

Tools to survive the Pandemic – Bankruptcy and Restructuring Options in Canada



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I. Survey of bankruptcy and insolvency laws in Canada

- Bankruptcy and restructuring is a federal regime
- There are provincial insolvency rules which vary for each province, but they are superseded by the federal legislation upon filing
- Proceedings before the Superior Court (commercial division)
- Two main statutes:
 1. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3
 2. *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36

I a) BIA vs. CCAA

Bankruptcy and Insolvency Act (BIA)

- \$1000 minimum of claims
- Businesses and individuals (general statute)
- Any size bankruptcy
- Restructuring generally under \$5M of claims
- Consumer proposals
- Managed by a Trustee-in-Bankruptcy

I a) BIA vs. CCAA

Companies Creditors Arrangement Act (CCAA)

- Only for businesses
- Claims total more than \$5M
- Generally used for restructuring
- Managed by a Monitor

I a) BIA vs. CCAA

	BIA	CCAA
Manager/Supervisor	Trustee	Monitor
Reorganization plan name	Proposal	Plan of Arrangement

I b) Order of Collocation of Creditors in a Bankruptcy (I36 BIA)

1. Secured creditors
2. Priority creditors (simplified)
 - a. Administration costs (includes legal and trustee costs)
 - b. Bankruptcy levy paid to the Superintendent of Bankruptcy
 - c. Employee wages, commissions, salaries
 - d. Municipal taxes (2 preceding years)
 - e. 3 months of past rent and 3 months of future rent
 - f. Workers compensation payments
 - g. Crown claims
3. Ordinary creditors
4. Not at-arm's-length creditors
5. Shareholder claims

Exceptions to the Order of Collocation

- Supplier's right to take back unpaid merchandise delivered **30 days** before the bankruptcy filing. The supplier has **15 days** to exercise this right. (81.1 BIA)
 1. Goods in possession of bankrupt/Trustee
 2. Identifiable
 3. Same state as when delivered
 4. Not resold to an at-arms'-length purchaser
- Employee wages up to \$2,000 each (81.3 BIA)
- Environmental claims (14.06(7) and 11.8(8) CCAA)
- Right of retention (1592 CCQ)

Exceptions to the Assets of the Bankrupt

- Property held in trust (67 BIA)
- Deemed Crown trusts (employment deductions, pension deductions, etc.) (67 BIA)
- Suppliers reclaimed merchandise (81.1 BIA)
- Property belonging to a third party but only if it is validly published

2) How to Make a Claim in Bankruptcy as a Creditor

1. Fill out the Claim Provable form (124 BIA)
2. Fill out the Voting Letter (51(f) BIA) – Proposals only

2 a) Claim Provable form (I 24 BIA)

IN THE MATTER OF THE BANKRUPTCY OF _____

of the City of _____ in the Province of _____, and the claim of _____
(NAME OF CREDITOR)

I, _____, residing in the City of _____ in the Province of _____,

DO HEREBY CERTIFY THAT:

1. I am a creditor of the above-named debtor (or that I am _____ of _____)
(POSITION OR TITLE) (NAME OF CREDITOR OR REPRESENTATIVE)

2. I have knowledge of all circumstances connected with the claim referred to below.

3. The debtor was, at the date of the bankruptcy (or the date of the receivership or, in the case of a proposal, the date of the notice of intention or of the proposal if no notice of intention was filed), namely the _____ day of _____, and still is indebted to the above-named creditor in the sum of \$ _____ as specified in the statement of account (or affidavit) **attached and marked Schedule "A"** after deducting any counterclaims to which the debtor is entitled. (The attached statement of account or affidavit must specify the vouchers or other evidence in support of the claim.)

4. *Complete appropriate category:*

A. UNSECURED CLAIM of \$ _____

That in respect of this debt, I do not hold any assets of the debtor as security and:

☐ Regarding the amount of \$ _____, I do not claim a right to a priority.

☐ Regarding the amount of \$ _____, I claim a right to a priority under Section 136 of the Act.

B. CLAIM OF LANDLORD FOR DISCLAIMER OF A LEASE of \$ _____

That I hereby make a claim under Subsection 65.2(4) of the Act, particulars of which are as follows: (Attach full particulars of the claim, including calculations

Voting Letter (51(f) BIA)

Voting Letter (Division I Proposal)
(Paragraph 51(1)(f) of the Act)

In the matter of the proposal of _____

I, _____, creditor (*or* I, _____,
representative of _____, creditor), of
_____ (*name of city*), a creditor in the above matter for the
sum of \$_____, hereby request the trustee acting with respect to the proposal of
_____ to record my vote _____ (*for or*
against) the acceptance of the proposal as made on the _____ day of _____
_____.

Dated at _____, this _____ day of _____.

Witness

Individual Creditor

Name of Corporate Creditor

2 b) Survey of the Claims Process until Payment

1. Proof of Claim (124 BIA)
2. Analysis of Claim by Trustee (135 BIA)
3. Meeting of Creditors (109 BIA)
4. Meeting of the Inspectors
5. Administration of the bankrupt's estate
6. Dividend payment to creditors

3. Survey of Insolvency Statutes in the United States

- Bankruptcy laws are federal statutes and proceedings occur before the Bankruptcy Court in the state in which the bankruptcy petition is filed
- Some states have more than one court that handles cases (Ex. Eastern and Western Divisions in Virginia, Northern and Southern Divisions in Texas, etc.)
- Chapters 7, 9, 11, 12, 13 and 15 of the US Bankruptcy Code describe the types of cases that can be filed
- Automatic stay goes into effect immediately upon the filing of a voluntary or involuntary bankruptcy petition
- Debtors attend a creditors' meeting shortly after the bankruptcy filing
- A debtor has the right to assume or reject contracts or leases in a bankruptcy case
- A trustee or debtor-in-possession has the right to undo transfers to creditors or third parties that occur within a specific time period prior to the bankruptcy filing

3 a) Requirements for Bankruptcy Filings in the US

- An individual or corporate debtor has the right to file a voluntary bankruptcy petition
- A creditor can file an involuntary bankruptcy petition against a debtor
- Involuntary petitions are good way for a creditor to stop the debtor from liquidating its assets or obtain the ability to recover avoidable transfers
- There is no minimum amount of debt that a debtor must have to be permitted to file an individual or corporate bankruptcy case
- There are debt limits for certain types of individual bankruptcy filings
- Corporate bankruptcy cases don't have debt limits

3 b) Types of Bankruptcy Cases in the United States

- Chapter 7-Liquidation by a corporation, partnership, or individual debtor
- Chapter 9-Reorganization of a municipality
- Chapter 11-Reorganization of an individual or corporate debtor that may involve the sale of its assets or continuing to operate in a different form with reduced locations, employees, assets, etc.
- Chapter 13-Individual wage earner plan to pay back creditors over a 3-5 year period
- Chapter 15-Cross-border insolvency cases

Chapter 7 vs Chapter 11 Cases

- Chapter 7 liquidations are the most common type of case filed in the United States and involve a complete shutdown of the business or liquidation of an individual's assets
- Chapter 11 cases often involve businesses including large retail boxes like Pier One, J. Crew, Gold's Gym, Hair Cuttery, Toys "R" Us, Aldo Shoes, Gymboree, etc.
- Chapter 11 is an effective tool to reorganize a business due to the debtor's ability to reject leases, obtain court approval for going out of business guidelines that contradict specific provisions of signed leases, and the ability to fast track a pre-packaged Chapter 11 plan that involves a sale of assets or restructuring of the business
- Chapter 11 debtors manage their own assets as a debtor-in-possession with the oversight of the U.S. Trustee's office and creditor's committee, equity holder's committee and/or an ad hoc committee of lenders
- Chapter 7 cases are managed by a Chapter 7 Trustee and the U.S. Trustee's office

3 c) Priority of Payments to Creditors in US Bankruptcy Cases

- Secured claims are paid according to their contract terms or as described in a court order or confirmed plan of reorganization
- 11 U.S.C. Section 507 *et seq.* defines and describes the priority for payment of unsecured claims and administrative expenses
- Priority of payment is typically as follows:
 - Administrative costs and expenses of professionals (attorneys, accountants, financial advisors, etc.) or any court appointed Trustee that manages the case
 - Wages, salaries, sales commissions and sick leave earned within 180 days of the filing up to a maximum amount of \$12,850 per employee
 - Contributions to an employee benefit plan
 - Claims relating to deposits paid by an individual to the debtor up to a maximum amount of \$2,850 per person for each person asserting this type of claim
 - Taxes owed to governmental units
- In Chapter 11 cases, the parties have the ability to negotiate different priorities and terms of payment and those may be described or defined in a plan of reorganization or court order

4. How to make a Claim in a US Bankruptcy Case

- Fill out and file the Proof of Claim form by the deadline specified in the notice you receive from the Court or the Debtor-in-Possession
- Make sure you include all relevant info and documents
- Pay close attention to all deadlines in notices received from the debtor-in-possession, the trustee or the Court
- Fill out and return the ballot that allows you to vote to accept or reject the terms of a Chapter 11 plan

Key info in Proof of Claim Form – US

7. How much is the claim?	\$	<div></div>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <div></div>		
9. Is all or part of the claim secured?	<input type="checkbox"/> No <input type="checkbox"/> Yes.	The claim is secured by a lien on property. Nature of property: <input type="checkbox"/> Real estate. If the claim is secured by the debtor's principal residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: <div></div> Basis for perfection: <div></div> Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ <div></div> Amount of the claim that is secured: \$ <div></div> Amount of the claim that is unsecured: \$ <div></div> (The sum of the secured and unsecured amounts should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ <div></div> Annual Interest Rate (when case was filed) <div></div> % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable	

5. What are the consequences of a restructuring?

- Regarding commercial leases
- Regarding other contracts
- DIP financing

5 a) Commercial Leases

- The insolvent party may disclaim or resiliate a commercial lease with 30 days notice (65.2 BIA)
- The landlord has 15 days to contest this disclaimer or resiliation before the court
- This does not give rise to the landlord's right of accelerated rent
- The associated loss becomes a claim provable

5 b) Other Contracts

- Debtor sends a 30-day notice before resiliation or disclaimer (65.11 BIA, 32 CCAA)
- The Co-contractant has 15 days to oppose that request
- The associated loss becomes a provable claim

5 c) Debtor-in-Possession Financing

- DIP Financing provides the interim financing during the restructuring to allow the corporation to remain operating
- A superpriority for the creditor to become a first ranking creditor in exchange for providing financing during the restructuring process (50.6 BIA, 11.2 CCAA)

6 a) How to choose between filing for bankruptcy, CCAA, or a proposal – BANKRUPTCY

Advantages

- Stay of proceedings
- Possibility to start afresh (i.e. create a new company to purchase the assets)

Disadvantages

- Liquidation of the corporation

6 b) How to choose between filing for bankruptcy, CCAA, or a proposal – PROPOSAL

Advantages

- Business continues
- Stay of proceedings
- Restructure debts
- Terminate onerous contracts

Disadvantages

- Doesn't apply to a group of companies

6 c) How to choose between filing for bankruptcy, CCAA, or a proposal – CCAA

Advantages

- Business continues
- Terminate onerous contracts
- A process designed especially to allow the company to restructure
- Admissible for a group of companies

Disadvantages

(Only available to companies with \$5M or more of claims)

- Stay of proceedings is not automatic (11.02 CCAA)

Fun Facts

- If a corporation has a subsidiary in another country, that subsidiary may continue operating even if the parent goes bankrupt
- Quorum of one creditor for a Meeting of Creditors to approve a proposal
- Canada has a lot of flexibility in terms of drafting plans and restructurings-US Bankruptcy Code is a lot stricter
- Trustees in Canada are usually accountants
- Trustees in the US are usually lawyers

Questions?

