

BIA and CCAA Amendments “One Year Later”

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- 1. Overview of Key Amendments
 - WEPPA Claims
 - Ability to Terminate / Assign Contracts
 - Asset Sales, including related-party transactions
 - Interim Financing
 - Receivership
 - Remedies
 - Treatment of Equity Claims
 - Protection from Liability
- 2. Observations
- 3. What's Next?



WEPPA - BIA

- Amendments effective since July, 2008
- WEPP established to make payments from Consolidated Revenue Fund to certain individuals for wages unpaid as a result of a bankruptcy or receivership of an employer
 - *Wage Earners Protection Program Act*, S.C. 2005, c.47 ["WEPPA"]
- Employees may claim four times the maximum weekly insurable earnings amount under EI (approx. \$3,300 in 2010), less amounts prescribed by regulation, in the six months prior to their employer's bankruptcy or receivership
- "Wages" includes severance pay and termination pay (post January 27, 2009) if the employee was terminated 6 months prior to filing (WEPPA, s. 4)
- Corresponding changes made in BIA creating new priority charges in bankruptcies and receiverships for unpaid wages ahead of claims of secured creditors (BIA, s. 81.3 and 81.4)
- \$2,000 of unpaid wages per employee may be recovered pursuant to a super-priority charge against the current assets (inventory + A/R) of the bankrupt (BIA, s. 136(1)(d)). Where the current assets are insufficient, unpaid amounts are subject to a preferred claim. Any other wage claims rank as unsecured claims (BIA, s. 136(3)).



WEPPA - CCAA

- Amendments effective since September, 2009
- The Court may sanction a plan only if it provides for payment of amounts to be paid to employees immediately after sanctioning that are at least equal to the WEPP claim under the BIA and for unpaid wages for the period between the CCAA filing and plan sanction order (CCAA, s. 6(5)).

WEPPA - Judicial Consideration

- BIA
 - *Ted Leroy Trucking Ltd., Re*
 - 2009 CarswellBC 98 (S.C.).
 - The Court considered the interpretation of the term “wages” in the WEPPA
 - At issue was whether WEPP covered amounts payable to third parties at the direction of the employee or by the employer on behalf of the employee pursuant to an agreement (ex. union dues, health or welfare trust, or to third party service providers)
 - “Wages” were interpreted broadly to mean all compensation for services rendered by the employee and are not limited to the portion of the compensation earned by the employee and due to be paid directly to the employee
- CCAA
 - *Canwest Publishing Inc./Publications Canwest Inc., Re*
 - 2010 CarswellOnt 3509 (S.C.J. [Commercial]).
 - The Court held that the employee claims provisions in s. 6(5) had been provided for in the plan



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Contracts - BIA

- Where debtor files proposal or NOI, may terminate certain agreements to which it is a party with Court approval and notice to the parties and trustee (BIA, s. 65.11)
- Parties to agreements may contest the termination, or if a party to the agreement suffers a loss, it may give rise to a provable claim
- The Court may order an assignment of the rights and obligations of a bankrupt under an agreement
- Bankrupts are now protected against termination or amendment of the agreement for reason of the filing, a protection historically granted only to a debtor who had filed an NOI or a proposal (BIA, s. 65.1 and 84.2)

Contracts - CCAA

Termination

- Debtor company now has same statutory authority to terminate agreements as granted to debtors under the BIA (CCAA, s. 32)
- This is consistent with the prior practice of including the right to repudiate contracts as part of the Initial Order
- The Court must consider (i) whether the Monitor approved the proposed termination, (ii) whether it would enhance the prospects of a viable compromise or arrangement of the debtor and (iii) whether it would likely cause significant financial hardship to a party to the agreement
- The Monitor must approve of the proposed termination, but the Court may prohibit it on application from a party to the agreement who has given notice to the other parties and the Monitor

Contracts - CCAA

Assignment

- Debtor company has express authority to assign an agreement (CCAA, s. 11.3(1))
- Language mirrors that of the BIA, but substitutes the Monitor in the role of the BIA trustee
- The Court must consider whether the Monitor approves of the assignment, whether the assignee would be able to perform the obligations, and whether it would be appropriate to assign those rights and obligations to that person
- Additionally, all monetary defaults must be remedied on or before the day fixed by the Court



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Asset Sales - BIA

- A debtor company in respect of which an NOI or a proposal has been filed may not sell or otherwise dispose of assets outside the ordinary course unless authorized to do so by a Court (BIA, s. 65.13)
- Court may grant authorization even if shareholder approval was not obtained and is required, but notice of any request for such authorization must be provided to secured creditors who are likely to be affected by the sale
- In the case of proposal filed by individuals carrying on business, the Court may only authorize sale or disposition if assets were acquired for or used in relation to the business
- Authorization will only be granted if the Court determines that the debtor company can and will make the necessary WEPP and super-priority (i.e. normal cost contribution) pension plan payments



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Asset Sales - BIA

- The Court must consider additional factors when considering a sale to a related person (whether good faith efforts were made to sell or dispose of the assets to non-related persons, and whether the consideration received is superior to that under any other offer made in accordance with the sale process)
- If authority for the sale is granted free and clear of a party's interests, the Court shall order that other assets be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is affected by the order
- This provision is similar to the “adequate protection” concept under the U.S. Bankruptcy Code



Asset Sales - CCAA

- Same Court authorization required as provided for in amendments to BIA (CCAA, s. 36)
- Court may grant authorization even if shareholder approval was not obtained and is required
- Notice of any request for such authorization must be provided to secured creditors who are likely to be affected by the sale
- The Court must take certain factors into consideration before granting authorization to sell to related persons (whether good faith efforts were made to sell or dispose of the assets to non-related persons, and whether the consideration received is superior to that under any other offer made in accordance with the sale process)

Asset Sales - CCAA

- If authority for the sale is granted free and clear of a party's interests, the Court shall order that other assets be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is affected by the order
- Authorization will only be granted if the Court determines that the debtor company can and will make the necessary WEPP and super-priority (i.e. normal cost contribution) pension plan payments

Asset Sales - Judicial Consideration

- BIA
 - *Hypnotic Clubs Inc., Re*
 - 2010 CarswellOnt 3463 (S.C.J. [Commercial]) at paras. 25-37.
 - The Court rejected an asset sale to a related party even though the appraised value of the assets indicated that the consideration received would be superior to any other conceivable offer
 - The debtor had not made the good faith efforts required under the BIA to sell or otherwise dispose of its assets to an unrelated party



Asset Sales - Judicial Consideration

- CCAA
 - *Nortel Networks Corp., Re*
 - 2009 CarswellOnt 4467 (S.C.J. [Commercial]) at para. 49 [Pre-amendment CCAA filing].
 - The Court approved a stalking horse sale process in the absence of a plan by considering: whether a sale transaction was warranted at the time, if the sale benefited the whole “economic community”, if any of the creditors had a *bona fide* reason to object to the sale and if there was a better viable alternative



Asset Sales - Judicial Consideration

- CCAA
 - *Fraser Papers Inc., Re*
 - Court File No. CV-09-8241-00CL, unreported Endorsement of Pepall J., December 10, 2009 (Ont. S.C.J. [Commercial]) [Pre-amendment CCAA filing].
 - The Court approved the stalking horse sale process in advance of a plan by reference to *RBC v. Soundair*
 - The Court considered that the debtor was a struggling player in a challenged industry, that the sale was the most effective and efficient means of maximizing value for its creditors and that the sale provides some certainty to stakeholders, allowing for the earliest possible exit from creditor protection
 - *Fraser Papers Inc., Re*
 - Court File No. CV-09-8241-00CL, unreported Endorsement of Pepall J., April 6, 2010 (Ont. S.C.J. [Commercial]).
 - The Court considered that the sale transaction maximized value for creditors, that the debtor had a lack of cash flow, the *Soundair* principles and the factors listed in the new CCAA s. 36, which was not yet in force at the time
 - The Court required the new test to be satisfied for the sale of assets to a non-arm's length party, and was satisfied that it met the test

Asset Sales - Judicial Consideration

- CCAA
 - *Brainhunter Inc., Re*
 - 2009 CarswellOnt 8207 (S.C.J. [Commercial]) at para. 15-21.
 - The Court approved a sale process and an asset sale with reference to the new asset sale requirements under the CCAA
 - The Court distinguished between the approval of a sale transaction pursuant to s. 36 and the approval of a sales process, in which the Court should consider s. 36 indirectly when applying the criteria set out in *Nortel (supra)*

Asset Sales - Judicial Consideration

- CCAA
 - *Canwest Global Communications Corp., Re*
 - 2009 CarswellOnt 7169 (S.C.J. [Commercial]) at para. 37.
 - Even where the transaction is in the ordinary course of business, the Court may consider the asset sale approval factors in assessing the fairness of the transaction
 - *Canwest Global Communications Corp., Re*
 - 2010 CarswellOnt 5510 (S.C.J. [Commercial]) at para. 27.
 - The Court held that the prohibition in s. 36 does not apply to transfers contemplated to be effected through a plan of arrangement
 - Where transfers are required to implement the plan and facilitate the restructuring and affected creditors have approved, s. 36 will likely not apply

Interim Financing - BIA

- An application may be brought for approval of interim financing on notice to all secured creditors likely to be affected by the security or charge granted in connection with the interim financing
- The Court may order the property of the debtor be subject to a super-priority security or charge in favour of the lender and may be given priority over existing secured creditors
- Any security or charge granted may not secure a pre-existing obligation
- The Court may order that a new interim financing security or charge ranks in priority over one granted in a previous Court order, only with the consent of the person in whose favour the previous order was made

Interim Financing - CCAA

- An application may be brought for approval of interim financing on notice to all secured creditors likely to be affected by the security or charge granted in connection with the interim financing
- This is the statutory recognition of the super-priority interim financing that was utilized previously, but specifically requires notice to all secured creditors to be primed
- The Court may order the property of the debtor be subject to a super-priority security or charge in favour of the lender (CCAA, s. 11.2)
- Any security or charge granted may not secure a pre-existing obligation
- Any security or charge granted may be given priority over the claim of any secured creditor
- The Court may order that a new interim financing security or charge ranks in priority over one granted in a previous Court order, only with the consent of the person in whose favour the previous order was made



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Interim Financing - Judicial Consideration

- CCAA
 - *Canwest Publishing Inc./Publications Canwest Inc., Re*
 - 2010 CarswellOnt 212 (S.C.J. [Commercial]) at paras. 42-46;
 - 2009 CarswellOnt 6184 (S.C.J. [Commercial]), at paras. 31-36.
 - The Court applied the relevant provisions in connection with two interim financing transactions
 - The applicant should first address the requirements in s. 11.2(1) (i.e. giving notice to affected creditors, that the security/charge does not secure an existing obligation), then address the factors in s. 11.2(4) (i.e. the period in which the company is expected to be subject to CCAA proceedings, how its business is to be managed during that time, whether its management has the confidence of its major creditors, whether the loan would enhance the prospects of a viable compromise or arrangement, the nature and value of its property, whether any creditor would be materially prejudiced by the security/charge and the monitor's report)
 - The list of factors to be considered by the Court provided for in the statute is not exhaustive



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Interim Financing - Judicial Consideration

- CCAA
 - *Cow Harbour Construction Ltd., Re*
 - Action No. 1003 05560, unreported Order of K.D. Yamauchi J., April 28, 2010 (Alta. Q.B. [Chambers])
 - The Court held that s. 11.2(1) is to be construed narrowly and literally to prohibit extending the security or charge to pre-filing obligations
 - The proceeds collected from accounts receivable generated after the filing date can be used to pay down pre-filing working capital obligations without violating s. 11.2(1), as long as the interim financing is used to fund the operations and restructuring of the debtor

Receivership - BIA

- On application by a secured creditor, the Court may appoint a National Receiver (“NR”) if it is considered just and convenient. The NR will have the authority to act throughout Canada, eliminating the need to obtain separate appointments in every province/territory where the debtor has assets (BIA, s. 243)
- The NR may take possession of all or substantially all of the inventory, A/R or other property and exercise any control or take any actions that the Court considers advisable
- The appointment of an interim receiver (“IR”) by the Court will last until the earlier of:
 - the date on which a receiver or trustee takes possession of the property over which the IR was appointed; and
 - the date the proposal is approved by the Court (BIA, s. 47 and 47.1)
- The Court may now direct the IR to “take conservatory measures” and “summarily dispose of property that is perishable or likely to depreciate rapidly in value” rather than the IR taking “such other action as the Court considers advisable” as was previously the case
- As compared with the previous provisions on receivers, the role of the IR is as an interim watchdog with a restricted term of appointment and more limited powers

Receivership - Judicial Consideration

- BIA
 - *Railside Developments Ltd., Re*
 - 2010 CarswellNS 8 (S.C.) at paras. 44-66.
 - The Court distinguished between the new IR and NR
 - The IR is now truly interim: it lasts only until the secured creditor, NR or a trustee takes possession, or a deadline expires
 - The amendments give the Bankruptcy Court (including Masters + Registrars in Bankruptcy, which are included in the definition of “court”) the power to appoint receivers previously reserved for the provincial superior Courts – a remedy independent of the bankruptcy regime

Remedies - BIA

- “Settlements and Preferences” now called “Preferences and Transfers at Undervalue” (BIA, s. 91-100, 95 and 96)
- “Transfer at undervalue” now defined as: “a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor” (BIA, s. 2)
- The ability of the trustee to review non-arm’s length transactions has been broadened and the requirement to prove intent has been removed. It must only be shown that the transfer had the effect of preferring, not that it was made with a view to prefer (BIA, s. 95)
- The scope for attacking transactions has been broadened. On application by the trustee, the Court may declare that a transfer at undervalue is void against, or may not be set up against, the trustee, or order that a party to the transfer pay the difference between the value of the consideration received and given by the debtor to the estate (BIA, s. 96)

Remedies - BIA

- Supplier Remedies

- The prior unpaid supplier 30 day goods provision was amended to give unpaid suppliers 15 days after the date of bankruptcy or the appointment of a receiver (including an IR) to submit a written demand for goods delivered to the purchaser or the purchaser's agent within 30 days before the bankruptcy or the appointment of the receiver (BIA, s. 81.1)
- The goods must be in the possession of the purchaser, trustee or receiver, be identifiable, in the same state as they were on delivery, have not been resold or subject to any agreement for sale at arm's length, and the supplier is not paid the entire balance owing after the demand is issued

Remedies - CCAA

- CCAA applies the new BIA provisions on Preferences and Transfers at Undervalue (CCAA, s. 36.1)
- Supplier Provisions
 - On application by a debtor company and on notice to secured creditors likely to be affected, the Court may declare a party to be a “critical supplier” to the debtor company
 - The Court may order critical suppliers to continue to supply goods or services to the company on terms and conditions that are consistent with the supply relationship or that the Court considers appropriate (CCAA, s. 11.4)
 - If such an order is made, the Court shall also declare that all or part of the property of the debtor is subject to a security or charge over all or any part of the debtor’s property in favour of the critical supplier and that security or charge may rank in priority over the claim of any security creditor

Remedies - Judicial Consideration

- CCAA
 - *Canwest Global Communications Corp., Re*
 - 2009 CarswellOnt 6184 (S.C.J. [Commercial]) at paras. 42-43; see also 2010 CarswellOnt 212 (S.C.J. [Commercial]), at paras. 50-51.
 - Amendments codified the prior practice of permitting the payment of pre-filing amounts to critical suppliers but also authorizes the creation of a charge
 - In this case, no charge was requested by the debtor (or the critical supplier), so there was an issue as to whether s. 11.4 even applied
 - The Court held that regardless of its application or not, the applicants had met the requirements
 - The Court held that the debtor is not required to seek a charge pursuant to this provision as security for a Court-designated critical supplier
 - The Court authorized but did not require the debtor to make payments for the pre-filing provision of goods and services to third parties who are critical and integral to their businesses

Remedies - Judicial Consideration

- CCAA
 - *Cow Harbour Construction Ltd., Re*
 - Action No. 1003 05560, unreported Order Amending the Initial Order of K.D. Yamauchi J., July 6 2010 (Alta. Q.B. [Chambers]) at paras. 35-41.
 - The Court granted a charge over the property of the debtor in favour of critical suppliers pursuant to s. 11.4 of the CCAA, and a fund was created for the critical suppliers

Equity Claims - BIA

- The terms “equity claim”, “equity interest” and “shareholder” have now been defined
- Creditors with equity claims are all to be in the same class of creditors in relation to those claims and may not vote at any meeting unless the Court orders otherwise (BIA, s. 54.1)
- Creditors with equity claims are not counted when determining if a majority of the unsecured creditors have voted to accept a proposal (BIA, s. 54(2))
- A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied

Equity Claims - CCAA

- The terms “equity claim”, “equity interest” and “shareholder” have been defined
- The Court will not sanction a plan if equity claims receive payment and non-equity claims are not paid in full (CCAA, s. 6(8))
- Creditors with equity claims are all to be in the same class of creditors in relation to those claims and may not vote at any meeting unless the Court orders otherwise (CCAA, s. 22.1)
- Equity claims that arise as a result of a fraudulent misrepresentation by the debtor (ex. where a shareholder asserts a right of rescission on the basis of fraudulent misrepresentation) may be compromised in a plan (CCAA, s. 19(2))
- Creditors with equity claims may not vote on a plan that compromises the claims unless the Court orders that they may vote on the plan
- Note that the Court has discretion to permit equity holders to vote, but s. 6(8) unequivocal that equity claims cannot receive any distribution until debt claims paid in full

Protection from Liability - BIA

- The BIA has been expanded to protect, in addition to trustees, trustees under a proposal, IRs and receivers, “any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or bankrupt” (i.e. privately appointed receivers and secured creditors) (BIA, s. 14.06)
- Professionals are protected from personal liability, including liability from being designated a “successor employer” for claims of “employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees” that existed or relate to the period prior to their appointment
- The Court may make an order allowing for the payment of fees and disbursements of the receiver and giving the receiver a charge ranking ahead of any or all secured creditors, only if it is satisfied that all secured creditors that would be affected were given reasonable notice (BIA, s. 243)
- These disbursements do not include payments made in the operation of the business of the insolvent person or bankrupt, but the receiver has been provided with borrowing powers and security for costs associated with such operations (BIA, s. 31(1))

Protection from Liability - CCAA

- Monitors are protected from personal liability, including liability from being designated a “successor employer” with respect to claims of employees or former employees of the company or a predecessor of the company, or in respect of a pension plan for the benefit of those employees that existed or relate to the period prior to their appointment (CCAA, s.11.8(1))
- The Court may make an order allowing for the payment of fees and disbursements of the Monitor and any financial and legal experts retained by the monitor, the company or any other interested person, and giving such party a charge ranking ahead of any or all secured creditors, only if it is satisfied that all such secured creditors that would be affected were given reasonable notice (CCAA, s. 11.52)



Protection from Liability - Judicial Consideration

- CCAA
 - *AbitibiBowater Inc., Re*
 - 2010 CarswellQue 2812 (S.C.) at paras. 280-296, Leave to appeal refused by 2010 CarswellQue 4782 (C.A. May 18, 2010); Application/Notice of Appeal filed, 2010 CarswellQue 8859 (S.C.C. Aug 16, 2010).
 - The Court held in *obiter* that statutory liabilities to remedy environmental damage should be provable claims under the CCAA whether or not the Crown has effectively incurred the costs
 - Such environmental claims will become priority claims under s. 11.8 where the likelihood of the Crown enforcing the remediation by incurring the cost is greater than the likelihood of enforcing it by an execution in nature against the debtor. The Crown does not need to actually incur the costs to qualify under that provision.

- 2. Observations
- 3. What's Next?

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