

# Liquidating CCAA's – Do They Have a Future?



## Presented by:

Peter Farkas - RSM Richter Inc.

John Sandrelli - Fraser Milner Casgrain LLP

Greg Watson – FTI Consulting, Inc.

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# Liquidating CCAA's: Why did they come into being?

- At the beginning, lenders looking for a better realization strategy
- Introduction to Canada of U.S. concepts and lenders
- Perceived, if not actual, likelihood of greater recovery in a “going concern” CCAA realization
- Further facilitated in response to *TCT*

# Liquidating CCAA's: Why did they come into being? *(cont'd)*

- Gave more flexibility to practitioners than receiverships - could be more “creative”
- No indemnities needed to be provided
- 30-day goods issues
- No levy
- In general, with cooperative debtor, very efficient for economic stakeholders

# Issues With Liquidating CCAA's

- A judicial view that if a company's assets are going to be sold, then it is not appropriate to use CCAA without a plan - receivership or bankruptcy should be invoked (*Fracmaster*)
- Is it fair to use CCAA's extraordinary remedies to benefit secured creditors only or limited number of economic stakeholders?
- Creditors have no say without a plan
- Split in view of courts between the west and the east

# What about the U.S.? - Liquidating Chapter 11's and Chrysler

- Section 363(b) authorizes a Chapter 11 debtor to sell property prior to a plan being presented - historically created for “the melting ice cube” problem
- Chrysler filed a pre-pack on April 30, 2009 and sold the bulk of its assets on June 2, 2009, under Section 363(b); sale approved by bankruptcy court
- Sale appealed by a bondholder

# What about the U.S.? - Liquidating Chapter 11's and Chrysler *(cont'd)*

- The U.S. Court of Appeals (Second Circuit) referred to the criteria developed in *Lionel* as factors for a court to consider approving a Section 363(b) sale:
  - Proportionate value of the asset being sold to the whole estate
  - Elapsed time since filing
  - Likelihood that a reorganization plan will be proposed in the near future
  - The effect of the sale on a future plan of reorganization
  - The proceeds of sale vis-à-vis any appraisals
  - Whether the asset is increasing or decreasing in value

# What about the U.S.? - Liquidating Chapter 11's and Chrysler *(cont'd)*

- Appeals court upheld bankruptcy court's approval of Chrysler sale largely on the basis that:
  - a) the only alternative to the sale to Fiat was a piecemeal liquidation - there were no other buyers
  - b) the sale price was \$2 billion as compared to liquidation value of \$800 million

# Liquidating CCAA's and the Amendments

- Now codified (sort of ) as Section 36. (1)

**“36. (1) Restriction on disposition of business assets – A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. **Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.**”** (*emphasis added*)

# Liquidating CCAA's and the Amendments - Factors to be considered in a sale

**“36. (3) Factors to be considered** – In deciding whether to grant the authorization, the court is to consider, among other things,

- a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- b) whether the monitor approved the process leading to the proposed sale or disposition;
- c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- d) the extent to which the creditors were consulted;
- e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.” (*emphasis added*)

Factors are similar to today's practice but different than *Lionel*.

# Liquidating CCAA's vs. Liquidating Chapter 11's

- U.S. focuses on the likelihood of a reorganization plan being filed if asset is sold
- Canada focuses on asset values and the likely impact on affected economic stakeholders on the sale and their input into process

# Amendments Impacting on Liquidating CCAA's - New Constraints (*as compared to present regime*)

- Court to “consider” whether DIP financing would enhance prospects of a plan (S. 11.2 (4)(d))
- DIP financing - priming charge requires notice to affected secured creditors - more cumbersome (S. 11.2 (1))
- DIP financing can only trump prior court charges with the consent of the chargee - problem if DIP charge comes on subsequent hearing (S. 11.2 (3))

## **Amendments Impacting on Liquidating CCAA's - New Constraints *(as compared to present regime)* *(cont'd)***

- New rules on sales to related party (S. 36 (4))
- Disclaiming of contracts more cumbersome (S. 32)
- Requirement to pay (or reserve) the super priority charge for arrears wages and pensions on sale (S. 36 (6)) \*
- Levy now payable (S. 23 (1)(f.1))

\* Reference is to S. 6(4)a and S. 6(5)a - probably should refer to S. 6(5)a and S. 6(6).

## **Amendments on Impacting Liquidating CCAA's - New Constraints (*as compared to present regime*) (*cont'd*)**

- Formal requirement for monitor to advise court if BIA is better process (s. 23 (1)(h))
- No disclaiming of collective agreements (s. 33 (1))

## **Amendments Impacting on Liquidating CCAA's -Enhancements (*as compared to present regime*)**

- Critical supplier section - court can order suppliers to supply (and grant credit) with a lien provided in favour of critical supplier (S. 11.4 (3))
- Assignment of executory contracts (including retail leases) (S. 11.3 (1))
- No presumed liability for monitor regarding employment, environmental or any other pre-filing matter (S. 11.8 (1))
- TUV's in CCAA (S. 36 (1) and (2))

# New “National” Receiver (BIA Section 243 (1))

- Basically same role / powers as present 47 (1) / 47.1 Interim Receiver
- Section 243 (1)(1)(c) - “take any other action that the court considers advisable”
- No personal liability in respect of employee matters before appointment (S. 14.06 (1.2)) - deals with *TCT* problem
- Existing environmental liability protection continued (S. 14.06 (2))
- Only a Trustee can be appointed (S. 243 (4))

# New “National” Receiver (BIA Section 243 (1)) Constraints (*as compared to Liquidating CCAA’s*)

- Ten (10) day delay after Section 244 notice sent - but provision for shortening (S. 243 (1.1))
- Must be made in the judicial district of the locality of the debtor (S. 243 (5))
- 30-day goods applies
- Super-priority of wages and pensions ranks ahead of Receiver’s fees
- No right to assign executory contracts
- Costs of taking possession in multi-plant situations can be greater than a DIP process

# **New “National” Receiver (BIA Section 243 (1)) Enhancements (*as compared to Liquidating CCAA’s*) (*cont’d*)**

- Control can be exerted by secured creditor - not dependent on D&O’s cooperation
- Ability to borrow through receiver’s certificates may not be as constrained as the new DIP provisions under the CCAA
- Speed
- May not be as expensive as CCAA given the expanded role of monitor in CCAA (e.g., approval of sale of assets, assignment of contract, etc.)

# Don't Forget about Provincial Courts of Justice Act or Law and Equity Act Receivers

- Where you have a “one-province” situation, a Courts of Justice Act Receiver may be the answer on the basis of the flexibility it provides
- Courts of Justice Act Receivers now get protection of BIA (S. 243 (2)(b))
- Will be fact driven

# The Future

- Liquidating CCAA's will still be the preferred tool for complex, cooperative debtor situations – choice of filing jurisdiction, assignment of executory contracts
- “National” Receiver will be used in the case of uncooperative debtor and shut down situations
- Courts of Justice Act Receiver will be used in select, simpler circumstances (e.g., single site real estate)



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