

**ADR IN CROSS-BORDER CANADIAN
CORPORATE RESTRUCTURING**

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**John Lorn McDougall, QC
Matthew Fleming**

Fraser Milner Casgrain LLP

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J.L. McDougall, QC & Matthew Fleming

1. Introduction and Overview of the CCAA

- The *Companies' Creditors Arrangements Act* (the "CCAA")¹ was enacted by the Parliament of Canada in 1933 during the Great Depression. The statute was originally intended to apply only to companies with complex financial structures and a large number of investor creditors. The CCAA was initially a very short, simple statute consisting of 20 sections, the operative provisions of which were sections 3, 4 and 5 regarding the ordering of creditors' meetings by the court and the approval of plans of compromise.
- In 1997 the CCAA was amended in order to modernize it. Parliament, among other things, did away with the restriction in the legislation which provided that the CCAA only applied where a company had an outstanding issue of bonds under a trust deed; pursuant to subsection 3(1), the CCAA is now available to any insolvent debtor "company"² and its affiliates provided that the total creditor claims against the company or its affiliates exceed \$5 million.
- The CCAA provides that an application to court may be made for an order permitting a meeting of creditors to vote on a proposed plan of compromise or arrangement. Creditors may be placed into classes for voting purposes depending on the nature of their claims.
- The purpose of the CCAA is to provide a structured, stable environment in which large insolvent companies can continue to carry on business and retain control over their assets while their creditors, shareholders and the court consider a plan or compromise that would permit the company to continue its business going forward,³ and to permit a broad balancing of stakeholder interests in the insolvent corporation.⁴
- CCAA proceedings are directed at compromise, and parties with competing and often diametrically opposed rights, interests and goals are obliged to come to a resolution of their differences or risk losing everything. In this respect, a restructuring under the

¹ R.S.C. 1985, c. C-36, as amended.

² "Company" means a corporation incorporated under Canadian federal or provincial statutes or a jurisdiction outside Canada, if it has assets or is doing business in Canada. See, for example, *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div.) where a U.S. company with U.S. and Canadian bank accounts located in Toronto was found to be a "company" pursuant to section 1 of the CCAA.

³ *Re Blue Range Resource Corp* (2000), 192 D.L.R. (4th) 281 (Alta. C.A.).

⁴ *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.).

CCAA is different in many respects from traditional litigation where, if the parties do not settle and the action proceeds to trial, it is often a zero sum game with winner take all.

- There are a number of points of tension that exist in the context of CCAA proceedings:
 - (a) between creditors and the company;
 - (b) between creditors and the monitor;
 - (c) between the different classes of creditors; and
 - (d) between the creditors within each class.
- Each of these tensions must be resolved somehow if the company is to survive. Currently, they are resolved through a combination of traditional litigation that is tempered by the use of quasi-ADR proceedings which include, for example, negotiations among the parties and the activities of claims officers who, in effect, act as arbitrators in determining whether to admit claims of creditors, and to quantify them, if necessary.
- As the commercial world has become increasingly globalized, insolvencies transcend national boundaries and result in proceedings in multiple jurisdictions. In this environment, the flexibility of the CCAA has contributed to the adoption of cross-border protocols consisting of written guidelines and principles that the parties and administering courts agree to adhere to in the course of the restructurings carried out in each jurisdiction. Such protocols are directed at simplifying restructurings where companies have assets and creditors in both Canada and the United States and must be sanctioned by the court in each jurisdiction.
- Accordingly, a cross-border restructuring carried out, at least in part pursuant to the CCAA, represents fertile ground for the adoption of additional ADR mechanisms, particularly because the concept of resolution by conciliation is fundamental to the process. The inherent flexibility of the CCAA could be easily modified to accommodate a greater role for ADR methods which include the traditional benefits of ADR: lesser costs for the parties, streamlined procedures and the freedom of the parties to choose the most appropriate forum and procedure to resolve their disputes.

2. Procedure under the CCAA

- CCAA proceedings are commenced by way of an application in the province where the company has its head office or chief place of business.⁵
- The first application is referred to as the “initial application” which must be accompanied by a cash flow statement and other financial information. In most cases, the initial application seeks the following relief:

⁵ CCAA, sections 9 and 10.

- (a) a declaration that the applicant is a company to which the CCAA applies;
 - (b) an order permitting the filing of a plan by a particular date; and
 - (c) a stay of proceedings.⁶
- An order for a stay of proceedings is significant and is designed to preserve the status quo for a period of time so that CCAA proceedings can be initiated “for the good welfare and well-being of the debtor company and of the creditors”.⁷ The stay restrains judicial and extra-judicial conduct that might “impair the ability of the debtor company to continue in business and the debtor’s ability to focus and concentrate its efforts on the negotiating of a compromise or arrangement”⁸ and, further, protects creditors by preventing one creditor from gaining an advantage over the others.⁹
 - When an order is made on the initial application, the court must appoint a monitor pursuant to section 11.7 of the statute.¹⁰ Until the 1997 amendments to the CCAA, the statute did not have an express provision regarding the appointment of a monitor, although in CCAA proceedings prior to 1997 courts would appoint “information officers” to assist with particular restructurings. Prior to 1997 the responsibilities of the monitor typically consisted of liaising with creditors and receiving and administering Proofs of Claim filed by creditors.
 - Following the introduction of section 11.7 through the 1997 amendments to the CCAA, the monitor is now tasked with:
 - (a) monitoring the debtor company’s business and financial affairs;
 - (b) filing reports with the court regarding the state of the debtor company’s financial affairs;
 - (c) advising the creditors of the reports in any notice of meeting of creditors; and
 - (d) carrying out such other functions as the court may order.
 - The last category above makes the monitor the primary facilitator for the court in the resolution of disputes between creditors and other interested parties.

⁶ CCAA, section 11. Under the CCAA, the granting of a stay is discretionary rather than being automatic as is the case with proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (“BIA”). Pursuant to subsections 11(3) and (4), the stay may not exceed 30 days but may be extended by the court.

⁷ *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C.S.C.).

⁸ *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

⁹ *Re Woodward’s Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.).

¹⁰ Pursuant to section 11.6 of the CCAA, proceedings under Part III of the BIA can be taken up and continued under the CCAA provided a proposal has not been filed under the BIA. In the result, interim receivers can also be appointed in CCAA proceedings pursuant to section 47 of the BIA (see, for example, *Re Royal Oak Mines Inc.* (2001), 143 O.A.C. 75 (C.A.)). In addition, chief restructuring officers or committees may be appointed in CCAA proceedings (see, for example, *Re Ivaco* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J. [Commercial List])).

- Following an order made after an initial application, the court will generally be required to make further orders respecting the classification of creditors for voting purposes and to direct the holding of meetings of creditors.¹¹
- The classification of creditors is often the critical issue – a creditor who opposes the plan will prefer to be in a smaller class while the company would prefer that creditor to be in a larger class so as to dilute the impact of that creditor’s dissent. The test for grouping creditors into classes is whether creditors share a “commonality of interest” but there is also recognition that a “rigid approach” can reduce the likelihood that a plan will be accepted, if creditors are classified so as to allow certain creditors to defeat the underlying purpose and object of the CCAA, namely, the continuation of insolvent companies.¹²
- If creditors accept the arrangement or compromise and it is approved by the court, it becomes binding on the company and on all creditors included in the plan. The voting requirement for approval is the same as the requirements in the *Bankruptcy and Insolvency Act* (“BIA”)¹³ - the “double majority” consisting of:
 - (a) a numeric majority of voting creditors in each class who filed proofs of claim prior to the meeting; and
 - (b) a two thirds majority in dollar amount of proven claims in each class.¹⁴
- Unlike the BIA, if the plan is not approved, bankruptcy does not immediately follow. The effect of this is that it allows for prolonged negotiations between the company and creditors and it rests with the court to determine if a plan is ultimately “doomed to fail” and to put the company into bankruptcy.
- Following approval of the plan of arrangement or compromise by the creditors, it is in the court’s discretion as to whether the plan should be approved. If the plan meets the statutory requirements and is “fair and reasonable” it will be approved by the court.¹⁵

3. Recognition in the CCAA of Foreign Restructuring or Insolvency Proceedings

- The 1997 amendments to the CCAA also included section 18.6, which recognizes that CCAA proceedings may be connected with foreign proceedings against the debtor company and contemplates that foreign proceedings will be coordinated with proceedings under the CCAA. Subsections 18.6(2) and (4) read as follows:

¹¹ CCAA, sections 4 and 5.

¹² See for example, *Re Northland Properties Ltd.*, (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), leave to appeal refused (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]).

¹³ *Supra*, note 6. The BIA is the federal statute governing insolvencies in Canada.

¹⁴ CCAA, section 6.

¹⁵ CCAA, section 6. See also, *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

(2) Powers of court – The court may, in respect of a debtor company, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under the Act with any foreign proceeding.

[...]

(4) Court not prevented from applying certain rules – Nothing in this section prevents the court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.

- In *Re Babcock & Wilcox Canada Ltd.*¹⁶ and *Re Matlack Inc.*¹⁷ Justice Farley, then the judge responsible for the Commercial List in Toronto, fleshed out the following objectives and principles of section 18.6 in the context of foreign restructurings:
 - (i) comity and cooperation between courts should be encouraged;
 - (ii) stakeholders should be treated as equitably and fairly as possible, wherever they are located;
 - (iii) stakeholders within the same class should be treated equally where reasonably possible;
 - (iv) multi-jurisdictional enterprises should be recognized as one global unit;
 - (v) one jurisdiction should assume principal administrative jurisdiction over the reorganization of the debtor;
 - (vi) harmonization of U.S. and foreign proceedings allows for judicial supervision of the debtor's assets in both jurisdictions.
- Where foreign insolvency proceedings have a close connection with a particular jurisdiction, it is appropriate for the court in that jurisdiction to have principal control over the insolvency process in order to avoid a multiplicity of proceedings.¹⁸
- However, the recognition by a Canadian court of a foreign proceeding depends on whether there is a real and substantial connection between the matter and the jurisdiction,

¹⁶ (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Comm. List]).

¹⁷ (2001), 6 C.B.R. (4th) 45 (Ont. S.C.J. [Comm. List]).

¹⁸ *Ibid.*

which is determined on the basis of “order, predictability and fairness, rather than by way of a “mechanical analysis”.¹⁹

- Moreover, notwithstanding the reflection of the principles of comity and co-operation set out in section 18.6, Canadian courts are not required to cede jurisdiction or authority over procedural or substantive laws where differences arise between the Canadian and foreign jurisdiction.²⁰ Pursuant to subsection 18.6(5) of the CCAA:

(5) Court not compelled to give effect to certain orders – Nothing in this section requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

- Accordingly, Canadian courts maintain their sovereignty over domestic proceedings. For example, where a proposed plan sought to exclude Canadian claimants from its process by providing that their claims against the debtor were to be governed by and treated in the foreign proceeding, and sought to bind them to the Canadian plan without granting the claimants the right to vote, the plan was not enforced by the court.²¹

4. Cross-Border Protocols and Communication Guidelines

- The American Law Institute has promulgated the *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (the Guidelines’)²² which were adopted by The International Insolvency Institute in June 2001 and were judicially approved by Justice Farley in *Re Matlack Inc.*, *supra*.
- The Guidelines are directed at facilitating communication between courts in multi-jurisdictional proceedings. They are not directed at changing domestic rules or procedures or impacting substantive rights and may be modified to adapt to particular procedural requirements.
- Guidelines #2 and #3 provide that a court may communicate with another court or with an “Insolvency Administrator” or “authorized Representative” for the purposes of harmonizing and coordinating proceedings in each jurisdiction. A court may also permit direct communications between a court and Insolvency Administrator or authorized Representative provided it is authorized by the foreign court (Guideline #4).
- Guideline #6 provides that communications may be carried out by way of the exchange of orders or decisions or by telephone or video conferences and further, that pleadings, facts and evidence may be directed to be filed with the foreign court.

¹⁹ *Ibid.*

²⁰ *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont S.C.J. [Comm. List]).

²¹ *Ibid.*

²² American Law Institute, *Transnational Insolvency: Cooperation Among the NAFTA Countries*, *Principles of Cooperation Among the NAFTA Countries* (Huntington, N.Y.: Juris Publishing Inc., 2003), Appendix B.

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- Counsel for all affected parties should be given notice of communications, a service list may be established and communications should be transcribed and filed and made available to the parties (*Guidelines* #7, #12 and #8, respectively).
 - Courts may conduct joint hearings in accordance with the framework set out in Guideline #9.
 - Courts are directed to accept Orders issued in the other court and the provisions of statutes, rules of procedure etc. as authentic, except where properly objected to, pursuant to *Guidelines* #10 and #11.
 - A court may issue orders or directions permitting representatives of foreign creditors or the foreign Insolvency Administrator to appear before it without becoming subject to the jurisdiction of the court (Guideline #13).
 - Directions issued by the court pursuant to the *Guidelines* are subject to amendment and modification and are effective upon adoption by both courts (Guideline #16). However, the adoption of any arrangements under the *Guidelines* does not constitute a waiver by the court of any powers or a substantive determination of any matter in controversy, nor a waiver by the parties of their rights (Guideline #17).
 - In contrast to the general application of the *Guidelines*, cross-border protocols are tailored to the specific circumstances of each proceeding and set out a framework for streamlining the restructuring in each jurisdiction. Such protocols are essentially agreements between the parties which recognize and reinforce the sovereignty of local courts, but also commit the parties to principles of cooperation and procedural requirements. They are effective only following their sanction by the court administering the restructuring in each jurisdiction and are designed to eliminate duplication. Protocols generally consist of the following elements:
 - (a) a summary of the background of the proceedings in each jurisdiction, including the identification of the court and court file number for each proceeding, the corporate entity subject to both proceedings, and the monitor, estate representative or committee of stakeholders;
 - (b) an outline of the purpose and goals of the protocol, including the harmonization and co-ordination of activities in each jurisdiction and the promotion of comity and fairness for each creditor, regardless of location;
 - (c) statements reinforcing the authority of the courts in each jurisdiction to make orders providing for particular relief where necessary;
 - (d) guidelines respecting co-operation between creditors, the monitor/estate representative and the debtor company and co-operation between the courts, such as joint hearings;

- (e) provisions regarding the retention and compensation of monitors, estate representatives and other professionals, the fact that each is subject only to the authority of their respective governing court and that their retention in one jurisdiction need not be approved in the other jurisdiction;
 - (f) requirements regarding notice and other procedural issues (which often includes an express adoption of the *Guidelines*);
 - (g) joint recognition of stays issued by each jurisdiction;
 - (h) a framework for resolving disputes under the protocol; and
 - (i) a preservation of the existing rights of the parties under the relevant legislation in each jurisdiction.
- Protocols have been adopted in cases such as *Re Matlack Inc.*, *supra*, *Re Laidlaw Inc.* (Ontario Superior Court of Justice, Court File No. 01-CI-4178; Farley J.); *Re 360networks Inc.* (British Columbia Supreme Court, Court File No. L011792; Tysoe J.), and *Re Livent Inc.* (Ontario Superior Court of Justice, Commercial List, Court File No. 98-CL-3162; Ground J.).
 - The *Guidelines* provide the foundation on which to design and build protocols to respond to the unique circumstances of each cross-border restructuring.

5. **Bill C-55**²³

- If and when proclaimed into force by Parliament, Bill C-55 will implement a variation of the *UNCITRAL Model Law on Cross-Border Insolvency* (the “Model Law”)²⁴ which has already been adopted in Japan, Mexico and South Africa and forms a significant part of amendments to the United States *Bankruptcy Code*, which took effect in October 2005.
- The proposed amendments in Bill C-55 permit a foreign representative to apply to a Canadian court for recognition of a foreign proceeding. Following recognition, the foreign representative may commence or continue proceedings under the CCAA (or BIA) as if the foreign representative were the debtor or a creditor of the debtor.
- The recognition order must specify whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. The former refers to an insolvency in a foreign jurisdiction where the debtor company has the “centre of its main interests”, which is presumed to be the jurisdiction in which the debtor’s registered office is located in the absence of proof to the contrary.²⁵ The latter is a proceeding in a foreign jurisdiction which is not classified as the “foreign main proceeding”.

²³ *An Act to Establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47.

²⁴ U.N. Doc. A/RES/52/158 (1997).

²⁵ Model Law, Article 16(3).

- There is an automatic stay of proceedings upon recognition of a foreign main proceeding subject to terms and conditions the court deems appropriate. The court may grant discretionary relief (i.e. stays, suspending transfers of debtor's assets) but automatic relief does not apply if CCAA proceedings have already been commenced in relation to the debtor. Further, relief granted in relation to foreign proceedings must be consistent with relief granted in domestic proceedings initiated after recognition of a foreign proceeding. Under the Model Law, domestic proceedings may not be commenced after recognition of a foreign main proceeding. There is no guidance in either Bill C-55 or the Model Law should the courts in different jurisdictions disagree as to which jurisdiction is the foreign main proceeding.
- The power of the court pursuant to the amendments in Bill C-55 to authorize "any person or body" to act as a representative for the purpose of having them recognized in a jurisdiction outside Canada is broader than Model Law which authorizes a "designated administrator" to act in a foreign proceeding in a foreign jurisdiction.
- The proposed amendments in Bill C-55 maintain the safeguards which exist in the current version of the CCAA to the effect that nothing in the amendments requires a Canadian court to make an order that is not in compliance with Canadian laws and Canadian courts may apply legal or equitable rules governing recognition of foreign insolvency orders that are consistent with Canadian insolvency legislation.

6. Arguments in Favour of An Increased Role for Arbitration in Cross-Border CCAA Proceedings

- Canada has already indicated a willingness to embrace international arbitral proceedings by virtue of its adoption of both the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention")²⁶ and the *UNCITRAL Model Law on International Commercial Arbitration*,²⁷ and as evidenced by the openness of Canadian courts to deferring to and recognizing the importance and validity of international arbitration awards.²⁸
- Cross-border restructurings, carried out in Canada within the ambit of the CCAA, create an opportunity for an enhanced role for international arbitration as a result of two key elements which exist within CCAA proceedings:
 - (a) Temporal Element: CCAA proceedings are generally not subject to strict statutory deadlines and an initial failure to achieve the requisite voting majority does not automatically result in the company being placed into bankruptcy, thereby permitting the parties to continue the negotiation process; and

²⁶ 10 June 1958, 330 U.N.T.S., p. 38 No. 4739.

²⁷ Annex I, UN Doc. A/40/17 (1985).

²⁸ *United Mexican States v. Karpa* (2005), 74 O.R. (3d) 180 (Ont. C.A.).

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- (b) Structural Element: CCAA proceedings already incorporate the three pillars of ADR: arbitration (through, for example, the role of court-appointed claims officers); mediation (through court-appointed mediators) and negotiation (the effective foundation for the entire process).
- Claims officers (often judges or arbitrators) are appointed by the court to adjudicate disputed claims in accordance with section 12 of the CCAA through streamlined and summary hearings. Creditors have a right of appeal from the decision of a claims officer to the judge administering the proceeding.
 - CCAA proceedings include the use of summary procedures and often occur in “real-time” given the flexibility of the statute. A greater role for ADR could facilitate the expeditious resolution of restructurings, especially where time is a factor.
 - The role of the monitor is similar in some respects to that of the arbitrator as the monitor’s opinion, practically speaking, is given a good deal of weight by the courts.
 - CCAA proceedings are in many respects, consensual in nature and greater freedom to arbitrate will permit the parties to exercise greater control over the process which might facilitate cooperation and compromise.
 - If international arbitration is incorporated into cross-border restructurings (under the CCAA in Canada), decisions resulting from arbitration or binding mediation can be enforced in two ways:
 - (a) if the parties reach a binding agreement to submit to consensual arbitration, the arbitral award is enforceable under the New York Convention; or alternatively,
 - (b) if the parties agree to an ADR process supervised by the court, the court can sanction the resulting decision.
 - A system which encourages or facilitates consensual arbitral proceedings and provides the mechanisms necessary to ensure enforcement of arbitral decisions in cross-border insolvencies, will ultimately contribute to greater commercial certainty and efficiency.

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