Fourth Edition 2018

Published by TIMES Group

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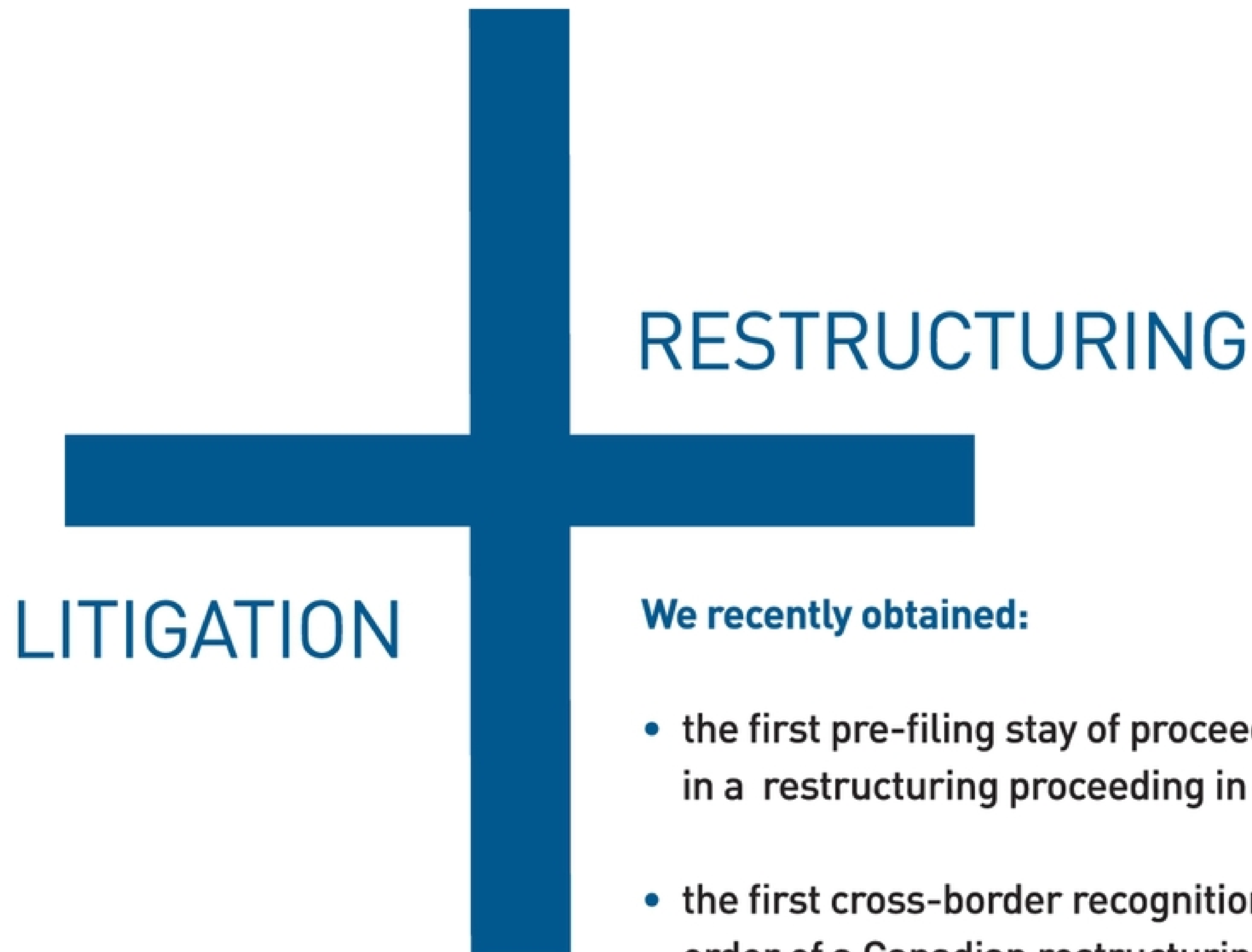


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# Ask Not What the Statute Says You Can Do, Ask What You Can Do With the Statute

**By Mitchell Grossell, Thornton Grout Finnigan LLP**

A Canadian perspective on the differences between the CCAA and Chapter 11 of the US Bankruptcy Code.

## Brief history of the CCAA and Chapter 11

On September 19, 2009, the *Companies' Creditors Arrangement Act* (CCAA), the primary insolvency statute in Canada for corporate restructurings over $5 million, was amended to, among other things, codify certain case law developments. Since the amendments to the CCAA, much ink has been spilled asserting that the amendments have moved the dial from a flexible statute to a rules-based insolvency regime similar to chapter 11 of the United States Code (the Bankruptcy Code).

The CCAA amendments addressed case law relating to: (i) asset sales, (ii) the forced assignment of agreements, (iii) the disclaimer of agreements, (iv) court ordered super-priority charges, and (v) the role and duty of the monitor.

Prior to the 2009 amendments, section 11 of the CCAA was the workhorse for obtaining much of the relief sought during a debtor's restructuring. Section 11 provided that a court may, subject to the provisions of the CCAA, on notice to any other

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person or without notice as it may see fit, make an order under this section.[1] Through the application of this broad judicial discretion, Canadian courts developed the case law that was eventually codified in the 2009 amendments.

In contrast, since 1978 when the Bankruptcy Code was enacted, it has been a comprehensive, rules-based statute to which debtors restructuring under the Bankruptcy Code must adhere. When comparing the Bankruptcy Code to the CCAA, the Bankruptcy Code does not give U.S. courts the same broad judicial discretion.

Despite 'fleshing out' the skeletal pre-2009 CCAA and introducing limiting language into section 11, the current CCAA remains a flexible and practical statute adept at finding pragmatic solutions to balance the interests of stakeholders and assist with the effective restructuring of a debtor.

It is beyond the scope of this commentary to test all the differences between the CCAA and Chapter 11. Instead, this analysis shall focus on the differences in noticing requirements and the role and duties of neutral third parties between the two restructuring statutes.

## Noticing requirements

### *CCAA*

The CCAA has not expressly codified noticing requirements in a restructuring proceeding. The default requirements regarding notice periods are governed by each province's *Rules of Civil Procedure* (the Rules). In Ontario, the Rules provide for a minimum notice period of seven days for a motion.[2] However, the Ontario Superior Court of Justice (Commercial List) has recognised that CCAA proceedings frequently involve multiple and evolving stakeholders located both nationally and internationally and that these types of proceedings often involve 'real-time litigation'. As a result, it is common for court orders to abridge the time for service and allow motions to proceed on short notice of a few days or, in some cases, less than 24 hours notice, all of which is allowed for in the Rules. Further, a recent trend has developed in CCAA cases where the order granted at the initial application of a debtor will set out case-specific noticing and service requirements, overriding the Rules.[3]

In CCAA proceedings, Canadian courts have developed a flexible and pragmatic approach to the real time nature of the proceedings to allow a debtor to seek a wide variety of relief, on short notice if necessary.[4]

### *Chapter 11*

In contrast, Rule 2002(a) of the Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules) provides for a 21-day notice period for substantive motions such as creditors' meetings, the sale of property of the estate outside of the ordinary course of business and the hearing to approve a compromise or settlement.[5] Further, a 28-day notice period is required for approval of a disclosure statement or confirmation of a chapter 11 plan.[6] Bankruptcy Rule 9006(c) allows for the abridgment of the requisite noticing period if the moving party can demonstrate exigent circumstances that warrant urgent or emergency relief.[7]

The Bankruptcy Rules impose much more stringent noticing requirements than the CCAA. While adequate noticing is required in the CCAA for stakeholders to consider and assess how their rights will be affected by the requested relief, this must be balanced with the realities of a debtor. Take for example the 'melting ice cube' debtor whereby every day that passes erodes further value from the debtor to the detriment of its stakeholders. Since CCAA courts commonly hear motions on short notice, a debtor is able to react quickly to a deteriorating situation without the additional risk of a Court requiring full notice. This relative prejudice to stakeholders is balanced by the appeal provisions in the CCAA.[8]

## Neutral third parties

### *CCAA*

When an initial order is granted in respect of a debtor under the CCAA, the court shall also appoint a person to monitor the business and financial affairs of the company (the Monitor).[9] The Monitor is an officer of the court and its role and duties include, *inter alia*: (i) publishing notice of the CCAA proceedings, (ii) reviewing the debtor's cash flow statement, (iii) appraising or investigating the state of the debtor's business or financial affairs, (iv) filing reports to the court, and (v) advising the court on the reasonableness or fairness of a proposed plan of compromise or arrangement.

In addition to its prescribed duties under the CCAA, the Monitor will assist management of the debtor with the restructuring and other issues that arise. In certain cases, such as when the debtor's board of directors have resigned, the Monitor's powers may be expanded and the Monitor may be authorised to sell assets, subject to court approval, and direct certain corporate functions.[10]

The Monitor, as a neutral third party, may also facilitate and progress contentious issues between the debtor and its stakeholders or assist with complex negotiations. Due to its unique position, the Monitor is well-suited for this role as it is entrenched in the business operations and financial affairs of the debtor, but does not have an economic stake in the debtor's business and affairs. In this respect, the Monitor is an important tool to facilitate a successful restructuring because its primary mandate is to consider the interests of all stakeholders of the debtor and maximise value.

***Chapter 11***

The US Trustee is a neutral third party in Chapter 11 proceedings that oversees the administrative aspects of the proceeding. The US Trustee will: (i) review the debtor's requests for emergency orders and ensure the requested relief is tailored to the circumstances, (ii) determine what official committees should be established in the proceeding, (iii) appoint the committee members and engage in the oversight of the committees' actions, (iv) review the restructuring plan and disclosure statement, and (v) ensure that the debtor manages the estate in a manner consistent with the Bankruptcy Code.[11]

The role of the US Trustee is to ensure that stakeholders' interests in the debtor estate are preserved. However, the US Trustee does this at an administrative level rather than the Monitor who is imbedded with the debtor. The US Trustee does not monitor the day-to-day affairs of the debtor nor does it have insight into the operations and financial affairs of the debtor. As such, the US Trustee does not take an active role in disputes or negotiations between the debtor and its stakeholders. Instead, the US Trustee only provides comments on final documents (i.e. a plan of reorganization or draft court orders) once terms have been settled.

The Monitor and the US Trustee play very different roles in their respective jurisdiction's restructuring proceedings. The Monitor is a court officer and advises the court on the reasonableness of actions taken by the debtor. The US Trustee acts on its own behalf and its major concern is compliance with the Bankruptcy Code. The US Trustee usually will not weigh into issues as long as there is compliance with the Bankruptcy Code.

## Further thoughts and conclusions

Despite commentary suggesting that the amendments to the CCAA have brought the CCAA closer to the rules-based regime of Chapter 11, the CCAA today remains a flexible statute. First, section 11 still confers broad jurisdiction to make any order that it considers appropriate in the circumstances. Second, the lenient noticing requirements in the Rules and the court's appetite to abridge notice allows a restructuring debtor to act quickly to seek court relief to accommodate evolving circumstances. Third, the roles and duties of the Monitor and US Trustee vastly differ. The Monitor plays an active role in the CCAA that can assist the debtor with its restructuring by facilitating discussions between the debtor and its stakeholders. The US Trustee oversees the Chapter 11 proceeding from a high level, ensuring compliance with the Bankruptcy Code.

The CCAA's flexibility is a valuable tool to the restructuring of Canadian companies and should not be overlooked when deciding the jurisdiction of proceedings for multinational companies with significant Canadian operations. Further, the Canadian courts and the judges presiding over CCAA cases have demonstrated a willingness to extend the foundational principles of the CCAA as a remedial statute in circumstances where the statute does not address a specific issue. As insolvency practitioners can relate, a pragmatic approach goes a long way in both relatively straightforward and complex restructurings. When the facts of a case permit an insolvency proceeding to be commenced in Canada, the CCAA will provide stakeholders with the necessary flexibility to achieve a successful restructuring.

**Footnotes:**

1 Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, section 11(1). Section 11 in the current version of the CCAA provides the court may, subject to the restrictions set out in the CCAA, make any order it considers appropriate in the circumstances.

2 Rules of Civil Procedure (Ontario), R.R.O., Reg. 194, r. 37.07(6).

3 For example, see the Initial Order issued on September 16, 2014 in the Matter of a Plan of Compromise or Arrangement of U.S. Steel Canada Inc., as amended and restated, CV-14-1069500CL and the Initial Order issued on January 25, 2018 in the Matter of a Plan of Compromise or Arrangement of Carillion Canada Holdings Inc., et al., CV-18-590812-00CL (the Carillion Proceedings).

4 For example, in the Carillion Proceedings, the Ontario Superior Court of Justice granted orders approving a settlement agreement and the assignment of contracts on less than one day's notice to facilitate the completion of a sale transaction that would provide liquidity to the debtors and further stabilize the debtors' finances.

5 Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules), Rule 2002(a).

6 Bankruptcy Rules, Rule 2002(b).

7 Bankruptcy Rules, Rule 9006(c).

8 Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (CCAA), section 14.

9 CCAA, section 11.7(1).

10 For example, in Nortel Networks Corporation, the court authorised the Monitor to exercise any powers that may be exercised by the board of directors of any of the applicants.

11 28 U.S.C. § 586.

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