Americas Restructuring Review 2020

Edited by

Richard J Cooper and Lisa M Schweitzer

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AMERICAS
RESTRUCTURING REVIEW
2020

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Preface

Welcome to the *Americas Restructuring Review 2020*, one of *Global Restructuring Review*'s annual, yearbook-style reports.

Global Restructuring Review, for anyone unfamiliar, is the online home for international restructuring specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, *GRR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our *GRR Live* banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than our journalistic output is able. The *Americas Restructuring Review*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from all across the Americas.

Across 17 chapters and 208 pages, this edition provides an invaluable retrospective from 32 authors. All contributors are vetted for their standing and knowledge before being invited to take part. Together, our contributors capture and interpret the most substantial recent international restructuring events of the year just gone, supported by footnotes and relevant statistics. Other articles provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular jurisdiction.

This edition is bigger than ever and covers Argentina, Bahamas, Bermuda, Brazil, Canada, the Cayman Islands, Chile, Dominican Republic, Mexico and the US (from several angles). It also includes two chapters on sovereign debt.

Among the nuggets you will find:

- a case study of the Noble Group's restructuring (the chapter of the Bahamas);
- a prediction on when Brazil's fabled new restructuring law might see the light of day;
- a request to Mexico's ruling party to amend the Concorso Law;
- clarification on when a foreign-to-foreign transfer may be "too foreign" for the purposes of US bankruptcy law;

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- analysis of the (somewhat) contradictory Chapter 15 decisions in Oi, Agrigkor and QCOG; and
- a description of some new stratagems hedge funds and private equity funds have found to get high returns in rescue deals.

And much, much more. We hope you enjoy the review.

On behalf of *GRR*, I would like to thank the review's editors Richard Cooper and Lisa Schweitzer, of Cleary Gottlieb Steen & Hamilton, for the direction and energy they've given, and my colleagues Jon Allen and Adam Myers, in our production department, for changes to our design that provide a digest of each chapter for those short of time. Thanks to them, this is the finest review we've produced.

If readers have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to insight@globalrestructuringreview.com.

David Samuels
Publisher
November 2019

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Canada's Flexible Restructuring Framework

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In summary

This chapter highlights the flexible nature of Canada's restructuring regime, where creative solutions to novel and complex issues are welcomed by the judiciary.

Discussion points

- Overview of the two main restructuring statutes (CCAA and BIA)
- The skeletal nature of Canada's main restructuring statute, and broad judicial discretion
- Examples of novel solutions achieved in various proceedings resulting in successful restructurings

Referenced in this article

- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
- Bankruptcy and Insolvency Act (Canada), R.S.C. 1985, c. B-3
- Canada Transportation Act, S.C. 1996, c. 10
- Canada Business Corporations Act, R.S.C. 1985, c. C-44
- Winding Up and Restructuring Act, R.S.C. 1985, c. W-11

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Introduction

If 'necessity is the mother of invention',[1] then insolvency is a perfect incubator within which creative solutions can emerge. Fortunately for companies that conduct business in Canada, the restructuring options that exist are broad, flexible and respond to even the most unusual of circumstances. Canada's main restructuring statute is relatively bare-bones in nature and is not encumbered by extensive restrictions on what steps may be taken, rigid time frames as to when they must be taken or by limited circumstances in which particular relief may be available.[2] The statutory framework is also supported by a well-developed body of jurisprudence that reflects the willingness of Canadian judges to be responsive to the 'real-time' nature of insolvency proceedings and to grant appropriate relief that fits the unique facts of a particular case. As such, Canada provides a model of efficiency, flexibility and creativity for restructuring solutions.

The two main federal statutes under which debtor companies can seek to restructure in Canada are the Bankruptcy and Insolvency Act (Canada) (BIA)[3] and the Companies' Creditors Arrangement Act (CCAA).[4] Generally, the BIA is utilised by a debtor company:

- when bankruptcy, as opposed to a restructuring, is appropriate; or
- to present a 'proposal' to creditors that is less complicated or will require less judicial oversight than a full restructuring under the CCAA.

For more complex restructurings involving companies with collective bargaining agreements, defined benefit pension plans or cross-border aspects, a proceeding under the CCAA will generally be the chosen path.

Until it was amended in 2009, the CCAA had only 22 sections in total.[5] Notwithstanding its brevity, this statute has provided the basis for the largest and most complex restructurings in Canada – including those involving Air Canada, Stelco, AbitibiBowater, Olympia & York, Nortel Networks and US Steel Canada. One of the most important, and unique, aspects of the CCAA is the following provision:

1 *Republic*, by Plato.

2 When compared, for example, with the extensive provisions of Chapter 11 of Title 11 of the United States Code [US Bankruptcy Code].

3 Bankruptcy and Insolvency Act, RSC 1985, c B-3.

4 RSC 1985, c C-36 [CCAA] Proceedings can also be commenced under the federal Winding Up and Restructuring Act, RSC 1985, c W-11. However, it is generally used in very limited circumstances, when dealing with particular entities such as banks, trust companies and insurance companies.

5 Even after the extensive 2009 amendments the CCAA remains brief, with only 63 sections in total.

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General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Since broad judicial discretion is conferred under the CCAA, it is perhaps not surprising that decisions issued by Canadian judges in restructuring proceedings reflect practical, flexible and creative solutions to some of the most difficult issues that arise. That has proven to be the case even where the CCAA appears to be otherwise unavailable to a particular debtor company, where other more traditional avenues for resolution have proven futile or where the facts cry out for a solution and none is readily apparent.

Castor Holdings

One such example can be found in the case involving Castor Holdings Ltd.[6] A national accounting firm in Canada had been embroiled in auditor's negligence litigation spanning 22 years, described by one of the presiding judges as 'the longest-running judicial saga' in Canada. It involved more than 40 plaintiffs (including foreign and domestic financial institutions, insurers and other stakeholders), several associated or successor firms and approximately 400 accounting and other individual professionals across the country.

Restructuring counsel and advisers were retained by the defendant partners of the national accounting firm following two decades of entrenched litigation among the parties.[7] A creative solution was developed to address and resolve all claims through a CCAA proceeding. The proposal involved numerous procedural and substantive hurdles. For example, the threshold requirement for a debtor commencing a CCAA proceeding and obtaining the benefit of a stay of proceedings did not extend to professional firms such as the accounting firm in question.[8] As a result, a unique 'synthetic bankruptcy' mechanism was developed to satisfy stakeholder and plaintiff concerns over the problematic questions of adequate disclosure of assets to satisfy any judgment, and appropriate funding issues on the part of the former partners of the professional firm. After intense negotiations, a 'coalition of the willing' creditors was successfully established to support a structured settlement among a small, but influential group of plaintiffs. Through combined litigation and negotiation tactics, the defendants garnered enough support to pass a plan of arrangement to resolve all claims. Creativity within the CCAA framework, together with the flexibility shown by the Canadian judge, facilitated an efficient resolution to one of the most intractable cases in Canadian litigation history.

6 *4519922 Canada Inc Re*, 2015 ONSC 124 (Ont SCJ [Commercial List]).

7 The author's firm was retained by the partners of the national accounting firm, and commenced the CCAA filing as a means to finally resolve these claims.

8 The court was satisfied that, as one company existed within the affected group, the applicants could qualify as a 'debtor company' within the meaning of the CCAA.

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Montréal, Maine & Atlantique Canada

Another case in which the flexibility of Canada's restructuring framework was tested involved a catastrophic loss of life arising from a tragic railway accident, which resulted in significant financial losses to the affected company. In July 2013, a freight train derailed in the village of Lac-Mégantic, in the province of Quebec. In total, 47 people were killed, and the downtown area was effectively destroyed. In the wake of the disaster, numerous claims were filed against the railway company, Montréal, Maine & Atlantique Canada Co (MMA). MMA filed for court protection under the CCAA in August 2013 to obtain a stay of proceedings and provide a comprehensive and binding forum for resolving claims filed against it. A threshold issue to be determined was whether MMA was a 'company' within the meaning of the CCAA, such that it could qualify as a 'debtor company' entitled to seek protection.[9] Section 2 of the CCAA contains a definition of 'company', which specifically states that the term 'does not include . . . railway or telegraph companies'. Similarly, the BIA defines 'corporation' to not include railway companies.[10]

Nonetheless, the court granted the initial order that commenced the CCAA proceeding, allowing the company to develop a plan of arrangement that had the effect of compromising all claims against it. The court found that the very limited insolvency provisions in the Canada Transportation Act[11] left a 'legal vacuum'.[12] As a result, it chose to exercise its inherent jurisdiction under section 11 (reproduced above) to grant an initial order, which provided for a stay of proceedings. The court justified this by focusing on the interests of MMA's creditors, saying that to 'deny MMA the right to avail itself of the [CCAA] would be grossly unfair with respect to the rights of ordinary creditors – including the victims in Lac-Mégantic – and absolutely unacceptable in a society governed by the rule of law'.[13] The court also noted the risk that applying different statutes to different creditors could create inconsistencies and injustices.[14] In other words, substance will prevail over form when the facts demand a practical, timely and equitable solution.

SquareTwo Financial

A further example of the Canadian courts' flexibility in granting relief that responds to unique facts or situations involved a cross-border proceeding before the Canadian and US courts.[15] SquareTwo Financial Corporation involved a group of companies incorporated and doing business in both Canada and the US. Chapter 11 proceedings were commenced under the US

9 *Montréal, Maine & Atlantique Canada Co*, Re, 2013 QCCS 4039 [*Re MMA*].

10 RSC 1985 c B-3, s 2.

11 SC 1996, c 10, which governs insolvent railway companies at sections 106 to 110.

12 *Re MMA*, supra note 10 at para 18.

13 *Ibid* at para 24.

14 *Ibid* at para 25.

15 The author was Canadian counsel for SquareTwo in obtaining the Order referenced above.

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Bankruptcy Code for all companies, on the basis that the US was the centre of main interest for the group. Proceedings were then brought in Canada pursuant to the CCAA for recognition of the Chapter 11 proceedings including orders granted by the US court.

This restructuring involved a pre-packaged joint plan of arrangement and was therefore subject to a two-week solicitation period prior to the Chapter 11 petitions being filed in the US. If news of the impending bankruptcy filing had become public prior to the intended date for filing the petitions, the filing date in the US could have been moved up in order to obtain the automatic stay of proceedings under the US Bankruptcy Code. However, that would have created a potential problem on the Canadian side of the cross-border proceeding. The CCAA does not provide for an automatic stay of proceedings upon filing, but rather, a stay is only available pursuant to a court order. The Canadian proceedings were for recognition of the foreign main proceedings brought in the US, and accordingly, recognition could not be sought in Canada until the first-day orders had been issued by a US court. A potential gap could therefore arise where a stakeholder could terminate rights or take certain steps in Canada, before an order recognising the (as yet uncommenced) US foreign main proceedings could be obtained from the Canadian court.

Owing to the nature of SquareTwo's business, it depended upon licences issued by a regulatory authority in each of the provinces and territories in Canada, supported by financial bonds posted in each province. Any suspension or termination of the licences or the bonds that supported the licences, even on a temporary basis, could seriously harm the business and jeopardise the ability to complete the pre-packaged transaction. Provided the businesses were permitted to operate in the ordinary course to facilitate the intended transaction upon filing, creditors in Canada would be unaffected by the pre-packaged joint plan of arrangement and would continue to be paid in the ordinary course.

Faced with different statutory requirements in Canada and the US, and the need to preserve stability to permit a future (intended) insolvency proceeding to be commenced, the Canadian court was satisfied that the provisions of the CCAA permitted extraordinary relief to be granted, based on the particular facts of the case. As a result, the court granted an immediate and unprecedented pre-filing stay of proceedings – prior to the commencement of any insolvency proceedings in Canada or the filing of the Chapter 11 petitions in the US. If any stakeholder had taken steps in the two weeks prior to the commencement of the insolvency proceeding that affected the ability of SquareTwo to carry on its business, the signed and issued order of the Canadian court could be provided to them.[16] The effect of the order was to require compliance with an interim stay of proceedings, and the preservation/reinstatement of rights, from the day on which it was issued (which coincided with the commencement of the solicitation period for the pre-packaged plan of arrangement).

The order was obtained without notice to any party, as to give notice would defeat the very purpose of it, with the original signed order sealed from the public record at the court office until the subsequent commencement of the Chapter 11 proceedings and CCAA

16 As no creditors took steps to enforce their rights during the two-week pre-filing period, the order did not have to be enforced. It therefore served as a form of insurance policy that was never utilised.

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recognition proceedings. Counsel for SquareTwo had the only other signed copy of the order. The Canadian court responded favourably to a creative use of various provisions of the CCAA coupled with applicable procedural rules of the court, by showing flexibility and a willingness to facilitate solutions that met the unique requirements of the case.

Asset-backed commercial paper

The largest corporate restructuring under the CCAA also had its share of creative and responsive judicial thinking. The case arose in 2007 out of the freezing of the Canadian asset-backed commercial paper (ABCP) market, caused by worries over exposure of the financial instrument to US sub-prime mortgages. ABCP issuers were not raising enough money from the long-term assets that typically funded the repaying of maturing short-term ABCP, which was leading to ABCPs falling into default. A default of the ABCP market also triggered a default of the credit default swaps (CDS) that underlay the ABCP. A default of the CDS would have left the ABCP holders with little possibility of recovery.

There were several obstacles to successful CCAA proceedings. First, there were a large number of ABCP issuers, most of whom were not related to one another. Second, and relatedly, the wide-ranging group of debtors had a correspondingly wide-ranging group of creditors. As a result, it was difficult to conceive of what the different classes of creditors could be. Third, ABCP was issued predominantly by trust entities. The CCAA definition of 'debtor companies' does not include trusts.

The court was able to overcome these difficulties with a practical and flexible approach. With the consent of the debtors, the court consolidated the proceedings into a single action, rather than running 20 separate proceedings that were each dependent on one another.

The court approved this on the basis that the restructuring plan was very much focused on correcting the ABCP market, rather than being specifically targeted at any individual issuer.

The issuers also requested that creditors vote as a single class. To protect the creditors, the issuers proposed looking at the votes for each series of ABCP notes, and reconsidering the issue of creditor classification if the noteholders of a series did not approve the plan. As the plan was eventually approved by a significant majority of noteholders, and a majority in each series, the potentially fraught and time-consuming process of creditor classification was not necessary.

Lastly, as in the *MMA* case, the issuing trust vehicles were able to bring themselves within the definition of a debtor company, and therefore benefit from CCAA protection. This was done by placing the issuer trust entities into corporations prior to the commencement of CCAA proceedings.

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Stelco Inc

Innovative use of the CCAA is not a new phenomenon. In 2004, Stelco Inc was facing financial difficulties, and obtained an initial order granting it protection under the CCAA. Several unions challenged the initial order, arguing that Stelco could not be granted CCAA protection as it was not insolvent, and therefore could not be a 'debtor company' as defined in section 2 of the CCAA.[17]

At the time of the hearing, common practice was to use the definition of insolvency provided for by section 2 of the BIA as the test to be applied.[18] Stelco claimed that it met two of the three tests under the BIA, and the court agreed. However, the court emphasised a second approach. It noted that the CCAA definition of a debtor company had one definition – where a company 'is bankrupt or insolvent' – that did not reference the BIA. The court therefore felt able to analyse whether or not Stelco was insolvent purely in the context of the CCAA.

In conducting this contextual analysis, the court considered the purposes of the CCAA, noting that as a remedial statute, it aimed to allow a debtor company to benefit from its protections before it reached the point where it could no longer be salvaged. The court observed that there was limited value to a restructuring if the company was past the point of being saved, and it was preferable to allow companies to commence a restructuring before it reached that point.

The court therefore indicated that it was willing to allow a company to benefit from CCAA protection where it was 'reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring'.[19] This would give the company a cushion where it could obtain DIP funding, pursue more thoroughly all possible restructuring opportunities and maximise its chance of a resolution that was viable in the long run.

The unions sought leave to appeal both to the Ontario Court of Appeal, and the Supreme Court of Canada, but both applications were successfully resisted by Stelco. The insolvency test from *Stelco* is now considered part of Canadian insolvency law.[20]

17 *Stelco Inc, Re*, 2004 Carswell Ont 1211 [*Stelco*].

18 That section provides as follows:

> *'insolvent person' means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and:*
>
> *(a) who is for any reason unable to meet his obligations as they generally become due;*
>
> *(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or*
>
> *(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.*

19 *Stelco*, supra note 17 at para 26.

20 For example, the test was used in *Urbancorp Toronto Management Inc, Re*, 2016 ONSC 3288, and *Target Canada Co, Re*, 2015 ONSC 303.

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Unlike Chapter 11 proceedings in the US, the CCAA continues to require debtor companies to demonstrate that they are insolvent. However, the flexible approach of the Canadian courts has ensured that the statutory requirement of insolvency has not created unnecessary barriers to commencing a restructuring as early as possible.

Monitor's role and standing to litigate claims

Canada's insolvency regime has a unique feature in the role of a court-appointed monitor in proceedings commenced under the CCAA. While originally selected by the debtor company prior to filing, once appointed pursuant to the initial order made on the date of filing, the monitor is an officer of the court with fiduciary duties to all creditors of the debtor company, and acts as the 'eyes and ears of the court' in the course of the restructuring. It files regular reports with the court, reporting on everything from the cash flow forecast prepared by the debtor company, the terms of DIP financing negotiated by the debtors, the reasonableness of any settlements reached, the status of claims and all other significant aspects of a restructuring. The monitor is an accounting firm that includes licensed trustees in bankruptcy who, in other situations, may be retained as adviser to debtor companies, lenders or other stakeholders.

Courts supervising CCAA proceedings have also used creative orders to give the CCAA monitor powers to litigate on behalf of different groups during the process. The courts have been flexible in their interpretation of standing requirements, to permit claims to be made as efficiently as possible, while avoiding delay.

For example, in *Ernst & Young Inc v Essar Global Fund Ltd*,[21] the Ontario Court of Appeal upheld the decision of Newbould J authorising the monitor to bring an oppression action on behalf of a group of creditors of Algoma.

The monitor sought to challenge a related party transaction, and argued that it (among other things) gave unwarranted value to a related party, and was therefore oppressive to the non-related creditors of Algoma. Potential oppression claimants are typically defined as including 'any other person who, in the discretion of a court, is a proper person to make an application under this Part'.[22]

The court held that, generally speaking, the monitor is to be neutral. However, in 'exceptional circumstances' it may be appropriate for the monitor to serve as a complainant in an oppression action.[23] This was clearly an 'exceptional' case.

The court agreed with the monitor that there was a significant benefit to collective action, where a broad range of creditors could consolidate their attempts to increase their recovery of the large amounts outstanding. While noting that actions where the monitor adopts a non-neutral role were an exception, the benefits of collective action made this an appropriate situation to permit the monitor to bring the claim.

21 *Ernst & Young v Essar Global Fund Limited*, 2017 ONCA 1014 [*Essar Global*].

22 See, for example, section 238 of the Canada Business Corporations Act, RSC 1985, c C-44.

23 *Essar Global*, supra note 21 at para 120.

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The broad range of possible powers a court can give to a monitor is an important innovation in CCAA proceedings. It allows significant legal disputes to be settled expeditiously and avoids duplicitous proceedings.

Conclusion

Given the above examples, the reader should not be left with the impression that creativity and flexibility in the Canadian restructuring framework have resulted in the core principle of commercial certainty being compromised or undermined. On the contrary, capital markets in Canada are robust and continue to attract sophisticated participants who thrive in an environment where creative solutions are encouraged and rewarded. This has the benefit of causing stakeholders and their advisers to constantly strive to find better solutions for the most difficult business problems.

* *The author would like to acknowledge the assistance of James Hardy, student-at-law (now an associate) at Thornton Grout Finnigan LLP, in the preparation of this chapter.*

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DJ Miller is a partner in the insolvency and restructuring group of Thornton Grout Finnigan LLP and has represented a wide variety of stakeholders in complex restructurings and insolvency litigation for the past 25 years. She was named 'Insolvency Litigator of the Year' (2018 and 2016) by Benchmark Canada, received the 2017 'Women of Excellence – Exemplar' award from the Turnaround Management Association and a Lexpert Zenith Award in June 2017.

DJ was lead Canadian insolvency counsel to the UK Pension claimants in the Nortel Networks case, and was successful in obtaining a precedent-setting pro rata allocation of US$7.3 billion of sale proceeds among more than 40 insolvency estates in Canada, the US and Europe following the first joint trial of the Canadian and US courts. She has extensive experience on the 'deal' side of restructurings as well as insolvency litigation, and has appeared before every level of court in Canada. DJ is a member of the Insolvency Institute of Canada, has served as president of the board of directors of the Toronto Chapter of the Turnaround Management Association and currently acts as vice president of Chapter Relations on the Executive Board of TMA Global. She is recognised as a leading lawyer in Insolvency Litigation and Financial Restructuring by *The Canadian Legal Lexpert Directory*, *Chambers Canada*, *Chambers Global* and *Who's Who Legal* among others.

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Thornton Grout Finnigan LLP (TGF) is a restructuring and litigation powerhouse in the Canadian market operating from its single office in Toronto. It plays a leading role in complex cross-border and multi-jurisdictional restructuring proceedings, resulting in it being recognised as 'Insolvency Firm of the Year' in Canada for three years in a row by an international market ranking and research firm. TGF is a mix of senior restructuring and litigation lawyers with a full range of experience gained within and outside of Canada's largest law firms, combined with talented and energetic younger lawyers who thrive in the entrepreneurial environment of a highly focused specialty firm.

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