RESTRUCTURING & INSOLVENCY 2022

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Getting the Deal Through

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Freshfields Bruckhaus Deringer

Lexology Getting The Deal Through is delighted to publish the 15th edition of *Restructuring & Insolvency*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the British Virgin Islands, the Cayman Islands, Guernsey and Jersey.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Catherine Balmond and Katharina Crinson of Freshfields Bruckhaus Deringer for their continued assistance with this volume.

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Getting the Deal Through

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Canada

Leanne M Williams, Puya Fesharaki and Derek Harland
Thornton Grout Finnigan

GENERAL

Legislation

1 | What main legislation is applicable to insolvencies and reorganisations?

Canada's insolvency and restructuring regime consists primarily of two federal statutes: the Bankruptcy & Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA).

Excluded entities and excluded assets

2 | What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

Certain regulated entities such as banks, trust companies and insurers are excluded from both the BIA and CCAA and are instead governed by the federal Winding-up and Restructuring Act.

In a bankruptcy proceeding, property owned by third parties or held in trust by the debtor for third parties will be excluded and exempt from claims of creditors. The BIA also carves out an exclusion in a bankruptcy for property that may be exempt from seizure under provincial laws (eg, pension benefits and retirement plans).

Public enterprises

3 | What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Neither the BIA nor the CCAA includes any specific provisions relating to government-owned enterprises. There is limited Canadian case law dealing with the insolvency of government-related entities, although the few decisions that exist (chiefly in respect of municipalities facing insolvency) have held that such public entities are prohibited from starting formal insolvency proceedings.

Protection for large financial institutions

4 | Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Yes, the federal Office of the Superintendent of Financial Institutions (OSFI) oversees a special regime targeted at the six largest Canadian banks that cannot be wound up without significant costs to the economy. OSFI requires that each such bank prepare and keep current contingency plans, and adopt certain other conservation measures, intended to guard against the risk of catastrophic failure.

Courts and appeals

5 | What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Typically, the court of first instance is the superior court in the applicable province or territory that has inherent jurisdiction over all bankruptcy and restructuring-related matters. Certain provinces have commercially sophisticated branches of the superior courts called the commercial list that, in practice, oversee more complex proceedings.

Any order or decision made under the federal bankruptcy or restructuring statutory regimes can be appealed upon obtaining leave from the appeal court or the judge being appealed. Generally, there is no requirement to post security.

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

6 | What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

A debtor may commence a voluntary liquidation under the Bankruptcy & Insolvency Act (BIA) by filing an assignment for the general benefit of its creditors. Such an assignment is made with the official receiver in the debtor's operating jurisdiction and must include a sworn statement listing, among other things, all the debtor's assets and liabilities, the names and addresses of its creditors, and the amounts owing to any creditors.

Upon such a filing, the debtor's assets will vest with the bankruptcy trustee, subject to the rights of the secured creditors to deal with their collateral. Unsecured creditors are stayed from exercising their remedies against the debtor's property.

Voluntary reorganisations

7 | What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A voluntary reorganisation is typically commenced under the BIA through either the filing of a proposal or a notice of intention (NOI) to file a proposal to creditors to compromise their claims. Upon the filing of the proposal or the NOI, creditors are automatically stayed from exercising their rights and remedies against the filing company. Where an NOI is filed, the proposal itself must be filed within 30 days, subject to extension by the court.

A voluntary reorganisation may also occur under the Companies' Creditors Arrangement Act (CCAA). Such CCAA filings are typically made by the debtor, although they can also be creditor-led. For the debtor to commence a voluntary reorganisation under the CCAA, the debtor

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must, at minimum, be a corporation with at least C$5 million in debt. In granting relief under the CCAA, the presiding court will often grant a 10-day stay of proceedings against creditor actions, subject to extension by the court. In CCAA proceedings, the court will also appoint a special court officer called the monitor to report on the proceedings for the benefit of all stakeholders, including the creditors.

Successful reorganisations

8 | How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

Both CCAA plans and BIA proposals require that such plans and proposals be accepted by a double majority of creditors (ie, in a BIA proposal by 50 per cent in number holding two-thirds in value of the voting unsecured creditors and, in a CCAA plan, by 50 per cent in number holding two-thirds in value of each class of creditors) before court approval is sought. For the purposes of voting in a CCAA plan, the classes of creditors are established based on a 'commonality of interest' test. In practice, the courts will generally sanction a plan or proposal that has been accepted by a double majority of creditors provided it is fair and reasonable from the point of view of the creditors generally.

Both CCAA plans and BIA proposals may include releases for non-debtor parties provided that the court finds such releases are fair, reasonable, necessary and connected to the purpose of the plan. The courts will consider requests for such third-party releases on a case-by-case basis.

Involuntary liquidations

9 | What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

Creditors may initiate an involuntary liquidation by filing an application under the BIA for a bankruptcy order with the court in the principal jurisdiction in which the debtor conducted business or resided during the year preceding the date of the application. The application must demonstrate that the debtor committed an act of bankruptcy (the most common of which is a failure to meet its obligations as they become due) within the six months preceding the commencement of the bankruptcy proceedings, and that the debt owing to the creditor is at least C$1,000.

Creditors may also bring an application to appoint a court-appointed receiver or privately appoint a receiver over all or a portion of the debtor's assets and business to oversee an involuntary liquidation. The receiver essentially steps into the shoes of the debtor for the purposes of running the business or liquidating its assets.

Involuntary reorganisations

10 | What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

An involuntary reorganisation under the CCAA may be commenced by a creditor, but this is uncommon.

In granting relief under the CCAA, the presiding court will often grant a 10-day stay of proceedings against creditor actions, subject to extension by the court. In CCAA proceedings, the court will also appoint a special court officer called the monitor to report on the proceedings for the benefit of all stakeholders, including the creditors.

Expedited reorganisations

11 | Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Neither the BIA nor the CCAA has a mechanism for carrying out expedited reorganisations. Nevertheless, both the BIA and CCAA do not prevent prepackaged reorganisations from being effected thereunder, and such prepackaged reorganisations have been accepted by the courts in instances where there is sufficient advance stakeholder consultation and support and it's in the best interests of the stakeholders.

Unsuccessful reorganisations

12 | How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

A BIA proposal must be approved by the necessary majorities of the creditors voting on the proposal. If the approval threshold for unsecured creditors is not satisfied, the debtor is deemed bankrupt. If the approval threshold for a certain secured creditor class is not satisfied, the debtor is not automatically placed in liquidation; however, the stay of proceedings against that particular class of secured creditors ends and they are permitted to take action against the debtor. A proposal will also fail if the court does not approve it. Subsequently, if the debtor fails to perform its obligations under a BIA proposal that has been approved by creditors and the court, the court may annul the proposal, which leads to an immediate liquidation, although any transactions that were properly undertaken during the reorganisation period are not vitiated.

Under the CCAA, if any class of creditors fails to approve the plan, the debtor may submit a new or amended plan. Creditors may also seek to lift the stay of proceedings to pursue their remedies against the borrower.

Corporate procedures

13 | Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Yes, the federal Canada Business Corporations Act (CBCA) and comparable provincial corporate legislation allow companies to carry out, among other things, corporation reorganisations, liquidations and dissolutions. A liquidation may be instituted by the corporation itself or by a shareholder or creditor. The CBCA can be used in a standalone fashion or in conjunction with the insolvency legislation.

Demonstrating insolvency is not a requirement to qualify for relief under the CBCA, unlike proceedings under the BIA and CCAA.

Conclusion of case

14 | How are liquidation and reorganisation cases formally concluded?

In a bankruptcy proceeding, an individual debtor can obtain an automatic discharge from bankruptcy after nine months, subject to certain exceptions or if any creditor applies to oppose the discharge. In liquidation proceedings under the BIA, the court will order a discharge of the trustee once all the estate's assets have been distributed to creditors by the trustee. Likewise, a receiver will be discharged once the estate has been liquidated and distributed.

A BIA proposal proceeding is completed when the proposal has been fully performed. A CCAA reorganisation concludes when the CCAA plan has been implemented and a CCAA liquidation concludes when the assets have been turned into cash and distributed.

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INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

15 | What is the test to determine if a debtor is insolvent?

Under the Bankruptcy & Insolvency Act (BIA), a company is insolvent if it is unable to meet its obligations as they become due, it has ceased paying its current obligations in the ordinary course of business, or the aggregate value of its property would not be sufficient to pay all of its obligations.

Under the Companies' Creditors Arrangement Act (CCAA), there is no definition for insolvency. The CCAA courts have relied on the BIA's definition of insolvency. The CCAA courts have also considered a debtor to be insolvent in such circumstances where the debtor is facing a 'looming liquidity crisis' and can reasonably be expected to become insolvent in the foreseeable future.

Mandatory filing

16 | Must companies commence insolvency proceedings in particular circumstances?

No, there is no legislative scheme that would compel a company to initiate insolvency proceedings.

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

17 | If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Directors and officers have a duty to act in the best interest of the company, as well as an additional duty to act in the best interests of the company's stakeholders. This may require a cessation of carrying on business if the company cannot meet its obligations as they become due. Directors and officers could be personally liable to the company's creditors if they continue, for instance, trading while the company is insolvent to the detriment of its creditors.

Directors' liability – other sources of liability

18 | Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Yes, directors and officers can be held personally liable for damages arising as a result of various actions (or inaction), including illegal acts (eg, a breach of their fiduciary or statutory duties), and any torts they committed individually or on behalf of the company. Further, several statutes impose personal liability on directors for, among other things, unpaid employee wages and vacation pay, failure to remit source deductions for employee income taxes as well as employment insurance and government pension plan contributions. They may also be held personally liable for environmental contamination liability.

Directors can be subject to criminal charges if certain offences are committed by the corporation. This penal sanction will only be imposed if the directors or officers were directing the corporation to commit the underlying crimes.

A resolution or settlement of claims or lawsuits against officers and directors will usually be included as part of the Companies' Creditors Arrangement Act (CCAA) plan or Bankruptcy & Insolvency Act (BIA) proposal, although these releases typically exclude claims for fraud.

Directors' liability – defences

19 | What defences are available to directors and officers in the context of an insolvency or reorganisation?

Directors and officers may rely on the business judgment rule and reasonable care and due diligence to shield themselves from any liability for corporate obligations in an insolvency context. If the director or officer made a bona fide business decision in good faith with a view to the best interests of the corporation, courts will be reluctant to substitute their own decision.

To prove the defence, the director or officer must be prepared to demonstrate that they were diligent in taking steps to avoid the particular liability being claimed against them personally.

Shift in directors' duties

20 | Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

An insolvency proceeding does not alter the duties owed by directors to the corporation. They still have a fiduciary duty to act in the best interests of the corporation, taking into account the interests of other stakeholders, including employees, creditors, consumers, shareholders and the environment.

Directors' powers after proceedings commence

21 | What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

In a bankruptcy, the debtor's property vests with the bankruptcy trustee, so that the directors no longer practically control the debtor's property. Although the directors are not automatically terminated upon a bankruptcy filing, directors have no further authority and will often resign when a company files for bankruptcy.

In reorganisation proceedings where the debtor company remains in possession, including BIA proposal proceedings and CCAA proceedings, the directors will continue operating the business for the benefit of its stakeholders.

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

22 | What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

In a bankruptcy, the debtor's property vests with the bankruptcy trustee, so that the directors no longer practically control the debtor's property. Although the directors are not automatically terminated upon a bankruptcy filing, directors have no further authority and will often resign when a company files for bankruptcy.

In reorganisation proceedings where the debtor company remains in possession, including BIA proposal proceedings and CCAA proceedings, the directors will continue operating the business for the benefit of its stakeholders.

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Doing business

23 When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

In a debtor-in-possession proceeding, a court-appointed officer will monitor and report to the court and creditors on the debtor company's financial affairs and activities, but otherwise, the debtor company operates its business. If there are substantial transactions that appear to be outside of the normal course of business, then court approval will be required.

Creditors are entitled to seek relief from the court if they believe they are being prejudiced in the proceeding. Creditors are not required to provide credit during a filing and can require cash on demand or such other payment terms as necessary.

In a receivership or bankruptcy proceeding, the receiver or trustee may decide to continue to operate the business if this would maximise value for the stakeholders, for instance, by allowing the receiver to sell the business in the ordinary course.

Post-filing credit

24 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

Debtor-in-possession (DIP) financing has become a common feature in Canadian restructurings. Under both the BIA and the CCAA, DIP financing may be given any priority the court deems appropriate. When determining whether or not to approve DIP financing and the priority it should be granted, the court will consider, among other things, whether the creditors have confidence in the management of the company, whether any creditor would be materially prejudiced as a result of the charge, the period during which the debtor is expected to be in insolvency proceedings, and whether the loan would enhance the prospects of a successful restructuring.

Sale of assets

25 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

A debtor company must obtain court approval if selling or disposing of assets outside the ordinary course of business. This includes the sale of substantially all or all of the debtor's business. In determining whether to approve any such sale by the debtor company, the court will largely focus on the marketing process preceding the sale. Some considerations the court will examine include whether the trustee or monitor approved the process, whether the trustee or monitor believes the sale would be beneficial to the creditors, the extent to which creditors were consulted, and whether the consideration received is fair and reasonable.

The purchaser must look at the terms of the purchase agreement as well as any court approval to determine if they will acquire the assets 'free and clear' of claims and liabilities. The court has the express authority under both the BIA and CCAA to authorise a sale or disposition 'free and clear' of any security, charge or any other restriction.

Negotiating sale of assets

26 Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Stalking horse bids are allowed during sale procedures; however, the court must be satisfied that this process is the best way to achieve maximum recovery to the estate.

Credit bidding is also typically permitted. Some of the factors a court will consider at the sale approval stage are whether a sufficient effort has been made to market the asset, the integrity of the sales process, and whether any parties are unfairly prejudiced.

Rejection and disclaimer of contracts

27 Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

In both CCAA and BIA reorganisations, a restructuring debtor may disclaim contracts with the approval of the monitor or trustee or the court. Disclaimers are effected on notice to the counterparty. The disclaimer can be challenged by the counterparty within 15 days upon application to the court. The court will consider the effect of the disclaimer on the overall restructuring in deciding whether to permit the same. The counterparty to the disclaimer may file an unsecured claim in the proceedings. If a debtor breaches the contract after the insolvency case is commenced, the counterparty can apply to the court to exercise its remedies against the debtor.

Intellectual property assets

28 May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The intellectual property (IP) licensor or owner cannot terminate the debtor's right to use the IP as of right when a liquidation or reorganisation proceeding is commenced. In a bankruptcy proceeding, the trustee steps into the debtor's shoes and may require the counterparty to the IP agreement to perform its obligations under the agreement.

Under the CCAA, the debtor remains in possession of its property, including its IP. Further, the standard CCAA initial order will prohibit counterparties from terminating their agreements with the debtor, and IP rights granted thereunder in such circumstances can continue to be used as long as it is paid for.

Personal data

29 Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

The use of personal information and data is governed under the federal Personal Information Protection and Electronic Documents Act and comparable provincial legislation. These statutory regimes require individuals' consent to the collection, use and transfer of their personal information.

'Personal information' is broadly defined, meaning that parties to insolvency proceedings will often be affected by the legislation. When determining or obtaining consent appears to be too burdensome, a

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court order limiting the need to obtain express consent can be sought if necessary.

Arbitration processes

30 How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Any justiciable issue can be arbitrated by obtaining prior court approval.

CREDITOR REMEDIES

Creditors' enforcement

31 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

The main approach taken outside of court proceedings is via private receivership. In a private receivership, the secured creditor, pursuant to its security agreement, may appoint a receiver to realise on the assets pledged under the security agreement to satisfy the debt. The private receiver must be a Licensed Insolvency Trustee.

Private sales may also be used by secured creditors who have seized property of a debtor subject to a security agreement under the Personal Property Security Act.

Unsecured credit

32 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Unsecured creditors must first prove their claim in court and obtain judgment. Upon obtaining judgment, the creditor can obtain a writ of seizure and sale over the debtor's personal or real property and garnish wages or other payments third parties owe to the debtor. Pre-judgment attachment is possible by obtaining a Mareva injunction, freezing order or having the debtor pay moneys into court.

While there is nothing inherently expensive or lengthy associated with these remedies, obtaining and enforcing a judgment still requires court proceedings, which naturally varies in difficulty and time based on the complexity of the claim.

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

33 During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

Under the Bankruptcy & Insolvency Act (BIA), the bankruptcy trustee will inquire as to the creditors of the bankrupt debtor and, within five days of the trustee's appointment, issue a notice to each known creditor of the debtor's filing for bankruptcy and of the first meeting of creditors. The first meeting of creditors will be scheduled within 21 days of the trustee's appointment. This meeting will discuss the affairs of the bankrupt, confirm the trustee's appointment and allow for the creditors to appoint inspectors or otherwise give directions to the trustee. Subsequent meetings may be called by the trustee or by creditors comprising 25 per cent of the proven claims.

The trustee is required to update the creditors on the administration of the bankrupt's estate on a routine basis and provide details regarding future transactions.

Under the Companies' Creditors Arrangement Act (CCAA), after an order is made on the initial application, the monitor is required to publish a notice with the initial order, provide notice to every creditor with a claim of over C$1,000 and create a list with each known creditor's respective claim. The court-appointed monitor is required to report any material adverse changes in the company's financial circumstances to the court and notify creditors of this report.

Creditor representation

34 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

Creditor and stakeholder committees may be formed based on the particular facts of each case. There is considerable flexibility afforded to the courts to appoint representative committees. However, creditor committees are uncommon in Canada and they do not usually have any power. Committees may be appointed when there are many diverse creditor groups who have differing priorities or vulnerable creditors who require representation. If appointed, the powers and responsibilities they possess vary from case to case and are based on the order made by the court.

Enforcement of estate's rights

35 If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

Creditors are given the ability to pursue claims on behalf of the estate when the liquidator is unwilling or unable to do so themselves with the court's approval. The creditor who initiated and funded the proceedings will receive any monetary judgment obtained to satisfy their debt and the surplus will go to the estate. If a creditor was not involved in pursuing the claim, they will only be able to benefit from these claims if there is a surplus payment made to the estate.

Claims

36 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

The creditor's claim is submitted via the proof of claim form that is distributed along with the notice to creditors issued by the BIA trustee or CCAA monitor. Contingent or unliquidated claims are filed under the same form and may be recognised. Under the BIA, if a creditor wants to vote at the first meeting of creditors, they must file the proof of claim before the first meeting. After a creditor files its proof of claim, the trustee, monitor (or a claims officer) will accept, revise or disallow the claim, in whole or in part, and the creditor will have 30 days to appeal the decision to the court.

There is no legislation establishing a time limit for a claim to be submitted under the CCAA, but there will often be a claims-bar order issued by the court, which judicially creates a timeline. In a CCAA

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proceeding, there will usually be a claims officer appointed via a claims process order issued by the court. This officer is usually an experienced adjudicator who can resolve complex claims quickly and efficiently. Any appeal rights can be found in the court order.

Claims may be transferred free of any statutory restrictions, however, to promote transparency, the party receiving the transfer must disclose this change to the court-appointed officer. This means that if a claim is acquired at a discount, it may be enforced for its full face value. Creditors will usually not be able to claim post-filing interest without the bankrupt estate having a surplus after all creditors have been paid in full.

Set-off and netting

37 To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Set-off is statutorily recognised in the BIA and CCAA. Both the BIA and CCAA contain mechanisms that permit netting of various types of financial contracts.

Modifying creditors' rights

38 May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The doctrine of equitable subordination, while embraced in the United States, has yet to find grounding in Canadian courts. Whether the courts will eventually adopt some limited right to modify a creditor's priority is still to be determined.

Priority claims

39 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Apart from employee-related claims, the major priority claims in liquidations and reorganisations are typically unremitted taxes and certain environmental remediation costs. In the BIA, there are several preferred claims (eg, administrative expenses) that rank below secured creditors but ahead of unsecured creditors. In practice, while the CCAA does not explicitly create preferred classes of creditors, court orders will often include similar priority claims.

Employment-related liabilities

40 What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employees may be entitled to termination and severance pay if they are terminated during a restructuring or liquidation. In Canada, termination pay compensates employees for the notice they were required to receive from their employer before being terminated. Termination is automatic upon bankruptcy. Severance pay is also available to some employees based on tenure with the employer. The specific entitlements differ in each province and are unsecured claims.

If a large number of employees (50 or more) are terminated within a short period, special rules for termination pay may apply, depending on the province. There are some provinces that have a statutory schedule for severance pay based on seniority. Both of these claims rank as unsecured.

Eligible unpaid wages are given special priority status under the Wage Earner Protection Program Act over the debtor's liquid assets where the debtor is bankrupt or a receiver has been appointed.

Pension claims

41 What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

The BIA creates charges for certain unpaid pension contributions for companies becoming bankrupt or under receivership. In a CCAA proceeding, the type of pension plan, the provincial legislation governing it and the nature of the pension-related claim must be reviewed to determine priority over other claims.

Environmental problems and liabilities

42 Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Those in control over property with environmental issues have duties and clean-up responsibilities imposed on them by Canadian environmental legislation. This includes all directors and officers of a corporation who were employed when the damage was caused, even if they have left the company. There is a strict due-diligence test for directors and officers to avoid personal liability and they must show they took all reasonable steps to prevent environmental damage. The costs of remediation are secured by a super-priority first charge over the property in question. Insolvency administrators will not be held personally liable for obligations caused by the debtor.

Liabilities that survive insolvency or reorganisation proceedings

43 Do any liabilities of a debtor survive an insolvency or a reorganisation?

The major liabilities that survive an insolvency proceeding are liabilities that pertain to fraudulent misconduct or misappropriation by the debtor. This includes property obtained by false pretences or fraudulent misrepresentation.

Distributions

44 How and when are distributions made to creditors in liquidations and reorganisations?

The timing and form of distributions in a reorganisation are not subject to legislation but rather are based on the individual plan of compromise or proposal to its creditors. In a liquidation, typically distributions are made when all the assets are turned into cash; however, interim distributions are also permitted.

SECURITY

Secured lending and credit (immovables)

45 What principal types of security are taken on immovable (real) property?

In Canada, a mortgage or charge is the principal form of security taken on real property.

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Secured lending and credit (movables)

46 What principal types of security are taken on movable (personal) property?

Within each province, there is personal property security legislation that establishes a system for registering security interests in movable property. The most typical type of security is by registration, but security may also be taken by possession. Certain legislation creates a lien on personal property in favour of the Crown.

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

47 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

There is an extensive regime in the Bankruptcy & Insolvency Act (BIA), which is also followed in the Companies' Creditors Arrangement Act (CCAA), pertaining to preferences and transfers at undervalue. If a transfer of property or payment is made by an insolvent person to a creditor, then it can be deemed void against the bankrupt estate. If the creditor is dealing at arm's length with the insolvent person then there must be intent on the part of the insolvent person to prefer the creditor and the preference must have been within three months of the initial bankruptcy event. If the parties are at non-arm's length, then there merely must be the effect of giving the creditor a preference and there is a 12-month window to attack the preference. Further, transfers at undervalue may be annulled if the consideration received by the debtor is less than the property or services full market value (one-year period for arm's length parties; five-year period for non-arm's length parties).

In a bankruptcy, the trustee will be able to obtain the property from the purchaser if a transaction is annulled, except if the purchaser is a legitimate third party without knowledge.

Equitable subordination

48 Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

The BIA prevents any dividends from being paid to a non-arm's length creditor if the claim arose before the debtor's bankruptcy until all other creditors have been paid in full. The court, or the trustee, may declare such a transaction between the debtor and the non-arm's length creditor to be a 'proper transaction', however.

More generally, non-arm's length claims are likely to attract scrutiny by any court officer.

GROUPS OF COMPANIES

Groups of companies

49 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Typically, the parent corporation will not be responsible for the liabilities of an insolvent subsidiary. However, pre-bankruptcy transactions between the parent and the subsidiary may be closely reviewed for appropriateness.

Combining parent and subsidiary proceedings

50 In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

Proceedings involving a corporate group may be dealt with under one application. However, under the Companies' Creditors Arrangement Act (CCAA), each branch of the corporate group must satisfy the debtor company requirements under the CCAA (eg, have debts of over C$5 million). Additional members of the corporate group may also be added to the proceedings after the initial application if the applicant brings a motion.

There have been several high-profile cases where Canadian courts have substantively consolidated the corporate group's assets for a pro rata distribution among the creditors. This will usually be done when there are significant time and expense savings that can be achieved. If certain creditors were to be unfairly affected by a substantive consolidation, however, the court will be less likely to pool assets for distribution purposes.

INTERNATIONAL CASES

Recognition of foreign judgments

51 Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

In Canada (except Quebec), the common law is responsible for the recognition and enforcement of foreign judgments. To be recognised and enforced, the non-Canadian court must be one of 'competent jurisdiction', which usually requires an analysis of the 'real and substantial connection' test, the judgment must have been final and determinative on the merits, and it must have been sufficiently precise to make it plain and obvious what the parties' rights and obligations are.

Canada is also a signatory to the UNCITRAL Model Law.

UNCITRAL Model Law

52 Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Yes, Canada was one of the earliest signatories to the UNCITRAL Model Law on Cross-Border Insolvency when it was implemented in 2005.

Foreign creditors

53 How are foreign creditors dealt with in liquidations and reorganisations?

There is no substantive difference between the treatment of foreign creditors and domestic creditors in insolvency proceedings.

Cross-border transfers of assets under administration

54 May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

There is nothing prohibiting the cross-border transfer of assets under administration and it has been done in the past. However, the court-appointed officer and all affected parties would need to be notified and the court would have to approve any cross-border asset transfer.

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COMI

55 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The Companies' Creditors Arrangement Act (CCAA) states that there is a rebuttable presumption that the debtor company's registered office is deemed to be the COMI. Some criteria that the courts have considered to rebut this presumption include:

- the location where the debtor's principal assets are found;
- the jurisdiction that the creditors would readily recognise;
- the location where central management operates; and
- the location where the debtor is most heavily regulated.

Cross-border cooperation

56 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

To recognise a foreign insolvency proceeding, there must be a 'foreign representative' that applies for recognition of a 'foreign proceeding'. Both of these terms are defined in the Bankruptcy & Insolvency Act (BIA) and CCAA. If a court is satisfied with both elements, the foreign proceeding must be classified as a 'foreign main proceeding' or a 'foreign non-main proceeding'. If recognised as a 'main' proceeding, there is a freezing order on the debtor's assets and a stay of all proceedings against the debtor imposed. Meanwhile, a 'non-main' proceeding determination means a stay will only be granted at the court's discretion.

Cooperation with foreign insolvency proceedings has a long history in Canada and cross-border collaboration and coordination is a defining feature of the Canadian insolvency regime. Many Canadian courts have implemented the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases that the International Insolvency Institute has created to facilitate cross-border cases.

Cross-border insolvency protocols and joint court hearings

57 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

There have been many complex and high-profile cross-border cases between Canadian courts and international courts, especially with the United States (eg, *Nortel Networks*, *Performance Sports Group*, *Pacific Exploration and Production*). The BIA and CCAA both have provisions designed to promote the use of cross-border insolvency protocols.

Winding-up of foreign companies

58 What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

Canadian courts only have jurisdiction over Canadian companies or the Canadian-situated assets of foreign companies.

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UPDATE AND TRENDS

Trends and reforms

59 Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

The covid-19 pandemic has had a significant impact on the Canadian insolvency space. Court hearings have largely migrated online and have been conducted virtually during the pandemic as a result. Certain industries (the retail and hospitality sectors, among others) have borne the brunt of the devastating economic effects of the pandemic, while other industries have escaped unscathed or even flourished. There were many interesting challenges during the early part of the pandemic to traditional common law and contractual principles in favour of beleaguered debtors, but most such challenges were rejected by the courts who found that the existing legal framework was robust enough to deal with the pandemic's effects.

Reverse-vesting orders (RVOs) have also become increasingly popular in the Canadian insolvency space over the past year. RVOs can contribute significant value to a debtor's estate by keeping licences and tax structures intact, and their adoption adds welcome flexibility to the Canadian insolvency practitioner's toolkit.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Canada	
Applicable insolvency law, reorganisations: liquidations	Bankruptcy liquidations are typically governed by the Bankruptcy and Insolvency Act (BIA). The Companies' Creditors Arrangement Act (CCAA) by contrast applies only to reorganisations or liquidations of corporate entities. Where complex or fundamental changes must be made to the shareholdings and debt structures of corporations, the 'arrangements' provisions of the Canada Business Corporations Act (CBCA) and comparable provincial legislation may be applicable. Federally incorporated banks and insurance companies are excluded from the BIA and CCAA and are dealt with under the Federal Winding-up and Restructuring Act (WURA).
Customary kinds of security devices on immovables	Security on immovable property is usually taken in the form of a 'mortgage' or 'charge' that is registered in the Land Registry Office in the province in which the real property is located.
Customary kinds of security devices on movables	Security interests in movable property are dealt with on a province-by-province basis under provincial personal property security legislation in Canada's common law provinces. This legislation provides the requirements for taking 'security interests' in 'personal property' through the mechanism of 'security agreements'.
Stays of proceedings in reorganisations/liquidations	In a BIA reorganisation, an automatic stay of proceedings is imposed on secured and unsecured creditors. In a CCAA reorganisation, a very broad stay of proceedings is imposed against both secured and unsecured creditors.
Duties of the insolvency administrator	Reorganisations: a 'proposal trustee' under the BIA and a 'monitor' under the CCAA are appointed in all cases and review the financial condition of the debtor, administer the claims process and carry out distributions under the proposal (BIA) or plan (CCAA). Liquidations: a BIA bankruptcy trustee is vested with the debtor's unencumbered property, collects and disposes of assets, supervises the claims process and distributes funds to creditors.
Set-off and post-filing credit	Canadian law recognises claims for 'legal set-off' and 'equitable set-off' in liquidations and reorganisations. Legal set-off requires that claims be both liquidated and mutual. Equitable set-off can exist regardless of whether debts are liquidated. Instead, the court looks at the connection between the various claims in respect of which set-off is asserted. Both the BIA and CCAA contain special provisions that expressly permit netting of particular types of financial contracts such as swaps, repurchase agreements and commodity contracts.
Creditor claims and appeals	Creditors, including creditors with contingent or unliquidated claims, must file proofs of claim with the BIA trustee or CCAA monitor. A creditor that is dissatisfied with a decision of the trustee or monitor may appeal the decision to the court.
Priority claims	Excepting employee-related claims, major priority claims in liquidations and reorganisations include governmental claims for taxes withheld from employees' wages, environmental clean-up costs, and real property taxes.
Major kinds of voidable transactions	The transactions that are subject to challenge, include: (i) transactions at an undervalue, namely, transactions in which the consideration received by the debtor is less than the fair market value given by the debtor; (ii) preferences that, in the case of arm's-length creditors, are transactions made with the intent to prefer the creditor within three months of the date of bankruptcy or, in the case of non-arm's length creditors, transactions within 12 months of bankruptcy that have the effect of giving a preference to the creditor; or (iii) dividends that are paid in the year before the insolvency filing when a corporate debtor is insolvent.
Operating and financing during reorganisations	During both BIA and CCAA reorganisations, the debtor typically continues to carry on business in the normal course. In liquidations, where a licensed insolvency trustee is appointed, the assets and business of the debtor company vest in the trustee and the directors and officers have no further authority to act on behalf of the company. Provisions under both the BIA and the CCAA allow funding analogous to US debtor-in-possession financing.
International cooperation and communication	Both the BIA and CCAA have provisions for the recognition of foreign insolvency proceedings and orders made in those proceedings. To facilitate cooperation between courts, Canadian courts have adopted the Judicial Insolvency Network (JIN) Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters.
Liabilities of directors and officers	Depending on the province, directors may be liable to employees for certain arrears of wages for services performed by the employees during their directorships including vacation pay and other amounts. Directors are also liable for certain amounts payable by the corporation to governmental revenue authorities, such as unremitted source deductions.
Pending legislation	Certain limited amendments to the CCAA and BIA will come into force effective 1 November 2019.

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