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 within the jurisdiction of the provinces.

Federal statutes with application throughout the country 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 and deemed trusts and liens relating to employee-related remittances for income taxes, employment insurance and the Canada Pension Plan, that impact on property 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 provincial, 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. To complicate matters a bit more, not all insolvency law in Canada is bankruptcy law. The two principal federal insolvency statutes are the *Bankruptcy and Insolvency Act* (the "BIA") and the *Companies' Creditors Arrangement Act* (the "CCAA"). In a creditor enforcement proceeding, the property of a debtor may also be dealt with by receivership (private or court-supervised) under provincial law or by interim receivership under the BIA.

The most typical types of proceedings or processes to deal with an insolvent debtor are (i) a reorganization ("plan") under the CCAA; (ii) a reorganization ("proposal") under the

---

[1] Artificial statutory trusts and most statutory liens created by provincial legislation are rendered ineffective in a formal bankruptcy under the BIA (the Canadian equivalent of Chapter 7 of the Bankruptcy Code). The CCAA, however, is not bankruptcy legislation.

BIA; (iii) liquidation ("bankruptcy") under the BIA; and (iv) private or court-supervised receivership, or interim 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 a brief description of restructuring proceedings under the CCAA, including some comparisons of CCAA law and practice 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 currently is the primary statute used for the restructuring of larger corporations and corporate enterprises. It is also the statute of preference for more complicated restructurings where it is anticipated that the court may be called upon to make orders and deal with circumstances that are novel and complex. While it has been called the Canadian equivalent of Chapter 11 of the Bankruptcy Code, there are material differences in legislative approach and practice.

The current version of the CCAA is only 22 sections long. Unlike the Bankruptcy Code, the CCAA does not contain a detailed statutory framework, causing many to refer to it as "Chapter 11 without rules". A growing body of jurisprudence has refined and defined the application of the CCAA's very general provisions and created certainty regarding how it will be applied. The breadth and scope of orders made by Canadian courts to date demonstrate the broad discretion they have exercised in interpreting the CCAA and their proven willingness to adapt and expand its application to deal with the uniqueness of an individual case.

Typically, a CCAA filing is initiated by the debtor. In 2007, Ontario had the experience of a significant customer (a Tier I automotive supplier) of a debtor supplier commencing a CCAA application in respect of the debtor (a Tier II automotive supplier). This action was taken by the customer as a defensive measure when the debtor revealed its imminent intention to file a bankruptcy assignment (the Canadian equivalent of a voluntary proceeding under Chapter 7 of the Bankruptcy Code). The goal of the customer/applicant was to keep the debtor's business operating for a period of time in order to maintain the supply of a component for an automotive part being produced by the customer/applicant for OEMs around the world. It was represented to the Canadian court that the non-availability of the component in question would prevent the customer/applicant from

manufacturing the part it supplied to its OEM customers, thereby triggering the potential shutdown of the assembly lines of multiple OEMs.

The CCAA is a debtor-in-possession ("DIP") regime. The court may establish restrictions in relation to the debtor's activities during the restructuring, including regarding its ability to conduct asset sales and engage in other activities out of the ordinary course of its business. The CCAA does not contain provisions that restrict the debtor's use of cash collateral or the sale, lease or use of other property held as security during the restructuring. 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.

A monitor is appointed in every CCAA case as an officer of the court. The monitor has responsibility for monitoring and reporting to the court on the business and financial affairs of the debtor. The court will typically mandate the monitor to carry out other functions. The monitor is usually an accounting firm that is also qualified to act as a trustee in bankruptcy under the BIA. While not required, it is not unusual for the same judge to supervise a CCAA case from its inception to conclusion.

Statutory Requirements for Filing under the CCAA

The CCAA applies only to insolvent companies (and not to individuals, partnerships or non-corporate entities).[2] 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 contents of the initial order are becoming fairly similar in nature. Some provinces, such as Ontario, have developed a model short form (first day) and long form (made with greater notice) order.

The initial order (as made or sometimes as expanded in the early days of the filing of the case) typically contains a broad stay of proceedings and provides for the appointment by the court of the monitor, often approves interim financing arrangements and related security and centralized cash management systems, approves of the debtor continuing to make ordinary course payments, provides charges in favour of the monitor and various professional advisors, approves indemnities and charges in favour of directors and officers, and gives the debtor broad powers to restructure its business, including by downsizing facilities and employees, selling non-core assets and terminating or ceasing to perform executory contracts.

In the majority of restructuring cases the initial order is not accompanied by the filing of a plan of compromise or arrangement, 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" plan negotiated

[2] As noted later, there are insolvency reforms pending that will also permit certain income trusts to be restructured under the CCAA.

prior to the filing. While the initial stay of proceeding cannot exceed 30 days, it can be extended, indefinitely, by further court orders.

Unless the court orders otherwise, the monitor is obliged to send a copy of the initial order to every known creditor having a claim of more than $250. There is no requirement for publication of a creditors' list. The initial application under the CCAA often is made with notice only to existing secured creditors and few, if any, unsecured creditors. There is currently no requirement for a list of creditors to be filed.

Stay of Proceedings

Typically, the stay of proceedings provided for in the initial order is 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. No stay can 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 events relevant to the case, such as a sales process. 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. Very often the monitor's role is expanded to disseminating information to creditors, maintaining a website where copies of court proceedings and its reports are posted (which is useful as there is currently no electronic court database containing this information), actively participating or supervising a sales process, assisting the debtor with the development of a plan and related negotiations with stakeholders, supervising and assisting with a claims filing and resolution process, and the calling and administering of meeting of creditors to vote on a plan.

Creditors Committees

The CCAA contains no provision 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 only in rare cases have such committees received funding from the debtor for their professional advisors. Representative counsel has been appointed by courts in a few cases to represent the interests or viewpoints of groups of creditors in circumstances where the formal representation of such groups was considered important to the restructuring.

In many cases, particularly in relation to bondholder groups, it is becoming common for ad hoc committees to be informally constituted and for the legal advisors for such ad hoc committees to be permitted to actively participate in the CCAA proceeding, including at court hearings. Similarly, many Canadian courts have provided 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.

Interim ("DIP") Financing Orders in CCAA Proceedings

A filing under the CCAA does not create a new estate. As such, the security of existing creditors will continue to be effective in relation to post-filing property and assets. It is the norm in Canada for debtors to have granted general security to its lenders, such that all or most of its property and assets are encumbered at the time of filing.

The initial CCAA order imposes a broad stay of proceedings that in most cases stays existing secured creditors. Without any statutory restriction on the use of existing cash collateral or other working capital assets, and in the absence of a statutory adequate protection concept, this means that the debtor is very often permitted to make use of such assets to continue operating. Nothing prevents a 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.

Canadian courts are still grappling with the concept of whether a party providing post-filing financing is entitled to receive security that can rank ahead or "prime" the security of an existing creditor. This is made more difficult because there is no concept of adequate protection contained in the CCAA and no statutory requirement on the part of the debtor to demonstrate that no other options are available or that the existing secured creditor's position will not be worsened if a priming lien is granted.

For many reasons, including that the existing lender may not wish to give up control to or find its existing security primed in favour of a new interim lender, the existing lender may negotiate to be the DIP lender. Where this does not occur or the debtor wishes to make other arrangements, Canadian courts have authorized interim financing in favour of a new lender. While far from automatic, in some cases the courts have also granted the new DIP lender a priming lien. The willingness of courts to grant priming liens, and the evidentiary support they will require and protections they will impose as a pre-condition to granting such liens, are areas that continue to evolve.

Claims and Classification

The CCAA does provide legislative guidance regarding how creditors are to be classified under the plan. Jurisprudence has developed that provides some assistance, such that unsecured creditors are usually classified separately from secured creditors and groups of secured creditors may be separated into classes having similar interests.

Contract Rejection

There is no express statutory authority for accepting, rejecting or disclaiming executory contracts currently contained within the CCAA. Most CCAA filings contemplate some form of "downsizing". Orders made in the proceeding will very often permit the debtor to stop performing its obligations under contracts or for contracts to be disclaimed, repudiated or terminated, with the resulting claims being dealt with under the plan in the same manner as would be a pre-filing claim.

Contract Assumption and Assignment

There is no express authority for the court in a CCAA proceeding to order the assignment of a contract that cannot be assigned without the non-debtor party's consent, or for the payment of cure costs in relation to the assumption and/or assignment of contracts.

Creditor Remedies

A CCAA filing effectively stays all creditor remedies during the restructuring process, unless the initial order, or a subsequent order, specifically lifts the stay in relation to such creditor. There are limited exceptions for eligible financial contracts (reviewed below). The primary remedies of an objecting creditor are to seek to terminate the stay, 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 in relation to it, on the grounds of hardship to that creditor given its own financial position.

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.

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. 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.

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 eligible financial contract ("EFC") or staying the enforcement by a counterparty of security over financial collateral held as security in relation to an EFC. By virtue of recent amendments, a transfer, charge or payment made in connection with financial collateral will not be presumed to be a fraudulent preference under the BIA. This amendment is also significant for restructurings under the CCAA. When the Insolvency Reforms (defined below) come into effect, they will for the first time introduce provisions permitting the challenge of fraudulent preferences under the CCAA by incorporating the BIA provisions into the CCAA.

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.

Asset Sales

Canadian courts during the course of a CCAA proceeding often approve of asset sales out of the ordinary course of business prior to any plan being proposed and even when seems possible that no plan will ever be filed. Under the CCAA, courts routinely make orders conveying title to the purchased assets free and clear of liens and encumbrances, commonly referred to as vesting orders.

A Canadian sales process is typically very different from a section 363 sale process. Stalking horse bids, break-up fees and other bid protections, detailed bidding and sale procedures (in the form commonly used in a Chapter 11 proceeding) and auctions are not

the norm. Purchase agreements recommended to the court for approval are often not made public and prospective purchasers are rarely given the opportunity to submit a higher or better offer once a successful bidder has been recommended to the court.

A Canadian-style sale transaction may proceed quickly through the following stages: (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); (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 any auction or ability of a third party bidder to make a higher or better offer. Canadian courts are reluctant to override a transaction recommended by the debtor and monitor, if the sales process followed is found to have fairness and integrity.

A sales process conducted under section 363 of the Bankruptcy Code has more formalized bidding and sale procedures, greater openness and transparency, and far less secrecy than does a typical Canadian sales process. 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 U.S.-styled bidding and sales procedures. This is also sometimes the case in a purely domestic Canadian proceeding where the universe of bidders is expected to include U.S. bidders who may be more favourably disposed to participating if the process is one with which they are comfortable.

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 of number representing two-thirds in dollar value of the creditors, or claims 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 CCAA plan is approved. 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, however, to refuse to sanction a plan that has been endorsed by the creditors.

Corporate Plans of Arrangements

Changes to the equity structure of the debtor can be made under the arrangement provisions of the applicable provincial or federal corporations' law statute. This can be and is sometimes done in conjunction with a restructuring under the CCAA. It may be possible to effect this type of "reorganization" by court order as part of a CCAA

restructuring and without there being a meeting of shareholders. In other cases, a separate companion application may be brought to approve of a corporate plan of arrangement. The court, as part of such an application, typically will require a meeting of shareholders to approve of the corporate plan of arrangement. Following shareholder approval, the court would also need to approve of the proposed corporate arrangement.

Recognition of Foreign Insolvency Proceedings

Currently, section 18.6 of the CCAA is the primary means for a Chapter 11 debtor to seek a comprehensive stay of proceedings in Canada without commencing a parallel Canadian restructuring proceeding. Examples of proceedings initiated under section 18.6 include: DURA Automotive, Allied Holdings, Foamex, Kaiser Aluminum, Heating Oil Partners, Pliant Corporation, Core-Mark International, Androscoggin Energy, United Airlines, PSINet and Babcock & Wilcox.

These cases demonstrate that a section 18.6 proceeding can serve as a mechanism for recognizing and implementing orders made in a Chapter 11 case, including stays of proceeding, claims processes, bidding and sale processes, DIP financing and security, plan confirmation and injunctive relief to implement a plan. Canadian courts generally look to ensure that orders for which recognition are requested are fair and reasonable having regard to the rights of creditors in Canada or, if not, are modified to be so.

Reforms to the CCAA enacted but not yet in force will introduce provisions for the recognition of foreign insolvency proceedings that are similar to Chapter 15 of the Bankruptcy Code.

Material Differences Between CCAA (in its current form) and Chapter 11

Among the meaningful differences that currently exist between the CCAA and Chapter 11 are that under the CCAA there is no:

- New estate created upon the initiation of the proceeding.
- Concept of adequate protection.
- Restriction on the use and disposition by a debtor of cash collateral or the use, sale or lease of other property held as security.
- Provision precluding pre-filing security from encumbering after-acquired property.
- Statutory authority to grant priority or “priming” liens for loans advanced to the debtor during the restructuring.

- 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.

- Administrative expense claims for persons who supply goods and services post-filing.

- Provisions (with some restricted exceptions) for the acceptance, rejection or assignment of executory contracts, including collective bargaining agreements, or statutory requirement for the payment of "cure costs" in relation to executory contracts being assigned and/or assumed.

- Statutory cram-down mechanism.

- Absolute priorities rule.

- Subordination of claims of equity holders or a statutory authority to subordinate claims based on equitable subordination (itself a doctrine not embraced by Canadian courts).

In practice, some of these legislative differences have been bridged by courts relying on the discretion given to them under, or the use of inherent jurisdiction to fill in "gaps" in or put "bones on the flesh of', the CCAA. The result is that in many respects CCAA practice is becoming more closely aligned with that experienced in a Chapter 11 restructuring.

Another significant difference in Canadian restructurings, is that in Canada there is no equivalent to *The Employee Retirement Income Security Act* of 1974 (ERISA) in relation to the ability of an insolvent employer to terminate an underfunded defined benefit pension plan.

Canadian Insolvency Law Reform

Canada has enacted reforms to its bankruptcy, insolvency and restructuring legislation, which legislation is not yet in force. When they become effective, these reforms (the "Insolvency Reforms") will more closely align the laws of the two jurisdictions (in a distinctively Canadian way that in many respects is very different than under the Bankruptcy Code). The Insolvency Reforms include provisions regarding:

- Public availability of creditors lists.

- DIP financing and priming liens.

- Restricting the operation of *ipso facto* clauses in contracts to which the restructuring debtor is a party.

- Assumption, rejection and assignment of executory contracts.
- Protection for intellectual property licensees.
- Asset sales and orders vesting title in assets free and clear of existing liens.
- Protection for lessors of aircraft objects.
- Challenging of preferences and transactions at undervalue in a CCAA proceeding.
- Claims of equity holders in relation to their equity interests being treated as equity.
- The recognition of foreign insolvency proceedings based on the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency 1997 (the "Model Law").

Insolvency Reform Provisions Unique to Canada

Pursuant to the Insolvency Reforms, the CCAA will now apply to income trusts with assets in Canada whose units are traded on a prescribed stock exchange. The Insolvency Reforms include protections for wage earners. In the context of restructurings, they give power to the court to remove directors.

Significantly, the Insolvency Reforms will broaden the nature and extent of legislatively-sanctioned charges that may be granted by the supervising court, many of which may be given priority over an existing security interest. Today, priming charges are very often given in favour of the debtor's professional advisors, the monitor and its advisors, and directors and officers. Under the Insolvency Reforms, Canadian courts will have express jurisdiction to grant the following charges:

- Administration charges in favour of estate professionals, such as the monitor and its advisors, debtor's counsel and other "interested" persons.
- Charges to secure indemnities to directors and officers.
- Charges for prescribed amounts of wages and vacation pay owing to employees.
- Charges for unpaid regular pension contributions, but likely not special contributions relating to unfunded liabilities.
- Charges in favor of persons mandated by the court to supply goods and services post-filing relating only to their post-filing exposure.
- Charges in favour of persons providing DIP financing.

Even though such charges may prime existing secured creditors, the Insolvency Reforms do not include an adequate protection concept or contain provisions providing for marshalling. The lack of legislation means that courts interpreting these provisions will be called upon to develop guidelines to balance the interest of those benefiting from such charges against other affected parties, particularly existing secured creditors. In Canada, there are also provincial and federal laws that may also impose statutory liens and trusts that can rank ahead of the claims of secured creditors in a restructuring.

A Canadian version of Chapter 15 of the Bankruptcy Code, modeled on, but not identical to, the Model Law is included in the Insolvency Reforms. Under the recognition of foreign insolvency proceeding provisions contained in the Insolvency Reforms, the definition of a foreign nonmain proceeding does not require the debtor to have an establishment in the jurisdiction in which the foreign proceeding is pending. Also, the ability of a Canadian court to refuse to recognize a foreign order is different. The new provisions will not prohibit the court from refusing to do something that would be contrary to public policy, as contrasted with section 1506 of Chapter 15 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). Notwithstanding the differences in wording between Chapter 15 and the Insolvency Reforms, in light of the established record of cooperation between courts in Canada and the U.S., we expect that Canadian courts will continue to facilitate the recognition of foreign insolvency proceedings in the same flexible manner as has been done to date under section 18.6 of the CCAA.

Co-ordinating Cross-Border Proceedings

Today, more than ever, cross-border proceedings involving affiliated debtors within a corporate group are becoming the norm. 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 be in the nature of main cases filed in both jurisdictions. Others may involve a foreign main proceeding filed in one jurisdiction, together with an ancillary recognition proceeding being filed in the other. Which is the best structure will depend on the circumstances and legal challenges unique to each restructuring. Procedural cross-border protocols dealing with the co-ordination and harmonization of cross-border proceedings have become more common. Professional advisors with experience in cross-border restructurings can provide valuable assistance in determining how best initially to structure a cross-border restructuring process and subsequently to deal with issues relevant to the administration of each of the cases, such as assets sales, claims processes and whether to file one or more plans.

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 only a few days' 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.

Canada remains a challenging jurisdiction within which to accomplish the restructuring of a business burdened by uncompetitive labour costs arising from a unionized work force. Canadian insolvency legislation does not provide a mechanism for the rejection of an unprofitable collective bargaining agreement. Nor can an insolvent Canadian corporation rely on ERISA-like legislation to effect the termination of an economically oppressive defined benefit pension plan. Those that purchase assets of an operating business also face the risk of inheriting significant successor employer obligations.

The absence of a formal committee of unsecured creditors currently means that unsecured creditors generally do not have the same "seat" at the table as secured creditors and other stakeholders. Changes being introduced through the Insolvency Reforms, however, will require publication of a creditors list and permit charges to be granted in favour of "interested" parties. These provisions may facilitate the formation and funding of creditor committees in CCAA cases in appropriate instances. The Insolvency Reforms will also introduce provisions dealing with preferences and transactions at undervalue, where no such remedies were previously available to creditors in a CCAA proceeding.

The influence of US-administered funds as lenders, creditors and equity participants in Canadian cases has already been felt and is growing. These influences have led to increased litigation, a trend that is likely to continue when additional tools, such as the ability to pursue preference claims under the CCAA, are added to the arsenal of players who might already have a combative tendency. Canadian restructuring law and practice is far from static and continues to evolve to meet the exigencies inherent in the restructuring of domestic and cross-border businesses.

For more information on Canadian restructuring law and practice and cross-border proceedings, please contact **Sheryl E. Seigel**, chair of the Business Restructuring & Insolvency Group, directly at 416-307-4063 or sseigel@langmichener.ca.

Business Restructuring & Insolvency

© 2008 Lang Michener LLP. May be reproduced with acknowledgement.

Toronto
Brookfield Place
181 Bay Street, Suite 2500
P.O. Box 747
Toronto, ON M5J 2T7
Tel.: 416-360-8600
Fax.: 416-365-1719

Vancouver
1500 Royal Centre
1055 West Georgia Street
P.O. Box 11117
Vancouver, BC V6E 4N7
Tel.: 604-689-9111
Fax.: 604-685-7084

Ottawa
Suite 300
50 O'Connor Street
Ottawa, ON K1P 6L2
Tel.: 613-232-7171
Fax.: 613-231-3191

Lang Michener LLP
Lawyers – Patent & Trade Mark Agents