

The Role of Liquidating CCAAs

**By Peter P. Farkas, CBV,
CA•CIRP, CIRP, John Sandrelli
& Jordan Schultz**

Mr. Farkas is a Vice-President in the Corporate Restructuring group of RSM Richter Inc. Mr. Sandrelli is Managing Partner of the Vancouver office of Fraser Milner Casgrain LLP. Mr. Schultz is an Associate with Fraser Milner Casgrain's Insolvency Group in Vancouver.



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As has been noted by many, the *Companies' Creditors Arrangement Act* ("CCAA") has become the restructuring statute of choice in Canada. However, in many cases, the CCAA is used only to sell off assets instead of "restructuring" a business. In the vernacular, this utilization of the CCAA is called a "Liquidating CCAA." Despite the initial popularity of liquidating CCAAs, the process has faced criticism as of late. Moreover, the recent amendments to the CCAA and the Bankruptcy and Insolvency Act ("BIA") could also affect the viability of Liquidating CCAAs. So what will be the role of Liquidating CCAAs in the future?

To answer this question, it is helpful to review why Liquidating CCAAs gained popularity in the first place. Despite being an old statute, the CCAA took hold in Canada only in the past 20 or 30 years, corresponding to a shift in Canadian insolvency practice from a "creditor is king" philosophy towards a more debtor-driven process. This shift in focus is what allowed the CCAA to emerge as the favoured approach to restructuring mid- to large-sized insolvent corporations.

The use of the CCAA to facilitate a liquidation (as opposed to a restructuring), however, required both creative advisors and some judicial activism on the Court's part. This occurred when judges, largely centered in Ontario but later taking hold throughout the country, began to adopt a less rigid interpretation of the statute and of legal precedents. Courts took the view that they should

assist parties in reaching an appropriate business objective if there was an overall benefit to economic stakeholders.

The last factor that accelerated the growth of Liquidating CCAAs was a lack of appetite to employ operating receiverships, resulting in large part from the noted case *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.*¹ In that case, the Supreme Court of Canada allowed a union to bring an application against a receiver alleging it to be a “successor employer” despite a court order expressly stating that the receiver was not a “successor employer.” The prospect of liability notwithstanding the protections built into receivership orders ratcheted back the comfort court-appointed officers took from those orders. As a result, if a creditor sought to implement a receivership, it had to choose between shutting down the business, or providing the receiver with a significant indemnity.

A long line of Ontario-centric cases emerged, underscoring the point that the CCAA had to be applied in a practical and flexible way in order to accommodate restructurings. Courts found that the purpose of the CCAA was to “facilitate” restructurings, and that the Act should be applied to further that purpose.² These courts had little difficulty moulding this liberal approach to promote Liquidating CCAAs.³

Despite all of these conditions favouring the Liquidating CCAAs’ development, there have been some difficulties as well. For one, some court decisions in the Western provinces adopted a tighter interpretation of the CCAA.⁴ These rulings questioned the appropriateness of, and the jurisdiction for, carrying out a liquidation under the CCAA. While there is no unanimity on this issue⁵, these decisions have created uncertainty as to whether the court could allow a Liquidating CCAA to proceed, and — if it could — what circumstances were required for it to do so.

Another knock against Liquidating CCAAs is that the mass of creditors does not have a say on the restructuring because no plan is ever presented for a vote. The rationale for this restriction is that by narrowing the process to “economic stakeholders,” i.e., those who realistically have a financial interest at stake, the future of the business was in the hands of those who have the motivation to do the very best under the circumstances. However, the negative aspect to this approach is to make it (at least in appearance) a closed process.

In the context of these incentives and difficulties, the amendments to the CCAA that came into force on September 18, 2009, will arguably promote the use of Liquidating CCAAs in the future. The primary change to the CCAA in this regard is Section 36, which provides express authority for the Court to approve asset sales, and should therefore resolve most jurisdictional issues.

In addition, the Court has many specific powers in a Liquidating CCAA that it does not have in a normal receivership. The court has authority to compel assignment of most contracts to any person, thus increasing the potential pool of assets or value for stakeholders. The court may also require “critical suppliers” to continue to provide goods and services essentially on credit,

which could assist in operating a business where DIP funds are not otherwise available.

However, a number of the new provisions could also limit the ability of creditors/debtors to use the CCAA as a liquidating procedure. Some provisions require the court to consider whether an order would “enhance the prospects of a viable compromise or arrangement being made ...”, which poses a problem as a plan is typically not contemplated in a Liquidating CCAA.

Furthermore, the Monitor has expanded responsibilities under the revised CCAA. While this does “open” the process to a degree, it could also add expense and time to liquidating under the CCAA.

As a possible alternative to Liquidating CCAAs, the recent amendments to the BIA give the court jurisdiction to appoint a “national receiver” that can seize assets in all jurisdictions, not just those in the province where the receiver is appointed. The main advantage to this approach, of course, is that the secured creditor is able to retain control of the process. This could also allow for a faster liquidation process, and potentially a less costly one. New amendments to the BIA also attempt to protect court officers against the liability that arose in the TCT case, although it remains to be seen how this amendment affects the indemnity required by receivers.

A Liquidating CCAA may continue to have certain advantages over the reconceived receivership process. The main drawback to the national receiver is that the application to appoint must be brought in the “judicial district of the locality of the debtor” — either the principal place of business for the past year, or where most of the property is situated. Further restrictions of a national receivership include the requirement to wait for the 10-day statutory period to pass, and the ability of suppliers to repossess certain goods supplied within 30 days of the receivership.

In summary, given the specific authority under section 36 to sell assets, coupled with the enhanced role of the Monitor under the amendments, some of the criticism of the CCAA should be tempered. While the “national receiver” section of the BIA may allow for a more streamlined receivership process, there continue to exist many of the benefits of a sale process under the CCAA — as well as the commercial reasons that led to the creation of Liquidating CCAAs. **RS**

1 [2006] 2 S.C.R. 123

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

3 *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (OCJ); *Sklar-Peppler v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (OCJ); and *Anvil Range Mining Corp (Re)* (2001), 25 C.B.R. (4th) 1 (OSC) aff’d (2002), 34 C.B.R. (4th) 157 (OCA).

4 *Royal Bank of Canada v. Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 230 (ABCA); *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 296 D.L.R. (4th) 577 (BCCA); *Encore Developments Ltd. (Re)*, 2009 BCSC 13

5 *Winnipeg Motor Express Inc. (Re)*, 2008 MBQB 297; *Re Jameson House Properties Ltd.*, 2009 BCSC 964