize by doing any number of things: downsizing its operations, reducing staff, reducing inventory, closing an unprofitable plant, changing management, all in an effort to effect change. Such changes may be designed to generate cash, increase liquidity, or improve the company's prospects for long-term profitability. All of this is permissible, provided that the debtor does not act in a manner so as to prefer one creditor over another, and does not breach any statutes or other laws in the process.

Formal Restructuring – CCAA Plan of Arrangement or BIA Division I Proposal

However, in certain cases, particularly where a businesses is either too unwieldy or complex to restructure informally, or where it may have already failed in its efforts to downsize or restructure informally, debtors may find that they are obliged to try to restructure via a formal restructuring. In these cases, the debtor comes forward, and tries to make arrangements with all of its creditors in one forum, in a formal insolvency proceeding. The principal statutes used by debtors to effect a formal restructuring are the Companies' Creditors Arrangement Act ("CCAA")[1] and what are commonly known as the Division I proposal provisions of the Bankruptcy and Insolvency Act ("BIA")[2]. Both the CCAA and the BIA are federal statutes, and both require that the debtors affirm that they are insolvent before they can avail themselves of the benefits contained in the statutes.[3][4] Both also require oversight by a licenced insolvency

[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. B-3 ("CCAA")

[2] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. C-36 ("BIA"), Part III, Division I

[3] *BIA*, s. 50(1); *CCAA*, ss. 3(1) and 2(1). Note that section 3(1) states that the CCAA applies to debtor companies (and affiliated debtor companies) with total claims against it in excess of $5 million, and debtor companies are defined in section 2(1) to be companies that are bankrupt, insolvent, or who are otherwise considered to be bankrupt or insolvent for the purposes of the *BIA* or the *Winding Up and Restructuring Act*, R.S.C. 1985, c. W-11.

[4] There is a third federal statute that can be used to restructure a company's affairs, and one that has been increasingly used in the last number of years to that end. That is the *Canada Business Corporations Act*, R.S.C. 1985, c C-44 ("CBCA"), and in particular, section 192 of that statute. Section 192 of the CBCA provides that a corporation that is not insolvent may seek the approval of the court with respect to an arrangement (as defined in the statute), where it is unable to effect such a "fundamental change" via another section of the same statute. Courts in Ontario have approved various arrangements, including certain arrangements involving insolvent corporations, where they have been persuaded of the appropriateness and the correctness of such arrangements, and where counsel have acted creatively to avoid the requirement that the applicant not be insolvent. However, this type of restructuring is beyond the scope of this paper and the presentation for which it has been prepared.

professional (a monitor, in the case of the CCAA, and a proposal trustee, in the case of the BIA) and a formal commencement of a proceeding.[5] Both also require that any final plan or arrangement be approved by the company's creditors and by the court.[6] However, there are some key differences between the two statutes, so it is critical that you know the facts of your case, so that you can properly choose which type of proceeding is appropriate for your particular matter. The following are some important differences to consider.

Minimum Debt Requirements - A debtor company must owe $5 million or more to its creditors before it can even seek relief pursuant to the CCAA[7]. There is no such minimum debt requirement under the BIA. Thus, many smaller companies may not even come within the monetary jurisdiction of the CCAA, simplifying the choice of proceeding.

Cost and Time Considerations - The cost and time involved in a typical CCAA proceeding are both usually greater than in a Division I proposal under the BIA. Thus, if the objective is a quick and less expensive proceeding, you are most likely looking at a proposal. If the matter is more complex, and requires more time, or more judicial oversight, you may be looking at a CCAA application, as the maximum amount of time for a restructuring under the BIA, from commencement to court approval, is six months.[8] If the process is not complete within that time frame, any debtor who commenced its restructuring under the BIA will be deemed bankrupt.[9] Thus, anyone who is not absolutely certain that their proposal will be accepted and completed within six months will want to avoid a BIA proposal, if possible.

Consequences of Failure - If the creditors vote to reject a plan of arrangement under the CCAA, the proceedings will thereafter be terminated and the stay of proceedings along with it. The company will go back to where it was pre-filing and may try to carry on its business or make other arrangements with its creditors. In the case of a Division I proposal under the BIA, however, where a proposal is rejected by the creditors, the debtor is automatically and

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[5] See *CCAA,* ss.11.7(1) and s.10(1) and *BIA* ss. 50(2) and 50(2.1).

[6] *CCAA,* s.6; *BIA* ss. 54, 57 and 58.

[7] *CCAA,* s. 3(1).

[8] *BIA,* ss. 50.4(8) and (9). If a debtor commences a proposal proceeding by way of a Notice of Intention to File a Proposal ("NOI") under 50.4(1), the debtor will have 30 days from the date the NOI was filed to file its proposal. Under s. 50.4(9) of the BIA, the court may grant extensions of the time within which to file a proposal, where certain conditions are met. Each extension is limited to 45 days, and the total time for completion of the process remains unchanged at six months from the date of the initial event.

[9] *BIA* s.50.4(8)(a).

immediately deemed bankrupt, as of the date of the initial bankruptcy event, usually the filing of the proposal or any notice of intention to file a proposal.[10] Thus, again, unless a debtor is absolutely certain that it can make a proposal that will attract the necessary support of its creditors, it may wish to avoid a BIA proposal, if possible.

Stay of Proceedings - A key ingredient in a formal restructuring proceeding is the stay of proceedings. This operates to prevent creditors from taking steps to enforce their rights against the debtor while it attempts to restructure its affairs. The stay provides the debtor company with some breathing room during which it will try to come up with a plan that will satisfy its creditors and permit the company to survive. Under the CCAA, a debtor entity must apply to the court for a stay of proceedings, which will be in the discretion of the presiding judge.[11] Under the BIA proposal provisions, a debtor simply files its proposal (or a Notice of Intention to File a Proposal) with the Superintendent in Bankruptcy, whereupon there is an immediate, automatic stay of proceedings.[12] Thus, if the company is in truly dire straits (such as needing to ensure that the electricity to the plant is not cut off, or the landlord does not lock the company out of its premises), it may wish to commence its proceeding under the BIA, rather than the CCAA.

There are many other considerations that go into choosing which statute to use for purposes of commencing a proceeding. Many of these are of a strategic nature, and are dependent on the position of the debtor in question. For example, if the debtor operates out of leased premises, it may choose to file under the CCAA rather the BIA, so as to avoid having to choose whether to disclaim the lease at the outset of the proceeding.[13] Similarly, debtors who have many creditors who would qualify as preferred creditors under the BIA may wish to avoid that statute as any proposal must provide for the payment of those claims in priority to unsecured creditors.[14]

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[10] *BIA*, s. 57. See also s. 50(12) and s. 50.4(11), which allow the court, on application by a creditor, proposal trustee or interim receiver, to deem a proposal to be refused or to terminate the period for making a proposal. A successful application under one of these subsections would also result in the debtor being deemed bankrupt.

[11] *CCAA*, s.11.02.

[12] *BIA*, ss. 69 and 69.1.

[13] Pursuant to BIA s. 65.1(2), under a BIA proposal, the debtor must disclaim any lease not later than at the time of the filing of the proposal. No such restriction exists for a debtor filing under the CCAA.

[14] *BIA*, s. 60(1) provides that a court may not approve a proposal that does not provide for the payment of preferred claims in priority to unsecured claims.

Attached as Appendix A to the paper is a comprehensive chart that compares the BIA and the CCAA in several key areas, pointing out the differences between the two statutes.[15]

It is therefore important to recognize that there is no "one size fits all" solution. Each situation needs to be considered on its own facts. In many cases, the choice as to whether to proceed under one statute or the other will be clear; in others, the debtor's legal and financial advisers will need to review the facts very carefully before coming to a decision as to which statute ought to be chosen for the restructuring.

LIQUIDATION

The business is beyond help, beyond fixing. Now what? Can you, or should you, simply sell off the assets – hold a fire sale and shut the doors? Most likely not. While it may be appropriate for the company to simply sell its assets, it still needs to think about its creditors. Anyone making decisions on behalf of the company will likely also want to ensure that any actions taken by the company do need lead to exposure for its principals or its officers and directors. If anyone has personally guaranteed the company's debts, this may also come into play. Any sale of the company's assets needs to be conducted in a commercially reasonable manner. Anything less, and the company may be exposed to possible court challenges that it didn't act in accordance with the requirements of the *Personal Property Security Act* ("PPSA").[16]

What does "commercially reasonable" mean? That depends on the circumstances. It may mean selling certain perishable assets more quickly to preserve value, or certain durable assets over a lengthier time frame.[17] It may mean taking particular steps to expose the assets to the market for a certain period of time before accepting any offers. It may also mean engaging knowledgeable professionals who have some expertise in the specific kinds of assets on offer.

To minimize any exposure for the company and its principals, officers and directors, it may also be prudent to commence a legal proceeding to ensure that everything is done on notice to all creditors, or all stakeholders, with full rights of participation, as appropriate. In this way, the company can provide notice of its intention to proceed to court and seek court approval of its actions. This will help insulate against any future challenges arising out of the manner in which the assets were sold.

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[15] Chart prepared by E. Patrick Shea, Gowlings LLP, and used with permission.

[16] *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA"); see s.63 that deals with the sale of collateral.

[17] PPSA, s. 63(3).

A liquidation can proceed in a number of ways. The Ontario *Business Corporations Act* ("OBCA") provides for the appointment of a liquidator who can take steps to liquidate a business.[18] The company could seek the appointment of a liquidator by the court who could then come up with a plan to liquidate the business in an appropriate fashion, and in accordance with the various statutory priorities. If it qualifies, it could also choose to commence an application to wind up its operations under the *Winding Up and Restructuring Act*.[19] The company could simply assign itself into bankruptcy, thereby assigning all of its property and assets to a trustee for the purposes of dividing up the assets in accordance with the priorities set out in the BIA.[20] Or the company could, if available, provide for a liquidation as part of a CCAA plan of arrangement, where such a plan could offer more than what would otherwise be available in a straight bankruptcy.[21] That is, the business is run as part of a wind-down, while under court protection from its creditors and under the watch of a court-appointed monitor.

As each of these options offers its own advantages and disadvantages, and not all businesses will qualify for relief under all of the various statutes, once again, it will be necessary to review these with legal and financial advisers who can point out which option is best depending on the prevailing circumstances.

If the decision whether or not to liquidate the business is that of the creditor, many of the same considerations come into play. Should the creditor simply sell the assets itself or appoint a receiver? Should the creditor seek the appointment of a receiver by the court? Again, the answer will depend upon the many factors at play and the particular circumstances of the creditor and the company.

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[18] *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 193(2).

[19] *Winding Up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 6.

[20] *BIA*, s. 49.

[21] See for example the following cases that provide for the sale of assets in a CCAA proceeding or a straight liquidation of the business: *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319; *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC [Comm. List]). But see also *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781 (CanLII) where the court determined that a receivership would be more appropriate than a proceeding under the CCAA.

RECEIVERSHIPS

The company owes its secured creditor or creditors a lot of money. One or more of them have called their loan. As part of that, the company has been asked to consent to the appointment of a receiver. Or maybe it's been asked to waive the time for the creditor to enforce its security. Should it do so? What is a receiver?

A receiver, as the name suggests, is someone appointed to receive funds that would otherwise be payable to another person. The receiver may also be a receiver and manager, at which point it may manage a business and receive the funds that flow from that business.[22] A receiver can be appointed by a secured creditor, as in the case of a private receivership, or by a court, in which case the person appointed is referred to as a court-appointed receiver.

Private or Court-Appointed Receivers

In the case of a private receiver, the person appointing the receiver must have some legal basis for so doing. Perhaps there is a security agreement that provides the creditor with the power to appoint a receiver in certain circumstances. There may be other instances where a creditor or other proper person can appoint a receiver privately. In such cases though, the appointing person must be cognizant of any statutory requirements surrounding such an appointment. The PPSA provides that the parties to a security agreement may make provision for the appointment of a receiver, or a receiver and manager, along with any powers and obligations of the receiver.[23] The parties may similarly provide for any circumstances in which a court – appointed receiver (or receiver and manager) may be sought.

Wherever a security agreement provides for enforcement, the creditor must nonetheless provide the debtor with a ten-day notice under the BIA advising that, unless the debtor consents in writing to an earlier enforcement, the creditor will have the right to commence enforcement proceedings following the expiry of the ten-day notice period.[24]

In cases where there is no security agreement that provides for the appointment of a receiver, creditors (or other proper persons) may seek the appointment of a receiver, or receiver and manager by the court. Often, this is done under a provincial statute, such as the *Courts of*

[22] See BIA, s.243(1)(a) and (b). Subsection (a) permits the court to appoint a receiver to take possession of all or substantially all of a debtor's property, while subsection (b) permits the court to appoint a receiver to exercise control over the debtor's property and business.

[23] *PPSA,* s. 60.

[24] *BIA,* s. 244.

Justice Act ("CJA") in Ontario.[25] The power of the court to appoint such a receiver is quite broad, as the CJA provides that the court may so appoint a receiver, or receiver and manager "where it appears to a judge of the court to be just or convenient to do so".[26]

The BIA also provides for the right of secured party to seek the appointment of a so-called "national" receiver (to differentiate it from a court-appointed receiver under a provincial statute, who may only act in the province where appointed).[27] The BIA also provides for the appointment of an interim receiver, in circumstances that warrant it.[28] Interim receivers may be important in circumstances where a creditor has demanded repayment of its debt, has issued the appropriate notice under the BIA regarding enforcing its security, and has legitimate concerns that the debtor may take steps to hide or otherwise dispose of the collateral prior to the expiry of the ten-day notice period.[29]

There is a major distinction between the powers of a private receiver and one appointed by the court. In the case of a private appointment, the receiver takes its powers from the appointing document.[30] Thus, it is important when crafting such documents to ensure that the appropriate powers are set out within. The powers of a court-appointed receiver come from the court order that appoints the receiver.[31] Often, in Ontario, the receiver's powers are set out in a template model receivership appointment order that was developed in the Toronto Commercial List.[32] However, it remains for each counsel seeking the appointment of a receiver to justify the appointment of a receiver, along with any powers that the receiver in question

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[25] *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"), s.101; see also Rule 44 of the Ontario *Rules of Civil Procedure* (R.R.O. 1990, Reg, 194) regarding further requirements for the appointment of a receiver under the CJA.

[26] *Ibid*.

[27] *BIA,* s. 248.

[28] *BIA,* s. 47.

[29] See e.g. *Royal Bank v. Applied Energy Systems Inc.* (2009), 2009 CarswellOnt 7797, 61 C.B.R. (5th) 104 (Ont. S.C.J. [Commercial List]).

[30] See e.g. *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.* (2004), 2004 CarswellBC 52, 1 C.B.R. (5th) 1 (B.C. S.C.). ("Coast Capital")

[31] See e.g. *Royal Trust Co. v. Montex Apparel Industries Ltd.* (1972), 17 C.B.R. (N.S.) 45 (Ont. C.A.)

[32] See the current version of the Commercial List template model receivership appointment order, along with the explanatory notes, on the Ontario Superior Court of Justice website, http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/standard-form/.

many require. Black-lined versions of model orders are common and are suggested for counsel seeking the appointment of a receiver before the courts.

Once a receiver is appointed, it will, unless there are other intervening circumstances, serve until its appointment is complete. If appointed by a creditor, the receiver will likely serve until it has collected the monies to which the appointing creditor is entitled, including any costs and fees associated with the appointment. If appointed by the court, the receiver will serve until the court orders otherwise, usually when the receiver's mandate is terminated, also by court order.

As one can imagine, as the powers of private and court-appointed receivers can be very different, so are the responsibilities of such receivers. In the case of private receivers, they are hired by and compensated by the creditor or other party who appoints them. They are thus only responsible to the appointing party when completing their duties, subject to any provisions of the contract or agreement that appointed them.[33] There is no oversight by any court or other supervising body, though a privately-appointed receiver will still need to act in a commercially reasonable manner. On the other hand, in the case of court-appointed receivers, the receiver is appointed by the court, their powers, duties and obligations are set out in the appointment order, and their responsibility is to the court.[34] Court-appointed receivers are court officers, and owe fiduciary duties to all stakeholders in the receivership process, and not just the creditor that sought their appointment.[35]

So, if one of your secured creditors wants to appoint its own private receiver, and asks you to consent, you will want to ensure a number of things. First, you will want to get advice regarding whether the creditor even has the right to appoint a private receiver, and if so, for what purpose, and with what authority and powers. Second, you may wish to consider whether you want to cooperate with the enforcing creditor by consenting to an earlier enforcement of its security. Third, even if it is appropriate that a receiver be appointed, you will want to ensure that the receiver collects whatever monies to which the creditor is entitled, by whatever process is appropriate and permitted under the agreement and by law, and nothing further. You will want to be provided with a proper accounting to ensure the amounts collected by the creditor are indeed correct and that the company has not been charged for any amounts that are appropriate under the debt instrument or the security agreement.

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[33] See *Coast Capital*, supra note 30.

[34] *Ibid*.

[35] *Ibid*.

If the creditor is owed in excess of the value of the assets owned by the debtor, the appointment of a receiver may well result in a complete liquidation of the business. On the other hand, if, after a certain point, the receiver collects all the funds to which the creditor is entitled, it will be required to turn back control of the business, or the assets, or to hand back any funds in its hands to the debtor.

The debtor should ensure that the receiver acts at all times in an appropriate fashion, failing which its actions may be challenged in court, either during or after the completion of its role. The possible reasons for such a challenge are numerous, but may include having acted improperly, or for having sold assets improvidently. This may come in the form of a challenge to the receiver's actions during the enforcement process or as part of a counterclaim in any action for repayment by the creditor.

In any event, it will be up to the debtor to determine whether and how closely it wishes to cooperate with any receiver, be it privately-appointed or court-appointed. This will in large measure depend upon the relationship between the debtor and the creditor, and the debtor's objectives going forward. Is the business salvageable? Are there any circumstances under which the creditor would continue to lend? Are the parties prepared to cooperate to ensure that some form of the business can survive, to their mutual benefit? In the right circumstances, these matters can be negotiated and can form the basis for new agreements that take into account each party's revised expectations.

CONVERSION OR WITHDRAWAL OF INSOLVENCY PROCEEDINGS

While the choice of an insolvency proceeding is an important matter, and will be based on the facts that present themselves at the outset, it is possible, in certain circumstances, to change from one type of proceeding to another, or even to terminate a proceeding where there has been a change in circumstances, such that the particular proceeding chosen is no longer appropriate.

For example, it is not uncommon for a proceeding to be commenced as a restructuring under the BIA by way of the proposal provisions, only to have the debtor find itself in circumstances where it can no longer complete the proposal process within the six months provided for in the BIA. In certain circumstances, to avoid an automatic deemed bankruptcy, the debtor may then decide to seek to convert the proposal proceeding into a CCAA application, by seeking the

court's approval to continue the proceeding as an application under the CCAA from that point forward.[36]

Similarly, a debtor may commence a proceeding under the OBCA in which a liquidator is appointed to liquidate the business, only to realize later on in the process that the liquidation is no longer appropriate or necessary, and that the business ought to be permitted to proceed as it was, prior to the commencement of the liquidation proceeding.[37]

Further, it is possible for a creditor to commence an application under the BIA for a bankruptcy order, on the basis that the debtor is insolvent and has failed to meet liabilities generally as they come due, only to later find that the debtor was not insolvent, and thus seek to withdraw the bankruptcy application.[38] The court will usually permit the application to be withdrawn where the debtor files an affidavit of solvency, attesting to the fact that it is not insolvent and is indeed able to meet its liabilities generally as they come due.[39]

In other words, the commencement of a proceeding in the insolvency world does not always preclude the possibility of using a different proceeding, should it become clear that the other proceeding is, in the circumstances, more appropriate and not inappropriate. However, as with all proceedings, any change from one statutory regime to another will need to be justified to the court and proper evidence put before the court, before one can expect the court to permit the change.

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[36] See for example: *Hemosol Corp. (Re)*, 2007 CanLII 1867 (ON SC (Commercial List)).

[37] See for example the case of The Chapple Family Trust, by its trustees v. Lincoln Park Inc., Ont. S.C. File No. 09-8355-00CL, and the unreported decision of C. Campbell J. of March 11, 2010

[38] See BIA s.43(14), which indicates that an application shall not be withdrawn without leave of the court. Withdrawal of an application will not be taken lightly, as the court will typically guard against the creditor using the bankruptcy process to gain a benefit to the detriment of other creditors. See e.g. *Nurmohamed, Re*, 2006 CanLII 12430 (ON SC (Registrar Nettie)).

[39] Also see *Poly Innovation Inc. (Re)*, 2013 ONSC 2782 (CanLII) (Ont. S.C.J. [Commercial List]), where the court, for similar reasons, permitted the debtor to withdraw its Notice of Intention to Make a Proposal.

DIFFERENT AND DIFFERING INTERESTS

As noted above, and in the chart that is Appendix A to this paper, the various creditor interests that exist, including their respective amounts and relative priorities, will often be the most significant driving force in the debtor's selection of a proceeding.

Some of the different creditor claims that may exist, depending on the type of proceeding, include the following:

- those with court-ordered charges, such as debtor-in-possession (or DIP) lenders, insolvency professionals, or director and officer charges;[40]
- secured lenders and other perfected secured creditors (including those with PMSI claims);
- unperfected secured creditors;
- the Crown (super-priority claims, deemed trust claims, registered claims)[41];
- landlords (preferred claims to rent owing pre- and post-filing)[42];
- employees (super-priority claims for wages, preferred claims for wages, unsecured claims for termination and severance)[43];
- a WEPPA charge;
- pension claimants (super-priority against assets for unpaid contributions, deemed trust claims for special payments owing)[44];
- lien claimants under various statutes (including the *Construction Lien Act* and the *Repairer and Storage Lien Act*)[45];

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[40] *BIA,* ss. 50.6 (interim financing charge), 64.1 (director's charge), and 64.2 (professionals' charge); *CCAA,* ss. 11.2 (interim financing charge), 11.51 (director's charge), and 11.52 (professionals' charge).

[41] See for example, *BIA,* s. 60 (1.1) and *CCAA,* s. 6(3).

[42] *BIA,* s. 136(1)(f).

[43] See *BIA,* ss. 60 (1.3), 81.3, 81.4 and 136(1)(d); *CCAA,* s. 6(5)

[44] See *BIA,* ss. 60 (1.5), 81.5 and 81.6; *CCAA,* s.6(6).

[45] *Construction Lien Act*, R.S.O. 1990, c. C.30, s.21 and Part XI – Priorities; *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25, Parts I (possessory liens) and II (non-possessory liens).

- recent trade suppliers (30 day goods claims)[46]; and,
- critical suppliers (with court-ordered charges against certain assets)[47].

CONCLUSION

As is clear, the company may choose from, or be faced with, a number of possible insolvency proceedings. The question of which proceeding is the most appropriate will be dependent on a myriad of factors. It will ultimately be up to the company, in conjunction with its legal and financial advisers, to carefully examine the facts of the case to determine which of the proceedings available will be most appropriate for it to take. If the decision as to which proceeding to take is that of the secured creditor, once again, it will have to consider many of the same factors to ensure that any proceeding it does take will result in maximum realizations and minimal exposure.

[46] *BIA,* s. 81.1.

[47] *CCAA,* s. 11.4.

COMPARISON OF BIA AND CCAA

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Commencing Proceedings	***Bankruptcy and Insolvency Act***	***Companies' Creditors Arrangement Act***
Commencing Proceedings	**BIA, ss. 50(2), 50.4 and 62** Proceedings are commenced by an administrative filing.	**CCAA, s. 9(1)** Proceedings commenced by application to the Court.
Publication Ban	**N/A**	**CCAA, s. 10(3)** The court has jurisdiction to prohibit the release of the cash flow statements filed by the debtor.

Stay of Proceedings	***Bankruptcy and Insolvency Act***	***Companies' Creditors Arrangement Act***
Grant of Stay	**BIA, ss. 69 and 69.1** Automatic and statutory. There is no discretion with respect to the general scope of the stay	**CCAA, ss. 11 and 11.02** At the discretion of the court, although a stay is typically granted where proceedings are a commenced. Standard or model orders have been developed.
Scope re Secured Creditors	**BIA, s. 69(2)** Stay cannot restrict rights of secured creditors where: (a) the creditor took possession of the debtor's property before an NoI was filed; (b) the creditor issued notice required under s. 244 more than 10 days before the NoI was filed; or (c) the debtor consented to enforcement.	**N/A** There are no prohibitions on the court staying the enforcement rights of secured creditors.

Individual Extensions	**BIA, s. 50.4(9)** The time for filing a proposal, and hence the stay, can only be extended in 45 day blocks.	**N/A** There is no restriction on the length of the stay extensions permitted.
Maximum Stay Period	**BIA, s. 50.4(9)** The insolvent person has a maximum of 6 months to file a proposal.	**N/A** There is no limit on the time within which the debtor must file a plan.
Test for Extension	**BIA, s. 50.4(9)** The court may not extend the time for making a proposal, and hence the stay, unless: (a) the insolvent person has acted, and is acting, in good faith and with due diligence; **(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and** (c) no creditor would be materially prejudiced if the extension being applied for were granted.	**CCAA, s. 11.02(3)** The court may not extend the stay unless (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and (b) the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.
Termination of Reorganization/Stay	**BIA, ss.50(12) and 50.4(11)** The Court can terminate the reorganization where: (a) the debtor has not acted, or is not acting, in good faith and with due diligence, (b) the debtor will not likely be able to make a viable proposal before the expiration of the period in question, or (c) the creditors as a whole	**N/A** There is no statutory test for termination of the stay.

	would be materially prejudiced were the application under this subsection rejected.	

Parties to Agreements	**BIA, s. 65.1(1)** Parties to agreements with the debtor cannot terminate, amend, or claim accelerated payment of forfeiture under those agreements on the basis only that the debtor is insolvent or has commenced proceedings under the BIA.	**CCAA, s. 34(1)** Parties to agreements with the debtor cannot terminate, amend, or claim accelerated payment of forfeiture under those agreements on the basis only that the debtor is insolvent or has commenced proceedings under the CCAA, but the court typically imposes a broader stay that prohibits the exercise of termination right for any reason.
Lessors	**BIA, s. 65.1(2)** Lessors cannot terminate, amend, or claim accelerated payment of forfeiture under a lease on the basis only that the debtor is insolvent or has commenced proceedings under the BIA, or that the debtor has not made lease payments for a period prior to the proceedings being commenced.	**CCAA, ss. 34(2)** Lessors cannot terminate, amend, or claim accelerated payment of forfeiture under a lease on the basis only that the debtor is insolvent or has commenced proceedings under the CCAA, or that the debtor has not made lease payments for a period prior to the proceedings being commenced[48].
Landlord	**BIA, s. 65.2** Leases must be disclaimed prior to or at the time of the filing of a Proposal.	**CCAA, s. 32** No restriction on timing for disclaimer of leases.

[48] The stay contained in an Initial Order made under the CCAA often contains a broader stay on the right to terminate, amend, etc. agreements.

Operations and Restructuring the Debtor's Business	***Bankruptcy and Insolvency Act***	***Companies' Creditors Arrangement Act***
Related Persons[49] (Purchase of Property)	**BIA, s. 65.13(5)** Where the debtor proposes to sell assets to a related person, the court must consider whether: (a) good faith efforts were made to sell the property to persons who are not related to the debtor; and (b) the consideration to be paid by the related person is superior.	**CCAA, s. 36(5)** Where the debtor company proposes to sell assets to a related person, the court must consider whether: (a) good faith efforts were made to sell the property to persons who are not related to the debtor company; and (b) the consideration to be paid by the related person is superior.
Employees (Sale of Property)	**BIA, s. 65.13(8)** The court may not approve the sale of property by the debtor out of the ordinary course of business unless the court is satisfied that: (a) remuneration owing to employees; and (b) unremitted or unpaid pension contributions, can and will be paid.	**CCAA, s. 36(7)** The court may not approve the sale of property by the debtor company out of the ordinary course of business unless the court is satisfied that: (a) remuneration owing to employees; and (b) unremitted or unpaid pension contributions, can and will be paid.
Suppliers	**N/A**	**CCAA, s. 11.4** The court may declare that a supplier of goods or services to the debtor company is "critical". Where a supplier is declared "critical", the court can order the supplier to supply goods or services to the debtor company on terms. The court must provide the "critical" supplier with security in respect of amounts owing for the goods or

[49] The meaning of related persons for the purpose of these provisions includes directors, officers, persons with direct or indirect control and any person related to directors, officers or person with control.

		services that are required to be supplied on terms[50].

The Plan or Proposal	*Bankruptcy and Insolvency Act*	*Companies' Creditors Arrangement Act*
Related Persons	**BIA, s. 54(3)** A related person may vote against, but not in favour of, a proposal.	**CCAA, s. 22(3)** A related person may vote against, but not in favour of, a plan.
Equity Creditors (Classification)	**BIA, s. 54.1** All equity claims must, unless the court orders otherwise, be placed into the same class for the purposes of voting on a proposal.	**CCAA, s. 22.1** All equity claims must, unless the court orders otherwise, be placed into the same class for the purposes of voting on a plan.
Equity Creditors (Voting)	**BIA, s. 54.1** A class of equity claims cannot, unless the court orders otherwise, vote on a proposal.	**CCAA, s. 22.1** A class of equity claims cannot, unless the court orders otherwise, vote on a plan.
Equity Creditors (Subordination)	**BIA, s. 60(1.7)** The court cannot approve a proposal that provides for a distribution to equity claims unless that distribution is made after the claims of all other creditors are paid in full.	**CCAA, s. 6(8)** The court cannot sanction a plan that provides for a distribution to equity claims unless that distribution is made after the claims of all other creditors are paid in full.
Employees (Distribution)	**BIA, ss. 60(1.3), (1.5) and (1.6)** The court may not approve a proposal unless the proposal: (a) provides for the payment of employee remuneration claims	**CCAA, ss. 6(5), (6) and (7)** The court may not sanction a plan unless the plan: (a) provides for the payment of employee remuneration claims

[50] The court has found that it has the jurisdiction to permit the debtor company to pay the pre-filing claim of a critical supplier to induce the supplier to continue to supply to the debtor company.

	immediately after court approval; and (b) unless the relevant parties have entered into an agreement that is approved by the pension regulator, provides for the payment of certain pension-related obligations.	immediately after the plan is sanctioned; and (b) unless the relevant parties have entered into an agreement that is approved by the pension regulator, provides for the payment of certain pension-related obligations.
Employees (Vote)	**BIA, s. 60(1.4)** Employees are not entitled to vote remuneration claims that are required to be paid in full by BIA s. 60(1.3).	**N/A**
Landlords	**BIA, s. 65.2** Where the debtor disclaims a real property lease: (a) the landlord has no claim for accelerated rent; and (b) the proposal must indicate whether the landlord may make a claim for: (i) and amount determined by a formula; or (ii) actual losses or	**N/A**
Secured Creditors	**BIA, s. 50.1(2) – (4)** Where a proposal is made to a secured creditor, the proposal may establish the value of the secured creditor's collateral. The secured creditor can apply to the court to have the proposed value reviewed.	**N/A**
Preferred Claims	**BIA, s. 60(1)** The court cannot approve a proposal that does not provide for the payment of preferred claims and administrative costs in priority to ordinary unsecured	**N/A**

	claims	
Directors	**BIA, s. 50(13)** A proposal may compromise claims against the directors of a debtor company that: (a) arose before the commencement of the proceedings; and (b) relate to obligations of the debtor company for which the directors are, by law, liable. The proposal cannot compromise claims against directors that are: (a) direct contractual obligations of the director(s); or (b) based on allegations of misrepresentation, wrongful conduct or oppressive conduct by the director(s). The court has jurisdiction to declare that a claim against directors cannot be compromised based on whether the compromise of the claim is fair and reasonable.	**CCAA, s. 5.1** A plan may compromise claims against the directors of the debtor company that: (a) arose before the commencement of the proceedings; and (b) relate to obligations of the debtor company for which the directors are, by law, liable. The plan cannot compromise claims against directors that are: (a) direct contractual obligations of the director(s); or (b) based on allegations of misrepresentation, wrongful conduct or oppressive conduct by the director(s). The court has jurisdiction to declare that a claim against directors cannot be compromised based on whether the compromise of the claim is fair and reasonable.
Her Majesty	**BIA, s. 60(1.1)** Unless Her Majesty agrees, the court cannot approve a proposal unless the proposal provides for the payment of employee source deduction claims within 6 months of the approval of the proposal. The court cannot approve a proposal where the debtor is in default in respect of employee-related remittances that became due after the proposal proceeding was commenced.	**CCAA, ss. 6(3) and (4).** Unless Her Majesty agrees, the court cannot sanction a plan unless the plan provides for the payment of employee source deduction claims within 6 months of the sanction of the plan. The court cannot sanction a plan where the debtor company is in default in respect of employee-related remittances that became due after the CCAA proceeding was commenced.
Approval Requirements	**BIA, s. 54**	**CCAA, s. 6**

	All classes of unsecured creditors must vote in favour of the proposal.	Approval of a plan is on a class-by-class basis.
Who is Bound	**BIA, s. 62(2)** Proposal is, once approved by the Court, binding on all unsecured creditors and secured creditors in classes that accepted the proposal.	**CCAA, s. 6** Plan is, once approved by the Court, binding on creditors in classes that accepted the plan.

Meeting to Consider Plan/Proposal	***Bankruptcy and Insolvency Act***	***Companies' Creditors Arrangement Act***
Conduct of Meeting	**BIA, ss. 102 – 114 and 51 - 53** Matters relating to the calling and conduct of the meeting of creditors are prescribed.	**CCAA, s. 4** The Court establishes the procedure by which a meeting of creditors is called to consider the plan and the procedures for the meeting.
Meeting of Shareholders	**N/A**	**CCAA, ss. 4 and 5** The Court may require that there be a meeting of shareholders.

Determining Claims	***Bankruptcy and Insolvency Act***	***Companies' Creditors Arrangement Act***
Claims Procedure	**BIA, ss. 124 - 135** The procedure for filing and determining claims is prescribed.	**N/A** The court establishes the procedure by which claims are established.

Judicial Discretion/Jurisdiction	***Bankruptcy and Insolvency Act***	***Companies' Creditors Arrangement Act***
Discretion	**N/A**	**CCAA, s. 11** The court, on the application of any person interested in the matter, may make any order that it considers appropriate in the circumstances.

Replacement of Trustee/Monitor	***Bankruptcy and Insolvency Act***	***Companies' Creditors Arrangement Act***
Replacement of Trustee/Monitor	**BIA, s. 57.1** The court can replace the trustee only where the Court terminates the reorganization.	**CCAA, 11.7(2)** The court has jurisdiction replace the Monitor at any time.

Failure of Reorganization	***Bankruptcy and Insolvency Act***	***Companies' Creditors Arrangement Act***
Failure of Reorganization	**BIA, ss. 50.4(8), 57 and 61(1)** Failure of proposal proceeding results in bankruptcy	**N/A**

Appeals	***Bankruptcy and Insolvency Act***	***Companies' Creditors Arrangement Act***
As of Right or with Leave	**BIA, s. 193** Appeal to the CA without leave where: (a) the point at issue involves future rights; (b) the order or decision is likely	**CCAA, s. 13** All appeals require leave.

	to affect other cases of a similar nature in the proceedings; or (c) the property involved in the appeal exceeds in value ten thousand dollars.	
Commencing Appeal	**General Rules, s. 31** Appeal must be commenced within 10 days. Appeal filed with Bankruptcy Court	**CCAA, s. 14(2)** Appeal must be commenced within 21 days. Appeal filed in accordance with the applicable Rules of Practice.
Stay Pending Appeal	**BIA, s. 195** Appeal results in automatic stay of Order appealed from.	**N/A**