

Comparison of Canada and U.S. Restructuring Proceedings

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Comparison of Canada and U.S. Restructuring Proceedings

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1. Statutes	<p><i>Companies Creditors' Arrangement Act</i> (“CCAA”): for larger cases; more flexible.</p> <p><i>Bankruptcy and Insolvency Act</i> (“BIA”): more rules; applies to both individuals and corporations.</p> <p><i>Winding-up and Restructuring Act</i>: financial institutions and insurance companies.</p> <p><i>Farm Debt Mediation Act</i>: for insolvent farmers.</p>	<p><i>United States Bankruptcy Code – Chapter 11</i> (the “Code”)</p>
2. Commencing Proceedings - Jurisdiction and Venue	<p>CCAA: Application to court, usually in province of debtor’s head office.</p> <p>BIA: Trustee files Proposal (or Notice of Intention to make a Proposal) with the Official Receiver in the “locality of the debtor”.</p>	<p>Under the Code a bankruptcy case may be commenced by filing a petition with the appropriate Bankruptcy Court in the federal district in which the debtor’s domicile (i.e.: place of incorporation), residence, principal place of business in the U.S. or principal U.S. assets are located.</p>
3. Notice	<p>CCAA: In practice, very short notice given to major secured parties and shareholders; Initial order includes “come back” clause.</p> <p>BIA: advance notice period to file a Notice of Intention to make a Proposal.</p>	<p>No advance notice period.</p>
4. Prerequisites	<p>Under both the CCAA and the BIA the debtor must be insolvent.</p> <p>The CCAA requires that the debtor have a minimum of CDN \$5,000,000 in liabilities.</p>	<p>Insolvency is not a prerequisite to filing a petition. However, a debtor may seek to dismiss an involuntary case on grounds of solvency. Partnerships and corporations are eligible for relief under the Code but</p>

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	CCAA application must be accompanied by cash-flow statements and financial statements	municipalities, stockbrokers and commodity brokers, banks, insurance companies and other financial institutions are not.
5. Who May Commence	Generally, the debtor. Otherwise, a receiver, liquidator, bankrupt or trustee in bankruptcy may file a Proposal under BIA. A creditor may also commence CCAA proceedings.	A voluntary case is commenced by an entity eligible to be a debtor under the Code. An involuntary case is commenced under Chapters 7 and 11, generally, by at least three creditors holding non-contingent, undisputed, unsecured claims of a minimum threshold amount.
6. Stay of Proceedings – Scope/Effect of Stay	CCAA: within the discretion of the Court very broad scope of stay. BIA: automatic statutory stay of proceedings.	Automatic stay upon the filing of the petition generally prohibits all activity against the debtor relating to collection of claims, subject to statutory and court-approved exceptions.
7. Stay of Proceedings – Length of Stay	Initial stay must not exceed 30 days under either CCAA or BIA. BIA: extensions by Court order of 45 days to a maximum total stay period of 6 months. Debtor must be acting in good faith, with due diligence, and likely to make a viable Proposal. CCAA: length of stay extension is within the discretion of the Court.	The stay remains in effect for the duration of the case or until the property is no longer property of the estate.
8. Relief from Stay and early Termination of Cases	Court may lift the stay if a creditor is materially prejudiced by it, or when there is no hope that the debtor will be able to make a viable Plan or Proposal.	The Court may terminate, annul, modify, or condition the stay upon notice and hearing for cause (e.g., lack of adequate protection of the applicant's interest in property or if the property is not necessary to an

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		effective reorganization and the debtor has no equity in the property).
9. Control of Property	Debtor remains in possession of its property and can carry on business. Creditors can seek court appointment of interim receiver to preserve, protect or take control of debtor's assets temporarily.	Upon filing, Debtor in Possession ("DIP") is created as separate entity. The DIP can carry on business and typically remains in possession of its property. Transactions outside-of-ordinary-course generally requires notice, a hearing, and Court approval.
10. Supervision of Debtor	CCAA: the Court will appoint a "Monitor" who will report to the Court and the creditors on the debtor's financial affairs. BIA: a trustee is appointed to monitor the affairs of the debtor and report to the Court.	If appointed, a trustee supervises and administers the estate and the bankruptcy case in the debtor's place, helping to ensure equitable and competent administration and safeguarding estate property and interests therein. Although a U.S. trustee serves an administrative function in each case, a trustee is only appointed upon request for cause. Otherwise, the debtor remains in possession and administers the estate.
11. Creditors' Committees and Representation	No statutory provision for creditors' committees. Courts have occasionally ordered consultative creditors' committees to oversee the debtor's business. Occasionally Court will order appointment of representative counsel to represent classes of claimants.	The U.S. trustee must appoint at least one committee of creditors holding unsecured claims to confer with the trustee or debtor-in possession about the administration of the estate, participate in plan formulation, investigate the conduct and financial condition of the debtor, and generally represent the interests of constituent creditors.
12. Debtor-in-Possession Financing	Both the CCAA and BIA allow debtors to borrow funds required to restructure and to secure such loans with	The debtor may incur unsecured and secured post-petition financing under appropriate circumstances. It

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	priority charges on their assets with Court approval. The Court must consider the duration of the proceedings, and the debtor's property and management, but also whether the debtor has the confidence of its lenders, and whether any creditor would be materially prejudiced as a result of the security to be granted.	may obtain unsecured debt in the ordinary course of its business, which is allowable as an administrative expense. If the debtor demonstrates a need for additional credit but is unable to obtain it on an unsecured basis the Court may approve credit that is secured by a lien senior or equal to an existing lien on estate property.
13. Restructuring Costs	The CCAA and BIA both provide for a Court-ordered charge on a debtor's property to secure payment of professional costs of financial, legal and other experts engaged in the restructuring process.	Various administrative expenses, including those incurred by the debtor or trustee for administering the estate, have first priority in a corporate reorganization. The Code provides for the interim payment of such expenses, subject to availability of funds and plan confirmation.
14. Treatment of Suppliers and other Pre-Filing Contracts	Clauses in agreements purporting to alter or terminate contracts for insolvency are unenforceable, subject to stay. Although generally creditors cannot be required to advance further credit, under the CCAA the Court can order critical supplier(s) to supply, secured by a charge in the supplier(s) favour. Unpaid suppliers' rights to repossess are suspended under BIA.	<i>Ipso facto</i> clauses, which are provisions in contracts permitting the non-debtor party to declare default or to terminate or modify the contract on account of a bankruptcy filing, are generally unenforceable in bankruptcy. Except with respect to executory contracts, creditors cannot be required to advance further credit after the stay is in place.
15. Treatment of Leases	The Debtor can disclaim real property leases with 30 days notice where essential to the debtor's ability to make a viable Proposal.	Leases, and other executory contracts, are generally not terminable by the non-debtor party (e.g., landlords) as a result of a bankruptcy filing. Except in certain circumstances (e.g., where debtor is in default and cannot provide adequate assurance of a cure), the "unexpired" leases may be assumed or rejected by the

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		debtor within 60 days of filing of the petition. Rejection of the lease gives rise to a pre-petition claim for damages.
16. Filing of Plan	<p>CCAA: timetable for the filing of Plan subject to court order, generally driven by debtor.</p> <p>BIA: Proposal must be filed within 30 days of the filing of the Notice of Intention to make a Proposal (or within 6 months with extensions). Failure to file Proposal results in bankruptcy.</p>	<p>Under the Code, the debtor has the exclusive right to file a plan during the first 120 days after the petition. The exclusivity period may be extended to no more than 18 months. Creditors may file a plan after the exclusivity period has expired or been terminated by the court.</p>
17. Classification of Creditors	<p>Debtor classifies creditors by “commonality of interest.” Unsecured claims generally constitute one class unless Plan or Proposal provides otherwise.</p> <p>For secured creditors factors, factors to determine commonality of interest include:</p> <ul style="list-style-type: none"> • nature of debts; • nature and priority of security; • remedies available to creditors; and • nature and treatment of claims under the Plan/Proposal. 	<p>For purposes of a plan, claims and interest may be placed in the same class if they are substantially similar (i.e., same priority and quality) or if they are below a <i>de minimis</i> threshold amount established by the court. Each secured creditor usually constitutes an entire class.</p>
<p>18. Consolidation</p> <p>a. Procedural Consolidation *</p> <p><small>*Administration of two or more cases as matter of convenience but entities treated as separate financial entities</small></p>	<p>The Court has jurisdiction to order procedural consolidation.</p>	<p>The Court may order procedural consolidation of cases where two or more petitions have been filed in the same court involving the same debtor.</p>

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<p>b. Substantive Consolidation* <small>*Treating multiple applicants as one debtor</small></p>	<p>In rare circumstances, Courts have ordered substantive consolidation where debtors' and common creditors' assets are inextricably intermingled.</p>	<p>Not provided for in the Code; its treatment by courts differs by jurisdiction and continues to evolve. The debtor will typically introduce it as part of a plan, although courts may hear motions to substantive consolidation at any time during the case.</p>
<p>19. Voidable/Fraudulent Transaction</p>	<p>It is rare to for a debtor's conduct to be reviewed or to seek to attack a fraudulent preference or a transfer at undervalue during a restructuring proceeding. In order to do so, a Court order is required to lift the stay.</p>	<p>The trustee is authorized to avoid preferences and fraudulent transfers.</p> <p>II. <u>Preference</u>: A trustee may avoid a transfer of an interest of the debtor in property (i) made to or for the benefit of a creditor, (ii) on account of antecedent debt owed to such creditor by the debtor, (iii) made when the debtor was insolvent, (iv) that occurred within 90 days of the petition date, and (v) that improved the creditor's position (e.g., compared to what it would receive in liquidation).</p> <p>II. <u>Fraudulent Transfers</u>: A trustee may avoid a transfer of an interest of the debtor in property, or an obligation incurred by the debtor, that occurred within two years of the filing of the petition, if the debtor (i) made such transfer with intent to defraud, hinder or delay its creditors or (ii) received less than a reasonably equivalent value in exchange for the transfer and (a) was insolvent or was made insolvent by the transfer, (b) had unreasonably small capital for the business or transaction in which the debtor was to be engaged, (c) believed it was incurring debt it could not repay at maturity, or (d) made such transfer for the</p>

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		benefit of an insider.
20. Contents of Plan	BIA requires that a Proposal contain certain terms, including providing for payment of: preferred claims in priority to ordinary creditors; fees and expenses to the trustee; employee withholdings tax arrears within 6 months; employees for compensation arrears immediately after Court approval.	The plan must set out the manner in which it will be funded and implemented. The plan must be supported by adequate disclosure of its contents, treatment of claims and material risks. The Code established specific requirements for Plan confirmation.
21. Plan Negotiation	CCAA: The debtor, with the assistance and supervision of the Monitor may file a plan for creditor and Court approval. BIA: the Trustee files the Proposal for the debtor.	During the exclusivity period, the debtor has the exclusive right, subject to the supervision of the trustee, to file a plan and has no obligation to negotiate the plan with creditors prior to filing. Any party in interest may file a plan if a trustee has been appointed, if the debtor fails to file a plan during the exclusivity period, or no plan filed by the debtor during the exclusivity period is timely accepted.
22. Meeting(s) of Creditors to Vote on Plan	Creditor meeting pursuant to Court order under the CCAA or in accordance with the BIA.	Impaired creditors file ballots accepting or rejecting the plan without any formal meeting. Holders of claims cannot solicit acceptance or rejection of a plan unless the court approves disclosure.
23. Creditor Approval – Voting Thresholds	Statutory majority (2/3 in value and over 50% in number): - by at least each class (CCAA) - of unsecured creditors (BIA).	All impaired classes of creditors are entitled to vote on the plan; unimpaired classes are deemed to have accepted it. A class accepts a plan if at least 2/3 in amount and half in number of voting creditors in that class accept it.

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24. Court Sanction	After requisite creditor approval, CCAA: Court must determine that Plan fair and reasonable. BIA: Court must find Proposal fair and reasonable and for the general benefit of the creditors. The Court must be satisfied that the Proposal contains the required contents prescribed under the BIA.	The Court can only confirm a plan if it complies with the Code and was proposed in good faith, is feasible, pays creditors more than they would receive in liquidation, and has been accepted by at least one impaired class.
25. Cram-Down of Plan	No cram-down is permitted.	The Court may cram down a plan on secured claims provided the prerequisites for confirmation have been satisfied and the plan does not “discriminate unfairly” so that claims are treated “fairly and equitably.” The “fair and equitable” requirements differ for secured and unsecured creditors.
26. Consequences of Rejection of Plan	CCAA: no statutory consequences. BIA: if the unsecured creditors or the Court reject the Proposal, the debtor is deemed to have made an assignment into bankruptcy.	If a plan is rejected by the creditors or the court, a creditor can propose another plan or move to lift the automatic stay and exercise its state law rights or convert the case to a chapter 7 liquidation.
27. Consequences of Default in Performance of Terms of Approved Plan	Creditor may apply to Court to terminate Plan or Proposal. On termination creditors may pursue their remedies under the CCAA. Under BIA, debtor will be deemed bankrupt immediately.	Material default with respect to a confirmed Plan is grounds for dismissal of chapter 11 proceedings or conversion to chapter 7 liquidation, whichever is in the best interest of the estate.