The Clash Between Corporate & Insolvency Law: CBCA Restructurings

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I. INTRODUCTION

When management of an insolvent company decides to restructure, the *Canada Business Corporations Act*[1] is typically not the first statute that comes to mind. Canada has a comprehensive insolvency regime: The *Bankruptcy and Insolvency Act*,[2] *Companies' Creditors Arrangement Act*,[3] and the *Winding-up and Restructuring Act*.[4] However, within the past decade a number of insolvent or near insolvent Canadian corporations have restructured using the *CBCA* section 192 plan of arrangement.[5]

This recent trend raises some interesting points regarding the effectiveness of *CBCA* restructurings since the *CBCA* is a corporate statute and not an insolvency statute. The purpose of the *CBCA* is to encourage the uniformity of business in Canada and allow the orderly transfer of corporations.[6] The purpose of the *CCAA*, on the other hand, is to allow an insolvent company the ability to carry on a business in the ordinary course while facilitating restructuring for the *general* benefit of its creditors.[7] Given the different purposes of the acts, do insolvent companies need both to facilitate restructuring?

This paper will examine restructuring under the *CBCA* and *CCAA*. The plan of arrangement statutory provisions will be outlined, the development of the common law on *CBCA* arrangements, and the *CBCA* Director's update on these arrangements. Next, a detailed analysis of the perceived advantages and disadvantages of *CBCA* restructurings will be addressed. This will be followed by a comparative analysis of the similarities and differences between restructuring under the *CBCA* and the *CCAA*. Finally, the future of *CBCA* restructurings of debt as well as remaining questions left to be answered regarding the Canadian insolvency regime will conclude this discussion.

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[1] RSC 1985, c C-44 [***CBCA***].
[2] RSC 1985, C B-3 [***BIA***].
[3] RSC 1985, c C-36 [***CCAA***].
[4] RSC 1985, c W-11.
[5] Paul Casey & Martin McGregor, "CBCA Section 192 Restructurings: A Streamlined Restructuring Tool or a Statutory Loophole?" (2013) Annual Review of Insolvency Law at para 1 [***Casey***].
[6] *CBCA*, *supra* note 1 at s 4.
[7] See *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183 at para 5 (O.C.J. [Commercial List].

II. DEVELOPMENT OF CBCA RESTRUCTURINGS

A. Relevant Statutory Provisions

Section 192 provides *CBCA* corporations the power to restructure its debt. An arrangement is defined and has been interpreted very broadly under this provision[8], including the approval of a debt restructuring.[9] Subsection 3 is the operative provision in the section. It allows the corporation to apply to the court for an order approving an arrangement proposed by the corporation.[10] This provision has two elements: (1) it must be not possible for a corporation to effect a fundamental change under any other provision of the *CBCA*, and (2) the corporation is not insolvent.[11] The insolvency test is found in subsection 2.[12] Finally, subsection 192(4) gives the court the discretion to make any interim or final order it deems fit.[13]

B. Section 192 and the Common Law

Given the solvency requirement of subsection 192(2), an insolvent corporation seeking to restructure its debt comes as a surprise. A line of cases addressing this issue has interpreted the arrangement provisions of the *CBCA* to be facilitative and have been utilized by corporations to effect a wide range of different types of transactions.[14] The courts have accepted the satisfaction of the solvency requirement in two situations: (1) when there is at least one applicant which is solvent,[15] or (2) when the solvency requirement is satisfied during the arrangement process. This may be accomplished by a reduction in the corporation's stated capital, converting debt into

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[8] Subsection 192(1) provides "arrangement" includes (a) an amendment to the articles of a corporation, (b) an amalgamation of two or more corporations, (c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act, (d) a division of the business carried on by a corporation, (e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate, (f) an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate. (f.1) a going-private transaction or a squeeze-out transaction in relation to a corporation, (g) a liquidation and dissolution of a corporation and (h) any combination of the foregoing.

[9] See e.g. *In the Matter of a Proposed Arrangement concerning Yellow Media Inc et al*, 2012 QCCS 4180 [***Yellow Media***].

[10] *CBCA*, *supra* note 1 s 192(3): Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

[11] *Ibid*.

[12] *Ibid* , s 192(2): For the purposes of this section, a corporation is insolvent (a) where it is unable to pay its liabilities as they become due; or where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and states capital of all classes.

[13] *Ibid*, s 192(4): In connection with an application under this section, the court may make any interim or final order it thinks fit.

[14] Industry Canada (Corporations Canada), Policy of the Director Concerning Arrangements under Section 192 of the *Canada Business Corporations Act*, 4 January 2010, online: Industry Canada, https://www.ic.gc.ca 2.01 [***Policy Statement***].

[15] See e.g. *Savage v Amoco Acquisition Co.* (1988), 40 BLR 188, 10 ACWS (3d) 18 [***Dome Petroleum***]. This case involved a complex transaction where Amoco proposed to restructure several billion dollars in secured and trade debts as well as all outstanding shares in Dome Petroleum. Dome would become a wholly owned subsidiary of Amoco after the transaction. At issue was whether this transaction satisfied the s. 192 solvency requirements because the genesis of the transaction was Dome's insolvency. Justice Kerans held the solvency test would be satisfied if one of the corporations to the transaction was solvent.

equity,[16] amending and extending debt obligations,[17] exchanging the debt of the insolvent company for debt of a solvent new company,[18] or a proposed sale of the company.[19]

The *CBCA* does not contemplate a stay of proceedings against creditors while a corporation negotiates a plan of arrangement.[20] The courts have exercised their broad powers under subsection 192(4) to address this potential issue by granting stays of proceedings in the interim order.[21] Additionally, both no-default and continued supply orders have been granted to further protect the reorganizing company.[22] This interpretation of subsection 192(4) is consistent with the purpose of section 192, as was articulated by the Supreme Court of Canada in *BCE*; that is, to achieve a fair balance between conflicting interests.[23] The courts have demonstrated the willingness to grant broad stays to facilitate the successful *CBCA* reorganization of a corporation.

C. CBCA Director's Policy Statement

On January 4, 2010, the Director of the *CBCA* released Policy Statement 15.1, concerning arrangements under section 192 of the *CBCA*. The purpose of the policy statement was to provide practitioners the Director's position of the permissible use, procedural safeguards, and substantive requirements applicable to section 192 arrangements.[24] While the Director opined transactions principally involving the compromise of debtholder claims may be more appropriately carried out under insolvency laws, the Director emphasized that attention should be

[16] See e.g. *Re Ainsworth Lumber Co. Ltd.* (25 July 2008), Vancouver No S-084425 (B.C.S.C.) [***Ainsworth***]; and *Gateway Casinos* (2010) (unreported) [***Gateway***].
[17] See e.g. *Re Compton Petroleum Corporation*, Calgary No 1001-10623 (Alta. Q.B.) [***Compton (I)***].
[18] See e.g. *Ainsworth*, *supra* note 17; *Re 45133541 Canada Inc*, 2009 QCCS 6444 (Que. S.C.) [***Abitibi****]; Re Tembec Arrangement Inc* (27 February 2008), Toronto No 08-CL-7367 (Commercial List) [***Tembec***]; and *Gateway Casinos*, *ibid*.
[19] See *Re 8440522 Canada Inc.* 2013 ONSC 2509 (Ont. S.C.J.) [***Mobilicity***].
[20] In a *CCAA* filing, the courts have exercised their jurisdiction under s. 11.02 to grant stays of proceedings against creditors of the insolvent company.
[21] See *Abitibi*, *supra* note 19 at para 106, quoting Forsyth J., *In the Matter of a Plan of Arrangement proposed by Trizec Corporation Ltd.*, (Apil 6, 1994) (Alta Q.B.) unreported: "In Trizec, Forsyth J. made the following observation on these broad powers under subsection 192(4) and their exercised in respect of the rights enjoyed by secured creditors: Subsection 4 of section 192 gives broad power to the Court with respect, inter alia, to interim orders. The power to restrain, for example, a secured creditor is not one of the specific powers delineated, and if it exists must be found in the general language which states, the Court "may make any interim or final order it thinks fit". On consideration of the whole of the section and the purpose of same, I am satisfied that in appropriate circumstances, given that the arrangement might affect the rights of secured creditors, the power to restrain enforcement of security and thus attempt to preserve the status quoi pending consideration of the arrangement by parties affected can be found in the broad general language of section 192(4)."
[22] See *In the Matter of a Proposed Plan of Arrangement Respecting Call-Net Arrangeco Inc. and Call-Net Enterprises Inc.*, Feb. 20, 2002, No. 02-CL-4423 (Ont. S.C.) at para 48 [***Call-Net***]; *Tembec*, *supra* note 19 at para 29. See also *Abitibi*, *supra* note 19 at para 114.
[23] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at paras 128-129 [***BCE***].
[24] *Policy Statement*, *supra* note 15 at 1.01.

given to paragraphs 3.07, 3.10, 3.12, and 4.04 of the policy statement.[25] These paragraphs address the notice requirement to affected security holders,[26] voting requirements,[27] minority approval,[28] and an independent fairness opinion, respectively.[29]

From the liberal interpretation of the *CBCA* provisions, debt reorganization has become a part of the *CBCA*. Next, the advantages and disadvantages of using the *CBCA* over the *CCAA* will be examined.

III. ANALYSIS OF CBCA RESTRUCTURINGS

A. Advantages of CBCA Restructuring of Debt

There are a number of perceived advantages which incentivize management to restructure a financially distressed company by way of a *CBCA* arrangement rather than a *CCAA* proceeding.[30] Whether these advantages are actually realized by the corporation depends on the context of the restructuring. This section will critically examine the most common advantages.

Management enjoys retaining a high amount of control over *CBCA* restructurings.[31] Unlike the *CCAA*, the *CBCA* does not require the appointment of a monitor or trustee to oversee the affairs of the insolvent company. Management has the flexibility to operate the company as it sees fit, subject to fiduciary duty requirements. This may only be a perceived advantage. *CCAA* proceedings allow management to retain control over normal operations as well.[32] Court approval is only required for significant transactions out of the ordinary course of business.[33]

Another perceived advantage is the perception that there is less court supervision over the restructuring process in comparison to the court's role in a *CCAA* proceeding. The argument is

[25] *Ibid* at 2.05.
[26] *Ibid* at 3.07: disclosure should be made of known security holders (who are debtholders) (1) who are "related persons", as defined in section 4 of the *Bankruptcy and Insolvency Act*, with respect to the debtor-corporation, (2) who hold a significant proportion (33%) or more of the total debt held by their voting class, or (3) who are entitled to vote in more than one class of securities. The Director requires, at a minimum, the corporation to obtain the information on a "best efforts" basis.
[27] *Ibid* at 3.10.
[28] *Ibid* at 3.12.
[29] *Ibid* at 4.04. To gain approval of the final order, an independent financial adviser should provide a report to all security holders, setting out reasons why the plan of arrangement is advantageous to them.
[30] *Casey*, *supra* note 5 at para 8.
[31] Milly Chow, "Out-of-Court Restructurings" 16 November 2010 at para 15, online: Blakes, http://www.blakes.com.
[32] *Casey*, *supra* note 5 at para 12.
[33] *CCAA*, *supra* note 3 at s. 36(1).

that management has full control of the planning, negotiation, and timing of the arrangement.[34] Management is only subject to the interim and final orders of the court. The *CCAA* requires the monitor to perform the duties set out in subsection 23(1) of the CCAA, and the debtor company to provide necessary assistance to the monitor to perform its duties.[35]

The time it takes for a plan of arrangement to be implemented may take as little as 30 days from the interim order to the final order.[36] This expeditious time frame is another advantage of restructuring using the *CBCA*, but this timeline may be unrealistic in most cases. On average, *CBCA* arrangements have been completed in 78 days.[37] There are two reasons for this: (1) *CBCA* compromises only security holder claims rather than all creditors,[38] and (2) a majority of the planning and negotiation between management and stakeholders occurs before the interim order. This artificially compresses the time to complete a *CBCA* arrangement.

Another advantage of *CBCA* reorganizations are the reduced costs it takes to complete the transaction. Fees by insolvency professionals, lawyers, accountants, and financial advisors account for a significant amount of costs under the *CCAA*. At the absolute minimum, *CBCA* restructurings avoid the cost of the monitor. There are also less court appearances to complete a *CBCA* plan than a *CCAA* plan. A successful restructuring may only have the interim and final hearing, lowering the overall cost. However, if there is sustained opposition from stakeholders, further court appearances may become necessary to complete the arrangement.[39]

Finally, a company that can successfully restructure under the *CBCA* may be able to avoid any stigma associated with filing under an insolvency statute.[40] For a public company, the stigma could put downward pressure on the company's stock price or an increase in the company's cost of capital. Even if a company successfully emerges from a *CCAA* restructuring, lenders may demand higher interest rates to compensate for the risk the company becomes insolvent again.

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[34] *Casey*, *supra* note 5 at para 12.
[35] *CCAA*, *supra* note 3 at s. 23(1), 35(1).
[36] Milly Chow & Marc Flynn, "Alternative Restructurings: Strategies, Challenges and Pitfalls" (2011) 26:2 National Creditor Debtor Review 13 at para 14.
[37] *Casey*, *supra* note 3 at para 14.
[38] *Policy Statement*, *supra* note 15 at 2.05. See also Sophie Melchers Francois-David Paré & David Crandall, "Debt Restructuring under the Canada Business Corporations Act" (2011) Corporate Litigation Volume XI, No. 4.
[39] See e.g. *Yellow Media*, *supra* note 10; and *Mobilicity*, *supra* note 20.
[40] *Casey*, *supra* note 3 at para 20.

However, a *CBCA* arrangement does not immunize a company from stigmatization; a proposal of an arrangement to creditors may still trigger an event of default against the company. As previously mentioned, this was the situation in *Call-Net* and *Tembec*, which required the courts to issue a no-default order at the interim hearing. When evaluating any perceived benefits, the potential of prejudice to some stakeholders must be considered.[41]

B. Disadvantages of CBCA Restructuring of Debt

Since the *CBCA* is a corporate statute, there are limitations to *CBCA* reorganizations. One limitation is that the *CBCA* will only accommodate the compromise of bondholders, debenture holders, and equity holders. The applicant company cannot compromise any claims by ordinary unsecured creditors or contingent creditors. A company requiring a total reorganization may not be successful under the *CBCA*.[42] A *CCAA* filing would be a better fit in such scenarios.

A company that is insolvent or near insolvent often cannot continue operations without obtaining DIP[43] financing. The company will require money to pay suppliers, trade creditors, and other parties vital to the continued operation of the company. While this is often a prevalent feature of *CCAA* restructurings,[44] there are no provisions for DIP financing in the *CBCA* and Canadian jurisprudence has been silent on this issue. A lack of the availability of DIP financing may be the deciding factor when management decides which statute to use.

As mentioned above, *CCAA* proceedings appoint a court monitor who is highly involved in the restructuring process. In contrast, there is no such role in a *CBCA* restructuring. While the *CBCA* Director is entitled to appear and be heard in person at any hearing for approval of an interim or final order, the Director has no discretionary powers under section 192.[45] The Director's duty is to ensure compliance with the *CBCA* provisions rather than the protection of the interests of

[41] *Ibid* at para 22.
[42] Two cases which illustrate this point are *Abitibi*, *supra* note 19 and *In the Matter of a Proposed Arrangement of Catalyst Paper Corporation* (17 January 2012), Vancouver No S-120362 (B.C.S.C.) [***Catalyst Paper***].
[43] Debtor-in-possession
[44] See e.g. Ontario Superior Court of Justice, Commercial List, Model *CCAA* Initial Order – Plan of Arrangement, preamble, online: Ontario Courts, http://www.ontariocourts.ca at paras 32-37 [***CCAA Model Order***].
[45] *CBCA*, *supra* note 1 at s 192(7): the Director's role extends to the issuance of a certificate of arrangement once the court has granted an order approving the arrangement and the Director has received articles in the proper form.

stakeholders.[46] As a practical matter, the flexibility afforded by the CCAA may offset any or all benefits of *CBCA* restructuring.

Two more disadvantages arise because the *CBCA* is not an insolvency statute. First, the *CBCA* Model Interim Order does not guarantee a stay of proceedings.[47] This introduces uncertainty into the *CBCA* process because a restructuring may not be feasible without the stay. The restructuring company must convince the court a *CBCA* stay is in the best interests of all stakeholders. The court may refuse to order a stay if it is clear a *CCAA* proceeding should be used. For example, despite stay orders containing continued supply provisions, the suppliers of *Catalyst Paper* refused to continue supply without cash or an advanced cash payment.[48] The *Catalyst Paper* proceedings were converted to a *CCAA* filing after only 14 days.

As demonstrated in the *Abitibi* and *Catalyst Paper* cases, there is always the risk a *CBCA* reorganization is converted to a *CCAA* proceeding. If this happens, any perceived advantages vanish. This makes the entire reorganization more expensive than a sole *CCAA* proceeding. Any fees incurred above the costs of a *CCAA* reorganization are additional costs to the company, its creditors, and other stakeholders.[49]

It must be recognized that many of the perceived benefits of restructuring under the *CBCA* may not actually occur in practice. For example, the lower costs of restructuring does not account for the costs associated with the planning and negotiation period.[50] Since these costs are internalized before formal *CBCA* proceedings commence, they are often overlooked when considering the costs of the transaction. Management of a company must carefully weigh both the perceived

[46] *Casey*, *supra* note 3 at para 32.
[47] Ontario Superior Court of Justice, Commercial List, Model *CBCA* Interim Order – Plan of Arrangement, preamble, online: Ontario Courts, http://www.ontariocourts.ca [***CBCA Model Order***]. Instead, the Model Order contains provisions ordering the meeting of security holders, the authorization of a plan of arrangement, information circular, notice requirements, solicitation and proxies, voting rights, and dissent rights.
[48] See e.g. *In the Matter of Catalyst Paper Corporation* (21 January 2012), Vancouver, No S-120712 (B.C.S.C.) (Affidavit of Brian Baarda) at para 115: Notwithstanding a stay of proceedings order under the CBCA proceedings, the Company received numerous calls and communications from numerous suppliers refusing continued supply without cash or advanced cash payments. The stay order under the *CBCA* is not a familiar order to the Company's suppliers and it has not proven to be effective in dealing with supplier issues, despite the fact that the Company has paid supplier accounts on existing credit terms.
[49] *Casey*, *supra* note 3 at para 18.
[50] *Ibid* at para 19.

advantages and disadvantages against each other within the broader restructuring context to decide which route is best for the future of the company.

IV. COMPARATIVE ANALYSIS OF *CBCA* AND *CCAA* RESTRUCTURINGS

A company seeking to restructure intends to exit from insolvency and continue as an ongoing concern. The *CBCA* and *CCAA* share some similarities, but also have their differences. A select few differences and similarities will be addressed below.

The *CCAA* appoints a monitor to oversee the business and financial affairs of the corporation and perform a 'watchdog' function for the court.[51] The monitor's purpose is to give creditors the same protection of a professional and impartial person as is provided to creditors in *BIA* proposals.[52] This role has expanded and frequently the monitor will state an opinion and make recommendations to the court concerning matters before the court.[53] Typically the court will not uphold a motion or approve a plan without the monitor's consent. There is no comparable role in a *CBCA* restructuring. The *CBCA* Director's position is closest to the monitor. However, this role is limited to ensuring that statutory compliance is upheld.[54] Minimal consideration is given to the protection of different stakeholders.

The scope of stakeholders' claims that may be compromised is another difference between *CBCA* and *CCAA* restructurings. The *CBCA*, as a corporate statute, focuses on solvent companies. As outlined in the Director's policy statement, a *CBCA* restructuring may only involve the compromise of debtholders[55] and equity holders' rights.[56] In contrast, the *CCAA* contemplates the compromise of every type of claim which may arise from the insolvency of a company. For example, a *CCAA* restructuring may include compromises to regulatory bodies, landlords, tort claimants, and other ordinary unsecured creditors. Due to this fundamental

[51] Duggan, et al., *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 2d ed (Toronto: Edmond Montgomery Publications, 2009) at 607. See *CCAA*, *supra* note 3 at s 11.7(1) [***Insolvency Text***].
[52] Andrew J.F. Kent, et al, "Canadian Business Restructuring Law: When Should a Court say 'No'?" (2008), 24 BFLR1, at 13-18.
[53] *Ibid*.
[54] *Policy Statement*, *supra* note 15 at 1.01.
[55] There is a difference between debtholders and creditors. Typically, debtholders consist of persons holding bonds or other forms of debt of the company. Creditors consist of persons who are owed money by the company. This may include suppliers, employees, or the government of Canada. Debtholders will always be creditors, but creditors may not always been debtholders.
[56] *Policy Statement*, *supra* note 15 at 2.05.

difference, a company wishing to compromise a wide scope of claims would best be suited to restructuring under the *CCAA*.

Finally, the two statutes handle priority in recovery differently. There are no established priority schemes within the provisions of section 192, while the *CCAA* has established creditor priorities. Since the *CCAA* is skeletal in nature, the priority scheme is established through the Model Initial Order and the *BIA*.[57] The lack of any established priority in *CBCA* restructurings results in creditor uncertainty regarding expectations of priority.[58] This could be detrimental because the inconsistency in statutory treatment between the *CCAA* and *CBCA* may negatively impact investment activity and result in a higher yield corporate bond market.[59]

The *CBCA* and *CCAA* restructuring processes also share similarities with each other. One such similarity is the plan of arrangement approval mechanisms. In both, the court has the final determination of whether a plan will be approved or not.[60] The *CCAA* requires a double majority approval, which means a majority of stakeholders in each class, representing two-thirds of the value of that class, must vote in favour of the plan.[61] On the other hand, the Director's policy statement states the appropriate levels and type of approval in a *CBCA* restructuring is a matter of judicial discretion.[62] In practice, this is typically two-thirds the value of outstanding debt.[63] The common law, statute, and policy statements suggest a company attempting to restructure with the *CBCA* will not have success without the requisite level of approval of the relevant stakeholders to the arrangement.

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[57] *CCAA Model Order*, *supra* note 46 at paras 38-43. See *BIA*, *supra* note 2 at ss 136(1), 137-140.1, and 141. After the priorities established by the *CCAA Model Order*, the priorities are: secured creditors' claims, preferred creditors, ordinary unsecured creditors, and postponed creditors.

[58] Canadian Association of Insolvency and Restructuring Professionals, "Comments on the Public Consultations on the *Canada Business Corporations Act* (2014) Legislative Comment at 5.

[59] *Ibid*.

[60] *CBCA*, *supra* note 1 at s 192(4)(e); *CCAA*, *supra* note 3 at ss 6(3), 6(5), 6(6), 11: For a court to approve a plan, the plan must accommodate the requirements in ss 6(3), 6(5), and 6(6) regarding unremitted source deductions, preferred amounts to employees, and unremitted pensions contributions. In addition, a court may exercise its s 11 general powers to not approve a plan if the plan is not "fair and reasonable". See *ATB Financial v Metcalfe & Manfield Alternative Investments II Corp.* (2008), 296 DLR (4th) 135 (Ont. CA); *Re Canadian Airlines Corp.* (2000), 20 CBR (4th) 1 (Alta. QB).

[61] *CCAA*, *supra* note 3 at s 6.

[62] *Policy Statement*, *supra* note 15 at 3.10.

[63] Jannis Sarra, "Examining the Insolvency Toolkit" (2012) Report of the Public Meetings on the Canadian Commercial Insolvency Law System [***Sarra Report***].

A stay of proceedings is another aspect common to restructuring under both statutes. Even though a stay has no statutory authority in section 192, the case law suggests that stays will be granted for companies restructuring their debt.[64] The *CCAA* expressly allows for stays by operation of section 11.02 up to a maximum of 30 days at the initial order.[65] *CBCA* stay orders are granted at the discretion of the court and have varying durations.[66] Indeed, stays have been found to be vital to an insolvent company's restructuring. Without this common feature, it is likely *CBCA* restructuring would not have become as popular.

A fundamental aspect of both statutes is the broad discretion the court is given to make any order it sees fit. This is provided for in sections 11 and 192(4) of the *CCAA* and *CBCA*, respectively. Due to the unique circumstances arising during insolvency, broad judicial discretion is required to accommodate unanticipated events before a plan is approved. Some concern has been expressed that the broad judicial discretion may provide insufficient protection for creditors.[67] Whether a company restructures under the *CCAA* or *CBCA*, the court must balance the competing interests of the various affected parties through the powers granted to it.[68]

V. CONCLUSION AND FUTURE OF CBCA RESTRUCTURING

In light of the potential disadvantages of *CBCA* restructuring and the similarities between the two statutes, do insolvent companies need the *CBCA* to restructure? The question of whether Canadian insolvency law should be governed by a multi-tiered system is not new.[69] Alongside the interplay between the *CCAA* and *CBCA* for debt restructuring, the *BIA* and *WURA* complete the Canadian insolvency regime.

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[64] See e.g. *Abitibi*, *supra* note 19; *Mobilicity*, *supra* note 20; *Compton (I)*, *supra* note 18.
[65] *CCAA*, *supra* note 3 at s 11.02(1): A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days, (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act; (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
[66] *Casey*, *supra* note 3 at para 58.
[67] Industry Canada, "Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act", online: https://www.ic.gc.ca [***Discussion Paper***].
[68] Balance has thought to be achieved by not doing a number of things: not providing any particular stakeholder an advantage of the other, not creating economic access or participation hurdles, not discouraging out-of-court resolution, and penalizing stakeholders who pursue less than legitimate propositions, *Sarra Report*, *supra* note 65.
[69] Kelly Bourassa, "Is it Time to Restructure Canada's Restructuring Statutes – Or Not?" (2013) Annual Review of Insolvency Law 2013 at para 1 [***Bourassa***].

There is no need for an insolvent company to restructure under the *CBCA*. The primary perceived benefits include the speed and flexibility offered to accomplish an arrangement, and the avoidance of stigma associated with insolvency.[70] These benefits come at the cost of potentially sacrificing the interests of other stakeholders. It has been suggested that if Canada wants the benefits of a *CBCA* restructuring, the *CCAA* should be amended to include provisions accommodating the expeditious and cost-effective *CBCA* restructuring.[71] An analogy to this would be the simplified procedure under section 76 of the Ontario *Rules of Civil Procedure*.[72] However, this expedited restructuring would not be available to all companies—there would have to be a test or threshold to satisfied first.[73]

Despite existing since the late 1800s,[74] the Canadian insolvency regime still has room to grow before it can be considered complete. Parliament must ensure there is no statutory "cherry-picking" occurring between the different statutes governing insolvent companies; this reduces the effectiveness of all the statutes of the regime. For example, if a company attempts to escape insolvency by only compromising its debt and equity obligations, this effectively gives secured and unsecured creditors a higher priority over the debtholders. This result is detrimental over time because debtholders will require higher interest rates to accommodate this risk.

Finally, insolvency is a very niche industry and it should be left to the industry experts. The *CBCA* Director must be an expert on corporate law issues, rather than the issues surrounding insolvency and restructuring. This makes the *CBCA* Director ill equipped to oversee an insolvent company restructuring its debt. On the other hand, the monitor and specialized courts such as the Commercial List in Ontario have developed expertise on the subject. Insolvency issues often must strike a delicate balance between the interests of many stakeholders and are best solved by insolvency professionals.

[70] *Discussion Paper*, *supra* note 69.
[71] *Sarra Report*, *supra* note 65 at page 72.
[72] R.R.O. 1990, Regulation 194 at s 76.
[73] For example, the company must only wish to complete a financial restructuring involving security holders. The plan would not be able to contemplate compromises to trade creditors, continued suppliers, or judgment creditors.
[74] *Insolvency Text*, *supra* note 53 at 11-12.