INSOL INTERNATIONAL

ESG IN RESTRUCTURING

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PRESIDENT'S INTRODUCTION

Environmental, social and governance (ESG) issues are rapidly changing the way that business is conducted across the world. We are witnessing new regulations on climate change, biodiversity and environmental conservation, modern slavery and workers' rights and board accountability, conflicts and stakeholder engagement.

More broadly, we are also seeing a change in social attitudes, and a growing expectation from financiers, insurers, investors and customers that the businesses they deal with must behave in a responsible and ethical manner.

These dynamic regulatory, social and economic changes will inevitably drive future restructuring activity, as companies seek to align their operational structures and business models with improved governance, labour protection, social justice goals and the reality of a net zero emissions economy and the necessity of a greener footprint.

At the same time, however, the evolution of social and economic settings – and the dominant focus on ESG – raises the question as to whether existing restructuring and insolvency laws adequately protect and uphold environmental obligations, employee entitlements and workplace health and safety obligations, and hold directors and other officers to account in relation to their responsibilities to the company and its stakeholders.

There is a delicate balancing act between the protection of these interests and the underlying assumption that restructuring and insolvency processes ought to maximise value for the collective body of creditors – and in some cases, the respective policy concerns of ESG issues and restructuring and insolvency law and practice may conflict.

This has been apparent in the controversial "Texas Two-Step" option canvassed in recent United States case law (under which it has been proposed for tort liabilities to be spun off to a new corporate entity that undergoes a restructure), as well as non-consensual third party releases and, in some jurisdictions, the potential for an insolvent entity to disclaim or otherwise evade liability for its environmental obligations.

This new publication from INSOL International – *ESG in Restructuring* – therefore comes at an important time. Project Leaders Clayton Chong and Smitha Menon, from WongPartnership, canvass the policy motivations of ESG and insolvency and restructuring law and practice, and consider the regulatory standards, soft law frameworks and practices concerning key ESG issues outlined by esteemed practitioners and academics in 31 jurisdictions.

The Project Leaders consider the manner in which restructuring law and practice may be shaped to deal with incredibly complex and emerging ESG issues – particularly environmental responsibilities, labour protection and board accountability – that can have far-reaching impacts on vulnerable claimants and broader society. They provide a "roadmap" of issues that regulators and policy makers may consider in shaping future law reform.

This book is an invaluable contribution to law reform and regulatory and policy development as we strive to ensure that restructuring and insolvency laws are modern, progressive and "fit for purpose" in relation to the underlying economic and social circumstances in which they operate.

PRESIDENT'S INTRODUCTION cont.

The book also highlights important practical issues for our members to be aware of in addressing a multitude of ESG issues in the course of an insolvency appointment. Uniquely, the book also analyses recent market developments and trends in the ESG refinancing sphere, with the aim of serving as a useful "one stop" resource for financial institutions considering the provision of finance to entities (in good times and in the event of financial distress) in the context of complex and evolving ESG obligations and liabilities.

I express my sincere thank you to the Project Leaders, and each of the jurisdictional contributors, for their significant expertise, time and commitment in completing this project over the last 12 months, as well as to our team of INSOL International technical and administrative staff for their efforts in bringing the project to fruition.

I hope you enjoy reading this publication and will find it useful in your future pursuits.

Scott Atkins
President & INSOL Fellow
INSOL International

September 2023

CANADA

1. General overview of the restructuring regime

1.1 Formal restructuring procedures

The Canadian Constitution divides the power to legislate between federal and provincial governments according to subject matter,[1] with bankruptcy and insolvency being matters within federal jurisdiction.[2] Most Canadian restructuring and insolvency proceedings are governed by two federal statutes: the Companies' Creditors Arrangement Act (CCAA)[3] and the Bankruptcy and Insolvency Act (BIA).[4] These statutes contain mechanisms for corporate reorganisation and liquidation proceedings and are applicable in all provinces. However, even in the context of proceedings under these federal statutes, the provinces retain jurisdiction over property and civil rights.[5] Thus, in the absence of a conflict with the CCAA or the BIA (as the case may be),[6] provincial legislation pertaining to property and civil rights continues to apply in insolvency / restructuring proceedings.[7]

At a high-level:

- restructuring under the BIA is available to most debtors and provides a structured set of rules and regulations;
- the CCAA provides greater flexibility in restructuring proceedings and applies to corporate debtors with total debts of over CAD $5 million. It is Canada's primary reorganisation statute for large companies; and
- both the BIA and the CCAA provide for:
  - a broad stay of creditors' rights and remedies;
  - the filing of a plan (or proposal) to compromise the debtor's debts;
  - the sale of some or all of the debtor's assets (either in conjunction with or instead of a plan or proposal);
  - meeting(s) of affected classes of creditors for voting on the debtor's plan or proposal;

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1 Territorial governments exercise province-like powers and responsibilities delegated from the federal government pursuant to devolution agreements between each respective territory and the federal government: see Government of Canada, "Federal, Provincial and Territorial Overview" online: <www.canada.ca/en/environment-climate-change/corporate/transparency/briefing-materials/corporate-book/federal-provincial-territorial-overview.html>. Accordingly, for the purpose of this chapter, references to "province" will include "territory".

2 Constitution Act 1867 (UK), 30 & 31 Vict, c 3 (UK), reprinted in RSC 1985, App II, No 5, s 91(21).

3 Companies' Creditors Arrangement Act, RSC, 1985, c C-36.

4 Bankruptcy and Insolvency Act, RSC 1985, c B-3 and, specifically, Part III (Proposals). Several other statutes govern specific situations, including: the Winding-Up and Restructuring Act, RSC, 1985, c W-11 (banks, trust companies, loan companies and insurance companies), sections 106-110 of the Canada Transportation Act, RSC 1996, c 10 (railway companies incorporated by a special act of the federal or provincial legislature), and the Farm Debt Mediation Act, SC 1997, c 21 (in certain situations involving farmers).

5 Constitution Act 1867, s 92(13).

6 Where federal and provincial legislation conflict, either by operational conflict (where it is impossible to comply with both statutes) or frustration of purpose (where the operation of the provincial statute would frustrate the legislative purpose behind the federal statute), the Canadian constitutional doctrine of federal paramountcy dictates that the provincial legislation is inoperative to the extent of the conflict: see, for example, *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 at para 11; see also *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, discussed later in this chapter in relation to environmental liabilities, in which the Supreme Court of Canada addressed the relationship among provincial environmental orders and legislation and the federal BIA.

7 *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 64; *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453, 1995 CanLII 69 at para 87; *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at paras 51, 52; *Crystalline Investments Ltd v Domgroup Ltd*, 2004 SCC 3 at para 43.

- court sanction of the plan or proposal; and

- the appointment of a court-appointed officer to monitor the proceedings and report to the court and creditors.

Restructuring proceedings under the BIA and the CCAA are court-supervised, and an important feature of Canada's insolvency regime is the role played by licensed insolvency trustees (LITs), who function as the "eyes and ears of the court."[8] LITs have different roles depending on the type of restructuring proceeding: as a "monitor" in a CCAA proceeding or as a "proposal trustee" in a BIA proposal proceeding.[9] Although there may be nuances between the two roles, whether as monitor or proposal trustee, LITs are required to act neutrally and to assist the court's supervision of the restructuring process by providing periodic, objective reports to the court and stakeholders with information that may otherwise be unavailable to the competing interested parties.[10]

1.1.1 Application

Debtors must meet certain threshold requirements before they can access either restructuring regime. In this respect, the BIA's proposal provisions only apply to a:

- "bankrupt";
- "insolvent person"; or
- receiver, liquidator or trustee on behalf of a bankrupt or an insolvent person.

The terms "bankrupt" and "insolvent person" are defined in the BIA as follows:

- "bankrupt" is an individual or company "who has made an assignment or against whom a bankruptcy order has been made".[11] It is a legal status; and
- "insolvent person" is an individual or company "who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under [the BIA] amount to one thousand dollars" and who meets one or more of the following three tests:[12]
  - they are unable to "meet [their] obligations generally as they become due";
  - they have ceased paying their "obligations in the ordinary course of business"; or
  - if their total assets, at "a fair valuation", or "disposed of at a fairly conducted sale under legal process", would "not be sufficient to enable payment of all obligations, due and accruing due".[13]

The first two tests are each known as the "cash flow test" and the third test is known as "the balance sheet test".

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8 See, for example, *Walter Energy Canada Holdings, Inc (Re)*, 2017 BCSC 53 at para 26.

9 In these roles, the LIT acts as a court officer with statutory and other duties as set out by the court. LITs also act as bankruptcy trustees in bankruptcy proceedings and as receivers in receivership proceedings, which are sometimes commenced in respect of insolvent persons or bankrupts under s 243 of the BIA.

10 *Walter Energy* at para 26; *Mutual Trust Co v Scott, Pichelli & Graci Ltd* (1999), 11 CBR (4th) 62 at para 5 (Ont Gen Div); BIA, ss 50(10), 59(1); CCAA, s 23(1).

11 BIA, s 2(1), "bankrupt".

12 The use of the disjunctive "or" in the paragraph that follows indicates that only one of the criteria is necessary to meet the definition: John Honsberger and Vern DaRe, *Honsberger's Bankruptcy in Canada* (Thomson Reuters, 5th ed, 2017) at 6; *Royal Bank of Canada v Eastern Infrastructure Inc*, 2019 NSSC 243 at para 45; *Stelco Inc, Re* (2004), 48 CBR (4th) 299, 2004 CanLII 24933 at para 28 (ONSC).

13 BIA, s 2(1). The courts have interpreted "due and accruing due" restrictively, in that obligations are excluded which are not yet due or are not chargeable to the accounting period in which the test is applied.

The CCAA has a different set of threshold requirements, applying to a "debtor company" or a group of "affiliated debtor companies" whose total claims against them exceed CAD $5 million.[14] The term "debtor company" is defined in the CCAA as a company that:

- is bankrupt or insolvent;
- has committed an act of bankruptcy under the BIA or is deemed insolvent under the Winding up and Restructuring Act (WURA);
- has made an authorised assignment into bankruptcy or a bankruptcy order has been made against it under the BIA; or
- is in the course of being wound up under the WURA.[15]

The CCAA does not define "insolvent" or "insolvency". As a result, Canadian jurisprudence has adopted the definition of an "insolvent person" under the BIA, but with one modification: it has expanded the first test described above such that "a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".[16]

Finally, the CCAA only applies to bankrupt or insolvent companies that are either incorporated under the laws of Canada or a province, have assets in Canada, or do business in Canada.[17]

1.1.2 Reorganisation

The CCAA and the BIA restructuring regimes contain similar provisions. For example, each statute generally provides for:

- the approval of debtor in possession financing (commonly referred to as DIP financing);
- the granting of certain priority charges to secure, among other things, administration costs, DIP financing and certain directors' liabilities;
- the disclaimer or repudiation of agreements;
- prohibitions on the sale of assets outside the ordinary course of business without court approval;
- the postponement of equity claims;
- the preservation of intellectual property licenses; and
- voting thresholds for the approval of any plan or proposal put to creditors.[18]

In addition, the BIA and the CCAA contain provisions which permit certain claims against directors to be stayed during restructuring proceedings as well as compromised in a proposal or plan.[19]

While there is significant overlap between the two regimes, there are also significant differences. For instance, the BIA proposal provisions are generally seen as more prescriptive, which in turn may result in reduced flexibility in the workout process with creditors.[20] The CCAA, by contrast, is a

[14] CCAA, s 3(1).
[15] *Idem*, s 2(1), "debtor company".
[16] *Stelco ONSC* at para 26.
[17] CCAA, ss 2, 3.
[18] See, for example, BIA, ss 50.6, 54, 65.11, 65.13 65.2, 104.1; CCAA, ss 6, 11.2, 32, 36.
[19] In addition, as discussed later in this chapter, in order to encourage directors to remain in a restructuring proceeding, both statutes provide the court with the ability to order that the debtor company indemnify the directors for certain obligations which they may incur following initiation of the proceedings and grant a charge over the debtor company's assets as security for such indemnity in priority to other creditors.
[20] Sarra, *Rescue!* at 44; *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 15.

flexible statute that is skeletal in nature,[21] resulting in a more court-driven process, which may increase the cost of the process.[22]

That said, as the BIA and the CCAA are both federal legislation dealing with substantively similar subject matter (i.e. insolvency), Canadian courts have held that they are to be interpreted, "to the greatest extent possible",[23] in a harmonious manner to prevent "statute shopping".[24]

CCAA reorganisation

A CCAA proceeding must be commenced by way of an initial application to the court in the province where the debtor company's head office or principal place of business is located or, if the company has no place of business in Canada, in any province within which any of the company's assets are situated.[25] The initial application typically is made by the debtor company, but the legislation permits an application to be made by any person interested in the matter,[26] including a creditor,[27] in what are sometimes referred to as "creditor-driven CCAAs".[28] The initial application must be accompanied by substantial evidence to support the relief sought, including evidence to satisfy the threshold requirements (discussed above), as well as information regarding the assets and liabilities of the debtor company and the cause(s) of the company's financial difficulties.[29]

If satisfied the requirements under the CCAA have been met, the court will pronounce an initial order. Typically, these initial orders contain provisions:

- declaring that a corporation is entitled to protection under the CCAA;
- appointing a monitor to supervise the restructuring of the debtor company;
- granting an initial stay of proceedings against the company, for a maximum period of 10 days;[30] and
- granting certain priority charges in favour of administrative professionals, interim lenders and directors and officers (among others).

On the initial application, the court may only grant relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course during that initial period.

The debtor company will return to court before the expiry of the initial stay period (at what is referred to as the comeback hearing) to apply for an extension of the stay. While the initial stay period is limited by statute to 10 days, there is no limit on the duration of subsequent stay extensions, provided the court finds they are "necessary" in the circumstances.[31] Debtor companies

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21 *Nortel Networks Corp, Re*, 2010 ONSC 1708 at para 67 (*Nortel 2010*); see also *Stelco Inc (Bankruptcy), Re* (2005) 75 OR (3d) 5, 2005 CanLII 8671 at para 36 (CA) (*Stelco ONCA*).

22 *Nortel 2010* at para 67; see also *Stelco ONCA* at para 36; Canada, Office of the Superintendent of Bankruptcy, Insolv Bull 98809435001, "Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act" (Ottawa: Industry Canada, 2002).

23 *Kitchener Frame Limited (Re)*, 2012 ONSC 234, at para 47.

24 *Century Services Inc v Canada (Attorney General)* 2010 SCC 60, at para 47.

25 CCAA, s 9(1). This gives debtor companies some flexibility to select their preferred provincial jurisdiction. For example, in *1057863 BC Ltd (Re)* 2020 BCSC 1359, the debtor companies filed in British Columbia where their head office was located, despite the fact that the main asset and business in the restructuring proceedings was a pulp mill located in Nova Scotia.

26 CCAA, s 11.

27 *Idem*, s 11.

28 See, for example, Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs" in Jill Corraini and the Honourable D Blair Nixon, *Annual Review of Insolvency Law 2019* (Thomson Reuters, 17th ed, 2020).

29 Specifically, the CCAA requires that a weekly cash flow projection be filed with the court along with all the financial statements (audited and unaudited) prepared in the last year, or if none were prepared in that time period, the most recent financial statements: CCAA, s 10(2).

30 CCAA, s 11.7(1).

31 *Idem*, s 11.02(2). However, despite this lack of time limit on further extensions, courts have made it clear that they expect an expeditious process: Sarra, *Rescue!* at 37.

will often use the comeback hearing as an opportunity to seek an amended and restated initial order (commonly referred to as an ARIO), which will contain additional substantive relief and extend the relief previously granted in the initial order to cover the extension of the stay period.

While the CCAA itself contains no detailed claims process, Canadian courts have recognised that to meet the fundamental objective of the statute (i.e. to facilitate compromises and arrangements between debtor companies and their creditors), "it is necessary to determine what are the true claims of the creditors as these might be compromised or arranged".[32] Accordingly, courts have exercised their broad jurisdiction under the CCAA to make such orders as are "appropriate", to grant orders establishing a process for calling for claims, adjudicating claims, and barring claims not filed before the specified claims deadline.[33] These orders are typically referred to as "claims process orders".

Following the completion of a claims process, the debtor company, with the assistance of the monitor, may put forward a plan of compromise or arrangement to the court.[34] Plans may involve creditors accepting various forms of compromise to the immediate payment of their claim, including a reduced payment, payment over time, a debt for equity conversion or some other form of compromise / compensation. A plan does not need to deal with all creditors and if a creditor is not dealt with in a plan, their claim is unaffected by it.

Before a plan can be put to creditors, the supervising CCAA court must first be satisfied that the proposed plan has a reasonable chance of success.[35] If it does not, courts will seek to avoid the unnecessary costs being expended in calling and conducting a vote by refusing to permit the plan to be filed.[36] A court order accepting a plan for filing typically establishes rules regarding the calling of a meeting for creditors to vote on the plan.

A plan may be put to one or more classes of creditors, both secured and unsecured.

Section 22 of the CCAA permits the debtor company to divide its creditors into classes and requires the debtor to apply for court approval of the classification before the meeting(s) of the creditors. Creditors "may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest", and the CCAA sets out a list of factors the court will consider.[37]

Each class of creditors must vote separately on the plan. To be accepted by the creditors of a class (and for the plan to be binding on the creditors in a class), the plan must be approved by more than 50% of the creditors voting on the plan (in person or by proxy), who represent 2/3 in monetary value of the claims of those creditors voting.[38]

Following the approval of the plan by the creditors, the plan is then brought to the court for sanction. Before a supervising CCAA court will sanction a plan, it must be satisfied that:

- there has been strict compliance with the statutory requirements and adherence to previous orders of the court;

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32 *Bul River Mineral Corporation (Re)* 2014 BCSC 1732 at para 36. For a general review of the policy objectives of the CCAA, see Sarra, *Rescue!* at 13-17.

33 CCAA, s 11; see also *Bul River* at para 43.

34 There are certain required payments which must be provided for in the plan (i.e., certain wages, benefit payments and tax payments): CCAA, ss 6(3)-6(6). Subject to certain statutory restrictions, the plan may contain any provision that a legal contract may contain. There is no requirement in the CCAA regarding who may develop the plan. However, in some cases the initial order will contain a provision that gives the debtor the exclusive right to prepare and file the plan.

35 See, for example, *Royal Bank v Fracmaster Ltd* 1999 ABCA 178 at para 13.

36 Sarra, *Rescue!* at 524-525; see also *Re Fracmaster Ltd* 1999 ABQB 379 (aff'd 1999 ABCA 178).

37 These factors are: "(a) the nature of the debts, liabilities or obligations giving rise to their claims; (b) the nature and rank of any security in respect of their claims; (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed": CCAA, s 22(2).

38 A creditor related to the debtor company may vote against, but not for, a plan.

- nothing has been done or purported to be done that is not authorised by the CCAA; and
- the plan is fair and reasonable.[39]

If the court approves the plan, it is binding on all members of those classes of creditors who voted in favour of the plan (even those creditors in each class who may have voted against the plan).[40]

BIA reorganisation

Unlike a proceeding under the CCAA, a BIA proposal proceeding is not initiated with a court application. Instead, these proceedings are typically commenced through the filing of a proposal or a notice of intention to make a proposal (NOI) by the proposed proposal trustee with the Office of the Superintendent of Bankruptcy. The filing of an NOI or proposal triggers an automatic stay of proceedings against the debtor corporation.[41] However, the stay does not apply to a secured creditor who, more than 10 days prior to the filing of the NOI or proposal, served the debtor company notice of its intention to enforce its security.[42]

Subject to the filing of certain documents (including a cash flow statement which must be filed within 10 days after the filing of the NOI), the BIA provides for an initial stay period of 30 days.[43] This stay may be extended by the court, on application of the debtor company, in increments of up to 45 days at time, to a maximum stay period of six months from the date of filing the proposal or the NOI.[44]

If the debtor company fails to file a proposal within the maximum six month period (or such shorter period if not all possible stay extensions are granted by the court), the company will automatically be deemed to have made an assignment in bankruptcy.[45] Similarly, if the debtor company fails to file certain prescribed documents (including the cash flow statement mentioned above), it is deemed to have made an assignment in bankruptcy.[46]

As with a CCAA plan, the BIA contains provisions mandating certain payments that must be included in a proposal.[47] In addition, a proposal must contain certain provisions, including that:

- it be made to the creditors generally, either as a mass or segregated into classes;[48]
- all funds payable under it must be paid to the proposal trustee to be distributed to the creditors;[49] and
- it must provide for the ratable payment of all claims, subject to certain provisions in the BIA.[50]

Other than the provisions prescribed in the BIA, there are few limits on the terms of a proposal.[51]

Once a proposal has been filed, the proposal trustee is required to send the proposal to all known creditors along with a report on the proposal and notice of the meeting of creditors at which a vote will be held on the proposal.[52]

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39 *Northland Properties Ltd, Re* (1989) 73 CBR 195 at paras 23-26; see also *Global Light Telecommunications Inc, Re* 2004 BCSC 745 at para 19.
40 BIA, s 54(2)(d).
41 *Idem*, s 69(1).
42 This is the formal notice (Notice of Intention to Enforce Security) required by s 244 of the BIA.
43 BIA, ss 50.4(1), 50.4(8).
44 *Idem*, s 50.4(9).
45 If no proposal has been filed, s 11.6 of the CCAA allows a BIA proposal proceeding to be continued under the CCAA if the debtor company has more than CAD $5 million in liabilities.
46 BIA, s 50.4(8).
47 *Idem*, s 60.
48 *Idem*, s 50(1.2).
49 *Idem,* s 60(2).
50 *Idem,* s 141.
51 *Honsberger's* at 183.
52 BIA, s 51(1).

Creditors vote on BIA proposals by class, according to the class of their respective claims. The BIA provides that all unsecured claims constitute one class (unless the proposal provides for more than one class of unsecured claims), and the classes of secured creditors (if any) are determined by considering factors set out in the BIA. These factors include:

- the nature of the debts giving rise to the claims;
- the nature and rank of the security in respect of the claims;
- the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;
- the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and
- such further criteria, consistent with those set out above.[53]

To be approved by a class of creditors, the proposal must be approved by creditors holding a majority in number and more than 2/3 of the value of the claims voted in that class.[54]

As discussed above, once creditors have voted as a class to accept or reject a proposal, the court must then approve it. Once the proposal is approved by a class of creditors, it binds all parties in that class, regardless of whether a particular creditor in that class voted in favour of the proposal or not.[55]

If approved by the required majorities of voting creditors, a proposal must then be submitted to the court for approval.[56] In deciding whether to approve a particular plan, the court must consider:

- the interests of the debtor in making a settlement with its creditors;
- the interests of creditors in obtaining a settlement that is reasonable and does not prejudice their rights; and
- the interests of the public in a settlement that preserves the integrity of the bankruptcy process and complies with the requirements of commercial morality.[57]

The court typically will not approve a proposal where it is not satisfied that the terms of the proposal are reasonable or calculated to benefit the general body of creditors.[58]

If the proposal is not approved by both the creditors and the court, the debtor company is automatically deemed bankrupt.[59]

1.1.3 Reorganising pursuant to corporate statutes

While a comprehensive review of restructurings under corporate legislation (at both the federal and provincial level) is beyond the scope of this chapter, we note that the arrangement provisions of the Canada Business Corporations Act (CBCA), as well as the equivalent provincial legislation, can be used in conjunction with the CCAA or the commercial proposal provisions of the BIA to reorganise the capital structure of a corporation.[60]

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[53] *Idem*, ss 50(1.4), 54(2).
[54] Creditors who are related to the debtor corporation are only entitled to vote against, but not for, the proposal: BIA, s 54(3).
[55] *Idem*, s 62(2).
[56] *Idem*, s 58(a).
[57] *Re Gardner* (1921) 21 CBR 424, 59 DLR 555.
[58] BIA, s 59(2).
[59] In contrast, under a CCAA proceeding there is no deemed bankruptcy.
[60] See also the corporations statutes issued under provincial jurisdiction, including the Business Corporations Act, RSA 2000, c B-9, ss 192-193 (ABCA); *Business Corporations Act*, R.S.O. 1990, c B-16, ss 182, 186 (OBCA).

Section 192 of the CBCA (and similar provisions of provincial statutes)[61] has also been employed as a mechanism for corporate financial restructuring.[62] While there are certain advantages to proceeding under the CBCA (corporate reorganisation proceedings can be faster, less costly, and less dependent on court supervision than CCAA proceedings),[63] the CBCA is not an insolvency statute and therefore has certain limitations. These limitations include, among others, no express authority to:

- grant a stay of proceedings;
- authorise DIP financing; or
- grant priority charges in favour of administrative professionals.[64]

The CBCA also does not contemplate or otherwise provide for the appointment of a court officer to supervise the restructuring, and courts have held that the jurisdiction to grant releases to third parties is more limited than the jurisdiction available under the CCAA and the BIA.[65]

1.1.4 Cross-border restructurings and insolvencies

Canada has incorporated a modified version of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency into both the CCAA and the BIA.[66] An authorised foreign representative in a foreign insolvency proceeding may thus bring an application to the Canadian court for recognition of the foreign proceeding. On such an application, the Canadian court must determine if the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.[67]

If the debtor company's centre of main interests (COMI) is located in the jurisdiction of the foreign proceeding, the proceeding will be referred to as a foreign main proceeding.[68] Both the CCAA and the BIA provide that for the purpose of the applicable recognition provisions of each Act, a debtor company's registered office is deemed to be its COMI in the absence of proof / evidence to the contrary.[69] The courts will consider the following factors to determine COMI:

- whether the location is readily ascertainable by creditors;
- whether the location is one which the debtor's principal assets or operations are found; and
- whether the location is where the management of the debtor takes place.[70]

Where courts are assessing the COMI of a Canadian entity operating as part of a larger corporate group, courts will consider additional factors, including:

- the location where corporate decisions are made;
- the location of employee administration, including human resource functions;

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61 See, for example, OBCA, s 182; BCBCA, s 288.

62 Martin McGregor and Paul Casey, "CBCA Section 192 Restructurings: A Streamlined Restructuring Tool or a Statutory Loophole?", online: <https://www.insolvency.ca/en/iicresources/resources/CBCA-Section-192_Canadas-Next-Insolvency-Regime_Myles-Davis.pdf> at 20; see also *Yellow Media Inc, Re* 2012 QCCS 4180.

63 Roderick Wood, *Bankruptcy and Insolvency Law* (Irwin Law, 2nd ed, 2015) at 593.

64 Mitch Grossell, "The Clash Between Corporate & Insolvency Law; CBCA Restructurings" online: <https://www.insolvency.ca/en/whatwedo/resources/TheClashBetweenCorporateLawandInsolvencyLawbyMitchGrossell.pdf>

65 See, for example, *Re iAnthus Capital Holdings, Inc* 2020 BCSC 1442.

66 BIA, Part XIII; CCAA, Part IV.

67 CCAA, s 47; BIA, s 270.

68 CCAA, s 45(1); BIA, s 268(1).

69 CCAA, s 45(2); BIA, s 268(2).

70 *Lightsquared LP, Re* 2012 ONSC 2994 at para 25.

- the location of the company's marketing and communication functions;
- whether the enterprise is managed on a consolidated basis;
- the extent of integration of an enterprise's international operations;
- the centre of an enterprise's corporate, banking, strategic and management functions;
- the existence of shared management within entities and in an organisation;
- the location where cash management and accounting functions are overseen;
- the location where pricing decisions and new business development initiatives are created; and
- the location of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.[71]

The court may also consider the connection between the debtor and foreign jurisdiction to give effect to the legitimate expectations of a debtor's constituents as to which laws will apply.[72]

As noted above, the BIA and the CCAA are, to the extent possible, to be interpreted harmoniously.[73] Thus, in recognition proceedings under the BIA, Canadian courts have considered and utilised the factors articulated in CCAA cases.[74]

Once a foreign proceeding is recognised as a foreign main proceeding, the Canadian court is required to grant a limited stay of proceedings in relation to the debtor company.[75] If the foreign proceeding is recognised as a foreign non-main proceeding, there is no automatic stay; rather, the relief granted is in the discretion of the Canadian court.[76]

The principle of comity requires that Canadian courts recognise and enforce judicial acts of foreign jurisdictions provided that the other foreign jurisdiction has assumed jurisdiction that is consistent with principles of order, predictability and fairness. Canadian courts have stressed the importance of comity and cooperation in cross-border insolvency proceedings to avoid multiple proceedings, inconsistent judgments and uncertainty.[77] However, where foreign judicial acts would be contrary to Canadian public policy, the CCAA and BIA do not limit Canadian courts' discretion to refuse to recognise such foreign judicial acts.[78]

1.2 Informal restructuring procedures

In Canada, informal out of court restructurings are not governed by any legislation, but rather are conducted on a consensual basis.[79] Informal restructurings usually involve a combination of the following:

- making arrangements directly with vendors / suppliers / landlords;[80]

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71 *In the Matter of Voyager Digital Ltd* 2022 ONSC 4553 at para 21 [*Voyager*]; see *Hollander Sleep Products, LLC (Re)* 2019 ONSC 3238 at para 33 *[Hollander]*; *CHC Group Ltd (Re)* 2016 BCSC 2623 at para 11.
72 *Wolfridge Farm Ltd, Re* 2015 NSSC 168 at para 30.
73 *Century Services* at para 45.
74 *Wolfridge* at paras 30, 32.
75 CCAA, s 47(2); BIA, s 270(2).
76 Additionally, upon the recognition of a foreign proceeding, the CCAA and the BIA require the foreign representative to take on certain obligations, including the posting of notices related to the foreign proceeding. As well, although not required by the statute, it is typical that a court will require the appointment of an information officer to monitor and report to the court on the status of the proceedings.
77 CCAA, s 44; BIA, s 267; see also *Voyager* at para 9; *Hollander* at paras 41, 42.
78 CCAA, s 61(2); BIA, s 284(2).
79 These are sometimes referred to as "private workouts".
80 For example, reducing payments or any associated interest rates or penalties, as well as payment plans.

- making changes internally to the business;[81]
- asset sales;[82] and / or
- securing additional financing or investment.

Two of the more common informal restructuring tools that debtors utilise as part of informal restructurings are forbearance agreements and bridge financing.

Forbearance agreements are agreements whereby a lender agrees to delay in (or forbear from) enforcing its security and other remedies for a period of time. These agreements can be mutually beneficial for both the debtor and the lender, as they can: (i) obviate the need for a debtor to commence formal restructuring proceedings; and (ii) provide the debtor "breathing space" to rehabilitate itself and take other informal restructuring steps, such as securing take-out or bridging financing. A well-drafted forbearance agreement can also be an opportunity for a lender to receive a fee or increased interest as consideration for the forbearance, correct any gaps or inconsistencies in its security, obtain an acknowledgement of the amount outstanding from the debtor, and set out terms for the enforcement of that security if the debtor cannot rehabilitate itself.

Meanwhile, bridge financing is a type of short-term financing utilised by debtor companies to take out an operating lender or replace their secured financing. This type of financing is generally short-term in nature and comes at a higher borrowing cost. In addition, bridge lenders typically require some form of security, which may be over unencumbered assets or in second priority to a current lender. By replacing or supplementing its existing secured debt with bridge financing, the debtor may "buy time" to find more suitable long-term and operating financing for its business.

2. Restructuring of ESG-related liabilities

While Canada currently has no restructuring specific ESG legislation or guidelines,[83] it appears to be a receptive framework for ESG considerations, given that:

- natural resources (mining, oil and gas, forestry) play a significant role in Canada's economy, and companies operating in these areas are regular participants in Canada's insolvency regime;
- ESG considerations and the public interest already play an informal role in the restructuring process.[84] In particular, when courts are asked to exercise their discretion, "the broader public interest" may be engaged "and may be a factor against which the decision of whether to allow a particular action will be weighed".[85] In deciding whether to approve plans of arrangement, for example, courts have considered the impacts that such plans will have on local communities, including their effect on jobs, the continuation of humanitarian work, and the supply of key

[81] For example, changes in management or downsizing, including reducing inventory, staff and other fixed costs.

[82] Due to the time-sensitive nature of most restructuring situations, this often will be at discounted prices.

[83] The Canadian Securities Administrators (CSA) mandate corporate governance related disclosure in Disclosure of Corporate Governance Practices, NI 58-101 (17 June 2005). The CSA provides further guidelines in Corporate Governance Guidelines, NP 58-201 (15 April 2005), which does not prescribe or restrict specific governance matters but does reflect best practices for governance. More specifically, in January 2022, CSA published guidance for investment funds on their disclosure of ESG practices. In Ontario, the Capital Markets Modernisation Task Force has recommended disclosure of material ESG information and specifically climate-change related disclosure. Likewise, as discussed in section 5.3 below, the Federal Government is seeking to mandate the adoption of the Task Force on Climate-Related Financial Disclosure standards for large corporations. These existing (and potential) ESG regulations expose non-compliant corporations to regulatory enforcement, including monetary sanctions.

[84] The role of "social stakeholders" such as the government, environmental stakeholders, First Nations, and the local community in business restructuring proceedings have been recognised since the evolution of the modern CCAA, as has the role of the public interest.

[85] *Century Services* at para 60.

community services.[86] Courts have considered similar factors in deciding whether to exercise their discretion to grant stays of proceedings.[87] That being said, ESG considerations are not definitive factors. They tend to be given less weight in the face of creditor opposition or in circumstances where they are not tied directly to the immediate demands of the debtor's restructuring;[88]

- Canadian corporate law provides that directors of a company may consider, when acting in the interests of the company, "the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment";[89] and
- evidence suggests that there is a correlation between ESG performance and profitability.[90] Additionally, growing customer and investor advocacy on ESG issues may cause lenders and investors to tighten access to funds for companies that do not meet or exceed ESG requirements, while companies with higher levels of ESG performance may appeal to a broader spectrum of lenders and investors and be viewed as less of a credit risk.

Despite the above, there are some structural limits and practical hurdles that limit the role of ESG considerations in Canadian insolvency proceedings, including:

- the BIA and the CCAA are both commercial statutes. The primary purpose of both statutes is clear: to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.[91] Therefore, unless addressing ESG issues will positively contribute to meeting that purpose, court officers and debtors may not be able to prioritise those matters;[92]

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86 In *Re Canadian Red Cross Society / Société Canadienne de la Croix Rouge* (2000) 19 CBR (4th) 158, 99 ACWS (3d) 732 (ONSC) [*Canadian Red Cross*], for example, the court approved a plan of arrangement in CCAA proceedings because, among other things, the Red Cross employed approximately 7,000 Canadians in other aspects of its humanitarian work and "makes valuable contributions to society through these humanitarian efforts": para 28. Similarly, in *Re Canwest Global Communications Corp* 2010 ONSC 4209, the court approved a plan of arrangement for a television broadcasting company because, among other things, it would "ensure the continuation of employment for substantially all of the employees" and would "maintain for the general public broad access to and choice of news, public and other information and entertainment programming" which was "an important public service": para 26.

87 For example, in *Re JTI-Macdonald Corp* 2019 ONSC 1625, JTI-Macdonald, a tobacco company, argued that they required a stay of proceedings to stop the enforcement of a judgment to preserve, among other things, the jobs of 500 employees, the work of 1,300 suppliers, and approximately CAD $1.3 billion in continued payments in respect of federal and provincial taxes and duties. Considering this, the court granted the stay of proceedings as "[a]ny steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders": paras 4, 13.

88 In *Re 1057863 BC Ltd* 2020 BCSC 1359, for example, the debtor sought permission to pay pre-filing unsecured employee amounts, arguing that it was necessary to, among other things: (i) "mitigate the adverse effects of the Pulp Mill's closure in the communities in which the Petitioners operate"; and (ii) "preserve their relationships with the employees who are no longer working, many of whom are expected to be called upon to return to employment at the Pulp Mill in the future": para 75. The Province of Nova Scotia, the major secured creditor of the debtor, opposed these payments. The court declined to approve the payments, despite noting that it "appreciate[d] that this vulnerable group of stakeholders will suffer arising from my decision". However, the court also noted that "[i]n the absence of any objection by Nova Scotia, and with the general support of the Petitioners and the stakeholders appearing on this application, I might have come to a different conclusion": para 87. In contrast, the court approved the payment of pre-filing obligations to employees in *Re Cinram International Inc* 2012 ONSC 3767 because these payments were necessary to keep employees working at the company and their services were "critical to the ongoing operations": para 67.

89 *BCE Inc v 1976 Debenture holders*, 2008 SCC 69.

90 ISS EVA, "ESG Matters" online: < https://www.issgovernance.com/library/esg-matters/>.

91 *Century Services* at para 15.

92 Indeed, "[the CCAA] is, after all, commercial legislation. Public interest is not the primary focus of the legislation and generally social stakeholders play a secondary role to that of creditors": Virginia Torrie and Vern DaRe, *The Participation of Social Stakeholders in* CCAA *Proceedings* 2019 AnnRevInsolv9 at 1.

- non-creditors cannot vote on plans and proposals.[93] Therefore, unless ESG stakeholders have a claim that is monetary in nature, such that they have the standing of a creditor, they cannot exert influence on the terms of a plan or proposal via the creditor approval process; and

- even if they do have the right to vote, ESG stakeholders can face challenges to participating in the restructuring process.[94] Canadian courts have granted orders appointing representative counsel for large stakeholder groups that collectively have a significant interest, but whose members individually lack the resources to secure "a seat at the table".[95] However, such appointments are not commonplace, likely because of the resources and coordination required to seek such an appointment.

2.1 Environmental (E): restructuring environmental liabilities

Canada is subject to both provincial and federal environmental laws. Most of these laws provide for various enforcement remedies, including orders and administrative penalties.

The primary federal law is the Canadian Environmental Protection Act,[96] which focuses on national and international environmental issues and establishes the federal regulatory authority. There are also federal laws and regulations related to water, fisheries, animals, and forestry that may be relevant to a company's environmental obligations.

In addition, every province has its own environmental protection laws. Provincial laws typically impose obligations to clean up contaminated land, which obligations are enforced by the provincial environmental regulator.[97] The majority of environmental enforcement orders are governed by provincial law.

2.1.1 Types of environmental liabilities

The costs associated with remediation or clean-up of affected property (otherwise known as reclamation and abandonment liabilities) are the most common type of environmental liability faced by insolvent corporations. A company may also be subject to fines and penalties issued by environmental regulators.

2.1.2 Priority given to environmental liabilities

Both the BIA and the CCAA include provisions addressing claims made by the federal and provincial governments for the costs associated with remedying environmental conditions or damage affecting real or immovable property of the debtor.[98] These sections provide for security for those costs by a charge on the affected real property[99] and any contiguous real property that is related to the activity that caused the environmental condition or damage, which security ranks in priority ahead of any other security against the property in question.[100] However, this charge does not apply to all environmental obligations a government seeks to enforce. This is illustrated in *Orphan Well Association v Grant Thornton Ltd* (*Redwater*),[101] discussed in greater detail below, where the majority of the Supreme Court of Canada (SCC) found that the regulator did not have a provable claim because it was not seeking a financial benefit and was acting in its capacity as regulator rather than creditor.[102] The statutory charge only applies to claims provable in

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93 These stakeholders can only express their displeasure if granted standing at the court approval stage.
94 ESG stakeholders may have limited funds, may be spread across large geographic areas, and may find it difficult to organise themselves into cohesive groups.
95 See, for example, *League Assets Corp (Re)* 2013 BCSC 2043 at para 63.
96 Canadian Environmental Protection Act, SC 1999, c 33.
97 The provincial regulator can order the assessment and clean-up of contaminated land.
98 BIA, ss 14.06(6)-14.06(8); CCAA, ss 11.8 (7)-11.8(9).
99 However, this charge is limited to the real property itself and does not attach to interests therein: *Yukon (Government of) v Yukon Zinc Corporation* 2021 YKCA 2 at para 98.
100 BIA, s 14.06(7); CCAA, s 11.8(8).
101 *Orphan Well Association v Grant Thornton Ltd* 2019 SCC 5 [*Redwater*].
102 *Redwater* at para 128.

bankruptcy, meaning there must be a debt, liability or obligation owing to the government / regulator and to which it must be possible to attach a monetary value.[103]

2.1.3 Disclaimer of environmental obligations

The decision of the SCC in *Redwater* has created significant uncertainty regarding the ability of a court officer to effectively disclaim contaminated property.[104] The SCC concluded that the disclaimer power conferred upon the trustee by the *BIA* is only related to the personal liability of the trustee, and "says nothing about the liability of the 'bankrupt' or the 'estate'".[105]

Orders and penalties issued by environmental regulators in the nature of fines, restitution orders or similar are not affected by a restructuring unless the proposal or plan explicitly provides for their compromise and the creditor in relation to that debt or liability votes in favour of such compromise.[106]

Both the BIA and the CCAA include provisions that give proposal trustees and monitors, respectively, protection in relation to specified environmental liabilities, provided the court officer acts in accordance with those provisions.[107] The court officer has no personal liability for any environmental condition or damage that pre-dates the court officer's appointment, or that arises or occurs post-appointment unless it is established that the issue was a result of the court officer's gross negligence or wilful misconduct.[108] However, proposal trustees and monitors are still required to comply with any applicable duty to report or make disclosure under applicable environmental laws.[109]

2.2 Social (S): restructuring health or safety-related liabilities

There are no provisions in the BIA or CCAA that relate specifically to the restructuring of health or safety-related liabilities.

2.2.1 Types of health and safety-related liabilities

In Canada, health and safety-related liabilities include amounts owing under the provincial workplace health and safety statutes and legislation relating to hazardous materials.[110] Another category of health and safety-related liabilities are those arising from products liability litigation – whether pursuant to class action proceedings or by way of "mass tort" claims. For example, in Canada there have been restructurings implemented to manage litigation (and the associated liabilities) regarding pharmaceuticals, transport, tobacco and tainted blood.[111]

2.2.2 Treatment of health and safety-related liabilities

Certain health and safety-related statutes create liens to secure the payment of obligations to health and safety regulators.[112]

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[103] *Idem* at para 119. These may also include contingent claims, provided they are not too remote or speculative: *Redwater* at para 138 and may include claims for costs incurred after the commencement of proceedings: CCAA, s 11.8(9); BIA, s 14.06(8).

[104] A comprehensive discussion of *Redwater*, including this issue, can be found in T Cumming, CE Hanert and J Oliver, "The Intersection of Regulatory and Insolvency Law: Redwater's Final Chapter and the Aftermath", 2019 AnnRevInsolv 5.

[105] *Redwater* at para 74.

[106] BIA, ss 62(2.1), 178(1)(a); CCAA, s 19(2)(a).

[107] BIA, s 14.06(7); CCAA, s 11.8(5).

[108] BIA, s 14.06(2); CCAA, s 11.8(3).

[109] BIA, s 14.06 (which applies to proposal trustees by virtue of s 66.4(1)); CCAA, s 11.8.

[110] Workplace Safety and Insurance Act, 1997, SO, c16, ss 144, 145; Workers' Compensation Act, RSA 2000, c W-15, s 127; Workers Compensation Act, RSBC 2019, c 1, s 264.

[111] For a discussion on the settlement of mass tort claims via the CCAA, see Vern W DaRe, "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case", 2008 AnnRevInsolv 10.

[112] The Workers Compensation Act, RSM 1987, c W200, s 104; Workers' Compensation Act, RSA 2000, c W-15, s 129; Workers' Safety and Compensation Act, SY 2021, c 11, s 185; Workers Compensation Act,

Under both the BIA and the CCAA, claims of the federal or provincial governments and workers' compensation bodies are treated as unsecured claims unless they are secured by certain types of security or charges, which have been registered in accordance with the applicable personal property securities legislation.[113]

As is the case with those issued by environmental regulators, orders and penalties relating to health and safety matters in the nature of fines, restitution orders or similar, are not compromised by a restructuring unless such compromise is expressly provided for in the plan or proposal and the creditor in respect of such debt or liability votes in favour.[114] Otherwise, there are no specific restrictions or limitations on the compromise or restructuring of health and safety-related liabilities.

Tort claimants and judgment creditors whose claims arise from health and safety-related matters are treated as unsecured creditors for the purposes of insolvency and restructuring proceedings.

2.3 Governance (G): third party releases in favour of directors and officers of the company

Canadian courts regularly sanction releases in favour of directors and officers (and other third parties) in the context of restructuring proceedings under the BIA and the CCAA.[115] In doing so, they consider the following factors (with no single factor being determinative or necessarily applicable in each case):

- whether the parties to be released were necessary and essential to the restructuring of the debtor;
- whether the claims to be released were rationally connected to the purpose of the proposal or plan and necessary for it;
- whether the proposal or plan could succeed without the releases;
- whether the parties being released contributed to the proposal or plan; and
- whether the releases benefit the debtors as well as the creditors generally.[116]

The broad jurisdiction of the court in a CCAA proceeding can be exercised to grant releases to directors and officers in the absence of a plan.[117] If no proposal is filed in a proposal proceeding under the BIA and the stay thereunder expires without the proposal proceeding being converted into a CCAA proceeding, the company will be deemed bankrupt, and no release will be available to directors.[118]

Both the BIA and the CCAA contemplate the compromise of certain pre-filing claims against directors and officers in proposals and plans.[119] However, both statutes also include limits on the

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RSBC 2019, c 1, s 265; Workers' Compensation Act, SNS 1994-95, c 10, s 148; Workers' Compensation Act, RSNB 1973, c W-13, s 73; Workers' Compensation Act, SNWT 2007, c 21, s 143; Workers Compensation Act, SPEI 1994, c 67, s 78; The Workers' Compensation Act, SS 2013, c W-17.11, s 160; Workers' Compensation Act, SNU 2007, c 15, s 143; Workplace Health, Safety and Compensation Act, RSN 1990, c W-11, s 122; Workplace Safety and Insurance Act, 1997 SO, c 16, s 145.

[113] BIA, ss 86, 87; CCAA, ss 38, 39.

[114] BIA, ss 62(2.1), 178(1)(a); CCAA s 19(2)(a).

[115] CCAA, s 5.1; BIA, s 50(13).

[116] *Re Lydian International Limited*, 2020 ONSC 4006 at para 54. Third party releases generally in the context of restructuring proceedings were considered in *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp* 2008 ONCA 587.

[117] Under the CCAA, the court can – in exceptional circumstances – utilise the broad jurisdiction conferred by s 11 (to "make any order that it considers appropriate in the circumstances") to release third party claims against directors and officers where a plan is not approved upon termination of the CCAA proceedings. To receive such an order, the applicant must demonstrate that the order is appropriate in the circumstances and that the parties to be released have acted in good faith and with due diligence: see for example, *Re ENTRETEC Corporation*, 2020 ABQB 751, where Justice Romaine granted such an order, subject to the exclusion of specified claims.

[118] BIA, s 50.4 (8).

[119] BIA, s 50(13); CCAA, s 5.1.

nature of claims that can be compromised, namely: (i) claims that relate to contractual rights of one or more creditors arising from contracts with one or more directors; and (ii) those based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.[120] Further, under both statutes claims such as fines, penalties or award of damages in respect of bodily harm or wrongful death cannot be compromised unless the plan or proposal explicitly provides for the compromise of that debt or liability, and the creditor in relation to that debt or liability voted in favour of the acceptance of the plan or proposal.[121]

The BIA and CCAA both authorise the court to grant a priority charge over all or part of the property of the debtor company in favour of the directors and officers as security for the indemnification of directors and officers in respect of liabilities that they may incur in such capacities after the commencement of proceedings.[122] These charges are intended to keep management in place during restructuring so that the debtor company may benefit from their experience and institutional knowledge.[123]

3. Protection of stakeholders' interests

3.1 Environmental (E): influence by environmental protection authorities or environmental advocacy groups in a restructuring

3.1.1 Approving a restructuring plan

As noted above, any proposal or plan is subject first to approval by the affected creditors – a majority in number holding at least two thirds by value of the claims voted in a class. While there is no requirement for approval of a proposal or plan by environmental regulators, environmental liabilities can be very significant, with the result that environmental stakeholders may have an effective "veto" of any plan if those liabilities represent more than one third of the value of claims voting in a particular class.

3.1.2 Discretion to consider wider public interest concerns

As discussed above, after the requisite majorities have voted to approve a proposal or plan, the court will consider whether to exercise its discretion to approve it. In doing so, the court will weigh various factors, including whether the proposal or plan is in "the interests of the public".[124] Such interests include the preservation of jobs,[125] the provision of important services to communities[126] and ensuring that debtors comply with their tax obligations.[127]

However, while courts may consider the impacts of their decisions on the public interest, the proposal provisions of the BIA and CCAA are still primarily focused on addressing the relationship between insolvent entities and their creditors with the purpose of preventing the social and economic costs of a liquidation.[128] Therefore, the interests of creditors are given considerable

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120 CCAA, s 5.1(2); BIA, s 50(14).
121 BIA, ss 62(2.1), 178(1); CCAA, s 19(2).
122 BIA, s 64(1); CCAA, s 11.51.
123 *Northstar Aerospace Inc, Re,* 2013 ONSC 1780 at para 29.
124 *Canwest* at paras 19-21; *Silbernagel, Re* (2006), 81 OR (3d) 152, 2006 CanLII 13427 at paras 9, 10. See BIA, ss 50.6, 54, 65.11, 65.13 65.2, 104.1; CCAA, ss 6, 11.2, 32, 36.
125 *Canadian Red Cross* at para 28.
126 *Canwest* at para 26.
127 *Silbernagel* (2006), 81 OR (3d) 152, 2006 CanLII 13427 (SC) at para 14.
128 See, for example, *Century Services* at para 15. In addition, the long form title of the CCAA is "[a]n act to facilitate compromises and arrangements between companies and their creditors", which also provides insight into its intended purpose: see, for example, *Stelco ONCA* at para 7; For BIA example, see *Kitchener Frame Ltd., Re,* 2012 ONSC 234 at para 53. While courts have recognised that the public interest includes, for example, the enforcement of environmental regulations, it has found that insolvency legislation has balanced this with the public interest of "third-party creditors in being treated equitably": *AbitibiBowater Inc, Re*, 2012 SCC 67 at para. 32; see also *Yukon (Government of) v Yukon Zinc Corporation*, 2021 YKCA 2 at para 91.

weight and deference, both in the provisions of the statutes and by the courts in exercising their jurisdiction under the Acts.[129]

3.1.3 Influence by environmental protection authorities or environmental advocacy groups in a restructuring

There is no statutory requirement under the BIA or the CCAA for environmental protection authorities or advocacy groups to approve a proposal or plan. However, creditors holding claims in respect of environmental liabilities that will be affected by a proposal or plan can vote on that proposal or plan. Accordingly, if those stakeholders have large monetary claims, they may exert significant influence on the course of restructuring proceedings. Moreover, where the claims of environmental regulators are afforded super-priority, those obligations may have a significant practical impact on the course of the restructuring proceedings.[130]

Additionally, if environmental obligations have to be paid out in priority to other creditors, with the result that subsequent creditors will see little or no recovery, debtors may find it difficult to secure the DIP financing that they require to fund a restructuring proceeding. In some cases, this may result in debtors not being able to pursue restructuring at all.

3.2 Social (S): influence by labour authorities, unions or employee / worker advocacy groups in a restructuring

3.2.1 Approving a restructuring plan

There is no statutory "veto" given to government regulators, unions, or employee advocacy groups under either the BIA or the CCAA.

As noted above, proposals and plans are subject to creditor approval. To the extent that employees and former employees are creditors of a debtor company, they are entitled to vote on the proposal or plan. Depending on the circumstances, employee creditors may be classified separately from other creditors.[131]

No proposal or plan can be approved by the court if it does not make provision for certain prescribed payments to and for the benefit of employees.[132]

3.2.2 Discretion to consider wider public interest concerns

As noted above, the court has the discretion to consider the public interest in proceedings under the BIA and the CCAA. This includes the interests of employees.

3.2.3 Protection of employee rights

Canadian Courts have exercised their discretion to appoint representative counsel to act on behalf of employees in CCAA proceedings, the costs of which may be paid out of the debtor company's estate.[133] Depending on the circumstances, representative counsel may assist employees and former employees by providing a reliable resource of information and by litigating claims on

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[129] For an example in BIA proposal proceedings, see *Wiivv Wearables Inc (Re),* 2021 BCSC 511 at paras 50, 52; see also *Magnus One Energy Corp, Re,* 2009 ABQB 200 at para 11; *Re Abou-Rached,* 2002 BCSC 1022 at para 65; For an example in CCAA proceedings, see *Olympia & York Developments Ltd v Royal Trust Co* (1993), 12 OR (3d) 500, 17 CBR (3d) 1 at para 42.

[130] See, for example, the discussion of *Redwater* in section *2.1.2* above.

[131] *Re Invictus MD Strategies Corp et al*, [2020] (BCSC), Vancouver Registry No S-201708 [*Invictus*].

[132] BIA, s 60(1.1), (1.3), (1.5) and CCAA, s 6(3), (4), (5), (6). A bill (Bill C-228) is currently before the Senate of Canada. If enacted, the proposed legislation would amend BIA, s 60(1.5) and CCAA s 6(6) by adding amounts in respect of certain pension obligations that must be provided for in any proposal or plan.

[133] *Sears Canada Inc et al (Re),* Toronto CV-17-11846-00CL (Ontario Superior Court of Justice [Commercial List]); *Nortel Networks Corp, Re* (2009), 53 CBR (5th) 196, 2009 CanLII 26603 at para 12 (*Nortel 2009*). For an example of representative counsel being appointed in BIA proposal proceedings, see *Kitchener Frame Ltd, Re* 2012 ONSC 234.

behalf of individuals who, on their own, would have little means of pursuing their claims in respect of pension, termination, severance, retirement, and other payments.[134]

Collective agreements entered into by the debtor remain in force during CCAA and BIA proceedings and may not be altered except as expressly authorised.[135] Collective agreements are expressly excluded from the operation of the contractual disclaimer provisions.[136]

Employees who are owed "eligible wages"[137] when their employer commences a proceeding pursuant to the CCAA or the proposal provisions of the BIA are eligible for payments pursuant to the Wage Earner Protection Programme (WEPP),[138] which provides for payments to employees of up to an amount equal to seven times the maximum weekly insurable earnings under the Employment Insurance Act by the federal government.[139] The government is subrogated to any rights that employees who receive payments may have against the insolvent employer, or the directors of the insolvent employer, to recoup amounts paid under the WEPP.[140] The balance of employee claims is unsecured.

3.3 Governance (G): board / management conflicts addressed in a restructuring plan)?

In certain circumstances, where management and other employees of a debtor company are deemed critical to restructuring efforts, courts may approve a key employee retention plan (KERP) and / or a key employee incentive plan (KEIP).[141] KERPs typically provide for payments to employees at specified times in the future, on the condition that the employees remain with the debtor company when those specified times arrive. KEIPs typically provide for payments tied to the debtor company successfully achieving certain milestones. Both plans are aimed at retaining those essential employees during the period in which they are likely to seek other opportunities as a result of the financial state of the debtor company.[142] Although neither the BIA nor the CCAA specifically contemplate priority charges over the debtor company's assets to secure KERPs and KEIPs, such charges have been granted in both types of proceedings.[143]

KERPs and KEIPs are developed in conjunction with a proposal trustee or a monitor and are subject to court approval. Courts have considered the following non-exhaustive list of factors in deciding whether or not to approve these plans:

- whether the proposal trustee or a monitor (as the case may be) supports the plan;
- whether the key employees who are the subject of the plan are likely to pursue other employment opportunities absent the approval of the plan;
- whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of the debtor company;
- whether the quantum of the proposed retention payments is reasonable; and

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[134] *Nortel 2009* at para 13.
[135] See *Honsberger's* at 222; see also Sarra, *Rescue!* at 389.
[136] CCAA, ss 32(9), 33(1); BIA, ss 65.12(6), 65.11(10).
[137] See Wage Earner Protection Programme Act, SC 2005, C. 47, s 2(1) [WEPPA].
[138] WEPPA, s 5(1)(b)(iv).
[139] WEPPA, s 7(1). The prescribed maximum amount payable to a single employee at the time of writing is CAD $7,578.83 (for proceedings commenced between November 20,2021 and December 31, 2021), and CAD $8,117.34 for those commenced in 2022. See Practical Law, "Wage Earner Protection Programme Act (WEPPA): Overview" online: < https://ca.practicallaw.thomsonreuters.com/Document/I8f9dd0a88e2511ea80afece799150095/View/FullText.html?transitionType=Default&contextData=(sc.Default)&clientid=910138-00001>.
[140] WEPPA, s 36(1).
[141] *Danier Leather Inc (Re)*, 2016 ONSC 1044 at para 75.
[142] Sarra, *Rescue!* at 346.
[143] *Danier Leather* at para 78. For CCAA examples, see *Cinram* at para 91 and *Grant Forest Products Inc, Re,* 2009 OJ No 3344 at para 4. For a BIA example, see *Ontario Securities Commission v Bridging Finance Inc,* 2021 ONSC 4347 at para 14.

- the business judgment of the board of directors regarding the necessity of the retention payments.[144]

KERPs and KEIPs may create conflicts between the interests of management and those of the debtor company. For example, where management negotiates DIP financing, management may use their strategic position to, for example, negotiate for a higher amount financing than would otherwise be necessary in order to fund payments to themselves pursuant to a KERP or KEIP.[145] This conflict is mitigated to a degree by the oversight of the court in approving both debtor-in-possession financing and KERPs / KEIPs, and the deference given by the court to the opinion of the proposal trustee or the monitor (who has participated in the formulation of the relevant plan) as to whether it should approve the retention / incentive plan.

Potential conflicts of interest between management and the debtor company are also addressed by the restriction on voting rights of "related parties" (which may include directors). Under both the BIA and the CCAA a "related person" may vote against but not for the acceptance of the proposal or plan.[146]

The provisions of federal and provincial corporate law continue to apply to the directors and officers of companies that are undergoing restructuring pursuant to the CCAA or the BIA. These include a duty of care and a fiduciary duty of loyalty on the part of directors and officers.[147] Further, companies listed on Canadian stock exchanges are also subject to additional disclosure obligations and other regulations targeted at reducing the risk of conflicts of interest with respect to management compensation. For example, companies listed on the TSX must publicly disclose in an information circular whether there are restrictions on insiders participating in security-based compensation arrangements. Companies listed on the TSX Venture Exchange are subject to additional restrictions, including requirements that disinterested shareholders approve insider participation in security-based compensation arrangements exceeding certain thresholds as well as for any amendment to security-based compensation that results in a benefit to an insider.[148]

4. "Soft law" framework

4.1 Environmental (E): industry guidelines and / or best practices that are prescribed for the protection of the environment in a restructuring

We have not identified any industry guidelines and / or best practices prescribed for the protection of the environment in a restructuring.

4.2 Social (S): industry guidelines and / or best practices that are prescribed for the protection of employee rights in a restructuring

We have not identified any industry guidelines and / or best practices prescribed for the protection of employee rights in a restructuring.

4.3 Governance (G): industry guidelines or codes of conduct relating to the avoidance of conflicts of interests that restructuring professionals are subject to

Lawyers, accountants and LITs are all subject to legally binding ethical obligations imposed by their respective governing bodies. The Canadian Association of Insolvency and Restructuring

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144 *Danier Leather* at para 76; see also *Grant Forest Products Inc (Re)* (2009) 57 CBR (5th) 128, 2009 CanLII 42046 (ONSC).

145 Sarra, *Rescue!* at 347.

146 BIA, ss 4(2), 54(3); CCAA, ss 2(2), 22(3).

147 See, for example: CBCA, s 122; Business Corporations Act, SBC 2002, c 57, s 142; ABCA, s 122, Business Corporations Act, RSO 1990, c B 16, s 115, Business Corporations Act, SNB 1981, c B 9.1, s 79, Business Corporations Act, SNWT 1996, c 19, s 102, Business Corporations Act, SPEI 2018, c 22, s 77, Business Corporations Act, CQLR, c S-31.1, s 119, The Business Corporations Act, SS 2021, c 6, s 9-1t, Business Corporations Act, RSY 2002, c 20, s 102, 123, The Corporations Act, RSM 1987, c C225, s 97, 116, Corporations Act, RSN 1989, c. C-36, s 203.

148 TSXV, Policy 4.4: Security Based Compensation (24 November 2021) online: <https://www.tsx.com/resource/en/2761>, s 5.3.

Professionals (CAIRP) has both rules and standards of professional conduct applicable to its members and candidates registered in their qualification programme.[149]

Each of these regulatory schemes include provisions requiring that applicable professionals:

- take reasonable steps to identify circumstances that could pose a conflict of interest;
- apply necessary safeguards in situations of conflict, such as notifying the client of the circumstances giving rise to the conflict and obtaining their consent to act in such circumstances; and
- decline to accept an engagement or resign from an engagement if a conflict of interest cannot be appropriately resolved with the application of safeguards.[150]

5. ESG in financing

5.1 ESG-linked loans, bonds or investments

Responsible investment is a growing trend in Canada. A 2020 report prepared by the Responsible Investment Association shows that "responsible investing" accounts for 61.8% of the country's professionally managed assets, with 45% of that amount being public equities.[151]

A number of financial institutions in Canada have established ESG / sustainable financing programmes. Several examples of financial products offered by these institutions include: "green bonds" to support initiatives related to among other things, renewable energy and green infrastructure; "social bonds" to support affordable infrastructure, access to health and nutrition, and businesses owned or led by equity seeking groups; and "transition bonds" that provide loans related to activities that significantly reduce emissions.[152]

In addition, at the time of writing this chapter, six Canadian financial institutions have adopted the Equator Principles.[153] The Equator Principles were formulated in 2003 and last updated in October 2020, and are intended to serve as a common baseline and risk management framework for financial institutions to identify, assess and manage environmental and social risks when financing projects.[154] By adopting the Equator Principles, these Canadian financial institutions have agreed

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[149] See CAIRP, "Rules of Professional Conduct and Interpretation" (August 2018) online: <https://cairp.ca/rules-prof-conduct.html> r 4, which provides that "[m]embers shall with respect to any professional engagement be free of any influence, interest or relationship which impairs their professional judgment or objectivity or which, in the view of a reasonable and informed observer, has that effect".

[150] See, for example, BC, Law Society of British Columbia, Code of Conduct, r 3.4 and Ontario, Law Society of Ontario, Code of Conduct, r 3.4; Alberta, Law Society of Alberta, Code of Conduct, r 3.4; BC, Chartered Professional Accountants of British Columbia, Code of Professional Conduct, r 210; Ontario, Chartered Professional Accountants of Ontario, CPA Code of Professional Conduct, r 210; Alberta, Chartered Professional Accountants of Alberta, Rules of Professional Conduct with Guidance, r 210; Bankruptcy and Insolvency General Rules, CRC, c 368, ss 34, 42-44, 47.

[151] See Responsible Investment Association, "2020 Canadian Responsible Investment Trends Report" (Responsible Investment Association, November 2020) online: <https://www.riacanada.ca/research/2020-canadian-ri-trends-report/> at 4, 9, 10.

[152] See, for example, Export Development Canada, "Sustainable Finance: Enabling a Sustainable, Equitable Economy", online: <www.edc.ca/en/about-us/esg/sustainable-finance.html>; see also, Royal Bank of Canada, Capital Markets, "Sustainable Finance", online: <www.rbccm.com/en/expertise/sustainable-finance.page>.

[153] Including Bank of Montreal, the Bank of Nova Scotia, Canadian Imperial Bank of Commerce (CIBC), Export Development Canada, Royal Bank of Canada, and TD Bank Financial Group: Equator Principles, Members & Reporting: "Equator Principles Financial Institutions (EPFIs) and their annual reporting on EP-related activities", online: <equator-principles.com/members-reporting/>.

[154] Carla Potter et al, "The Equator Principles – EP4: Impacts and Considerations for Project Financings" (December 1, 2021), American Bar Association, online: <www.americanbar.org/groups/business_law/publications/blt/2021/12/equator-principles/>; Equator Principles, "About the Equator Principles: A financial industry benchmark for determining, assessing and managing environmental and social risk in projects", online: <equator-principles.com/about-the-equator-principles/>.

they will not finance projects that do not comply with the requirements of the Principles. Accordingly, in considering financing, these institutions may, for example, require that prospective borrowers:

- develop and maintain environmental and social management systems that will identify, assess and manage ESG risks in their projects;
- develop plans to minimise or offset the potential risks of their projects; and / or
- show ongoing engagement with local communities that may be affected by their projects.[155]

5.2 Financial institutions (banks and funds) and their commitment to achieve ESG targets

Six of the largest Canadian banks[156] have committed to achieving a net-zero banking economy by 2050, as outlined in the Paris Agreement on climate change.[157] They are also members of the Net-Zero Banking Alliance.[158]

Several Canadian banks are working on implementing the climate-related disclosures developed by the International Task Force on Climate-Related Financial Disclosures[159] which, as discussed in the section below, will be mandated by the Canadian Federal Government in 2024. In addition, many of Canada's largest banks also have committed to increasing the issuance of green bonds to finance new and existing green projects and developing new metrics to link ESG factors with bank group performance and executive pay.[160]

5.3 Promoting ESG by the central bank and regulators

Climate change is an area of focus for both Canada's central bank, the Bank of Canada,[161] and the Office of the Superintendent of Financial Institutions (OSFI). In January 2022, the Bank of Canada and OSFI released the results of a pilot project on climate scenario analysis, and the development of certain scenarios (developed in conjunction with six[162] federally regulated financial institutions) designed to help the Canadian financial sector identify, measure, and disclose climate-related risks.[163]

In May 2022, OSFI issued a draft guideline addressing the impact of climate change on managing risk, and introducing mandatory financial disclosures aligned with the International Task Force on Climate-Related Financial Disclosures framework.[164]

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155 *Ibid*.

156 These include: (i) Bank of Montreal; (ii) Canadian Imperial Bank of Commerce; (iii) National Bank of Canada; (iv) Royal Bank of Canada; (v) Scotiabank; and (vi) TD Bank Group.

157 National Bank, "Six of Canada's Largest Banks Join United-Nations-convened Net-Zero Banking Alliance" (October 15, 2021), online: <www.nbc.ca/about-us/news-media/press-release/2021/20211015-Six-des-grandes-banques-canadiennes-se-joignent-a-lalliance-bancaire-Net-Zero-des-Nations-Unies.html>.

158 This is an industry led, UN convened global group of banks committed to aligning their lending and investment portfolios with net-zero emissions by 2050: UN Environment Programme, Finance Initiative, "Net-Zero Banking Alliance", online: <www.unepfi.org/net-zero-banking/>.

159 Canadian Bankers Association, "Focus: Banks in Canada Committed to a Net-Zero Economy by 2050", online: <cba.ca/Assets/CBA/Documents/Files/Article%20Category/PDF/bkg_netZeroCommitments_en_Nov.pdf.>

160 *Ibid*.

161 The Bank of Canada is a member of the Central Banks' and Supervisors' Network for Greening the Financial System.

162 These include: (i) Co-operators Group Limited; (ii) Intact Financial Corporation; (iii) Manulife Financial Corporation; (iv) Royal Bank of Canada; (v) Sun Life Financial; and (vi) TD Bank Group.

163 Bank of Canada, "Bank of Canada / OSFI pilot helps Canadian financial sector assess climate change risks" (January 14, 2022), online: <https://www.bankofcanada.ca/2022/01/bank-canada-osfi-pilot-helps-canadian-financial-sector-assess-climate-change-risks/>.

164 OSFI has stated that it plans to issue the final version of the guideline by early 2023, disclosure starting in 2024, which "aligns with a commitment made by the federal government to require financial institutions to publish climate disclosures starting in 2024": OSFI, "OSFI consults on expectations to advance climate risk management" (May 26, 2022), online: <www.osfi-bsif.gc.ca/Eng/osfi-bsif/med/Pages/b15-dft_nr.aspx>.

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