

Companies` Creditors Arrangement Act

CCAA - Introduction

- Comparison with Bankruptcy & Insolvency Act
- Who it affects
- Court approval
- Creditors vote by class
- Majority in number and two thirds in value
- Initial stay – 30 days maximum
- Claims against directors compromised

CCAA - Introduction

- Burden of proof on applicant
- Good faith and due diligence test
- Claims of Crown stayed
- Terminating contracts
- Sale of substantial assets prior to consideration of plan by creditors
- DIP financing and priority for professional fees
- Monitor

CCAA - Introduction

- Interim receiver
- Restructuring Officer
- Claims barring procedure

Purpose of CCAA

- Compromise or arrangement of creditor claims by an insolvent company without going bankrupt
- Originally designed for companies with significant debt
- Initial stay period usually 30 days
- Act came into existence in 1933
- Act is very short – 22 sections as opposed to 275 sections under the BIA

Purpose of CCAA

- Applies to any company incorporated under laws of Canada or in Province
- Or any company having assets or doing business in Canada even if incorporated outside Canada
- Does not apply to Banks, Railways, Telegraph companies and Trust companies
- These companies are covered by the Winding Up and Restructuring Act.
- CCAA is a Federal statute but matters are heard in the Provincial Court (The Supreme Court of British Columbia)

CCAA Specifics

- Company has to have debts of at least \$5 million
- Company can apply for protection under CCAA without notice to any creditor
- Filing provides an automatic Stay of Proceedings against all creditors (secured, unsecured, government) of up to 30 days
- Because of the very narrow scope of the statute significant case law has developed and CCAA has become a very creative statute

CCAA Specifics

- Enables companies to:
 1. Reorganize their affairs
 2. Restructure their debts
 3. Renegotiate and terminate contracts
 4. Obtain additional financing ranking as a first charge over all secured creditors
- Known as an arena of judge-made law, the initial CCAA order and subsequent restructuring can be as simple or complicated as the individual drafting the order and the plan wants it to be

CCAA – Sanctioning of Plan by Court

- Majority of creditors representing majority in number and 2/3 in value of creditors of a particular class voting on the plan
- May be sanctioned by the Court
- Sanctioning a plan by the Court is not automatic; generally the Court considers whether a plan is fair and reasonable (this does not mean equal)

CCAA – Sanctioning of Plan by Court

- Factors considered in determining whether plan is fair and reasonable:
 1. Composition of unsecured vote
 2. Result is better than a liquidation
 3. There are no alternatives
 4. Any creditors being oppressed
 5. The public interest
- On application the onus is on the company to satisfy the Court that it has acted and is acting in good faith and with due diligence

CCAA Uses and Abuses

While statute provides great opportunities to assist insolvent companies in reorganization, there are several instances of abuse, e.g.

- Hopeless cases ('doomed to failure')
- Lack of business enterprise
- Inordinate professional fees incurred
- Inadequate protection for existing creditors or even new creditors

CCAA Sale of substantial assets prior to voting on a plan

- Court has approved of sale of the bulk of the debtor's assets prior to a plan being presented to the creditors, e.g.
 - Canadian Red Cross
 - Skydome Corporation
 - Consumer Packaging

CCAA – DIP Financing and Admin Charge

- Should be subject to what is reasonably necessary to meet debtor's urgent needs while plan is being developed
- Must be cogent evidence that the benefit of financing clearly outweighs the prejudice to the lenders whose security is being subordinated.

Writers involvement in Recent Filings

Company	Monitor	Trustee/ Receiver	Business Review
Skeena Cellulose I	✓		✓
Skeena Cellulose II		✓	
New Skeena Forest Products	✓		
Jackpine Forest Products	✓		✓
Houweling Nurseries	✓		✓
Garibaldi Alpen Resorts	✓		
Points North Group	✓		✓
Canadian Imperial Ventures	✓		
Hester Creek Winery		✓	✓
Redekop Properties		✓	
United Used Auto & Truck		✓	
360 Networks (audit client)			

The Role of the Monitor

- Independence
- Statutory Duties
- Reports
- Material Adverse Change
- Cash Flow Projections
- Cost Reductions/Sale Approvals
- Refinancing/Restructuring
- Post Filing Payments
- Liaison with Stakeholders
- Recent Cases
- Supermonitor

Independence of the Monitor

- Who can be the Monitor?
- Who should be the Monitor?
 - Only required since 1997
 - Auditors have client knowledge with potential conflicts
 - Auditors cannot be a trustee
- Impartiality and Independence
 - Impartiality and independence as the Court may direct
 - Not an advocate for Company
 - Sometimes act as “financial advisor”

Independence of the Monitor

- Eyes and ears of the Court
 - - Reliance on information provided by Monitor
- Ensuring Company compliance with Order
- Reporting to secured creditors
 - - Sometimes sell assets with secured creditor approval
- Meetings with stakeholders
 - - Creditors often have little confidence and trust interest in management
- Who pays?

Statutory Duties

- **Section 11.7 (3) of the Act**
 - File Reports**
 - (i) Per Order**
 - (ii) Material Adverse Change**
 - (iii) Prior to meetings**
- **Court Order Requirements**
 - **Initial Order**
 - **Comeback Order**
 - **Administration Order**
- **Typical CCAA Order – duties of Monitor**
- **Flexibility of the statute – “inherent jurisdiction of the Court” lends to potentially broad nature of role of Monitor**

Monitor Reports to Court

- Purpose
- Prescribed Information
- Frequency
- Audience
- Structure / Schedules
- Asset values
- Confidentiality issues
- Web Sites
- Typical Report layout
- Key: Independent Assessment

Material Adverse Change

- In projected cash flow
- In financial circumstances
- In operations
- In restructuring process
- In economic factors / outlook
- How material?
- How adverse?
- How common?
 - Royal Oak and Canada 3000 but reports are rare

Cash Flow Projections

- Format - what good is it without an income statement and a balance sheet?
- Period covered – their choice: weekly or monthly
- Detail - as much or as little as they feel like
- Certification– you don't really think we've audited this do you?
- Assumptions – are they too easily achieved?
- Whose Projections are they anyway?
- Is anyone holding Management's feet to the fire?

Cost Reductions / Sale Approvals

- Terms of Order / Mandate
- Who decides - not usually the party paying
- Burn rate – burn, baby, burn
- Claims arising post filing (severance, pensions, etc.)
- Sale of redundant assets – who needs DIP?
- Sale of divisions – cash, cash, cash at fire sale prices
- Cash realised will finance extensions
- Virtually impossible to obtain Court approval for a major transaction without hiring the Monitor, prior approval

Management Assessments

- Mandate - no-one wants to go there
- Can the team that got us here really lead us to the Promised Land?
- Chief Restructuring Officer
- Find a Report with one, if you can

Refinancing / Restructuring

- Terms of Order
- Forms of assistance by Monitor
- Reporting
- How long does it take to put a Plan together?
- Doomed to Failure concept

Post Filing Payments

- Terms of Order
- Exposure for suppliers – but many give credit anyway
- Deposits / Trust Fund – a rare animal
- Letter to suppliers - YOYO

Liaison with Stakeholders

- Petitioner
- Secured Creditors
- Trade Creditors
- Post-Filing Suppliers
- Employees/Unions
- Lessors
- Municipalities
- Government Departments/Agencies
- First Nations
- Media

Recent Court Decisions

- United Used Auto – keep the secured at bay
- Hester Creek – less than full disclosure in Petition
- Hickman Equipment - affirmed Auditor may act as Monitor
- Skeena – Plan can terminate contracts
- Broad and liberal interpretation a recurring theme
- Inherent jurisdiction of the Court vs. the Act

Supermonitor

Monitor is now playing far broader role than the original role of watchdog. Examples of expanded role include

1. Implementation of initial order
2. Financial advisor
3. Facilitator-mediator
4. Manager
5. Receiver

Supermonitor

- The potential broad nature of the role confuses the conflict analysis.
- Courts have concluded Monitor must act independently and consider the interests of the petitioners and the creditors.
- The Monitor must be an agent of the Court, assist the Court and be independent of any parties.
- The more experienced the role the more active the Monitor becomes in the proceedings.

Report of Senate Committee November 2003

- Consolidation of insolvency statutes - No
- DIP funding

Involvement - 2 key lessons

Skeena I	1. Stakeholders views	2 Court`s eyes/ears
Skeena II	1. Evergreen contracts	2. Monitor assigns
Skeena III	1. Twin Track	2. Whose DIP
Houwelings	1. Strategic Direction	2. Monitor arranging sales
Jackpine	1. Conflict	2. Replacement of Monitor
Hester Creek	1. Stay of the Stay	2. Monitor`s Report

Summary of CCAA

- Beware
- Be Concerned
- Be Involved
- Time consuming and expensive process
- Courts generally on side of Debtor
- Often difficult to overturn, especially where jobs at stake, even if shutdown (Skeena)
- Good counsel from Day 1 a must
- Judge shopping
- Monitor`s Reports critical
- Abuses can outweigh benefits
- \$5 million limit too low
- Evolving Role of Monitor