
Bankruptcy: Canada vs. US Overview of Canadian Restructuring Laws

**Lowenstein
Sandler**

Canadian Political Structure

- 10 provinces
- 3 territories
- Population 33 million
- 1 Federal government
- 10 provincial governments (and territories)
- Common law tradition – except Québec
- Québec – language
 - laws/civil code



Canadian Legal Jurisdiction

- Bankruptcy and Insolvency = federal law
- but**
- Adopts provincial laws concerning underlying contract and property issues
 - So small differences in each provinces and larger differences in Québec

Why Understand Canadian Restructuring Laws?

- Economies are inter-twined
- No economic border
- Typical structure:
 - Parent in one country with subsidiaries in another
 - Sister companies in each jurisdiction
 - Supplier to a Canadian purchaser or vice versa
- Economic pain felt on both sides of the border when things go wrong

Canadian Restructuring Regimes

- **Restructuring (Chapter 11 type)**
 - *Companies' Creditors Arrangement Act* (“CCAA”)
 - *Bankruptcy and Insolvency Act* (“BIA”)
 - Debt reorganizations under corporate law statutes such as the *Canadian Business Corporations Act* (“CBCA”) or the *Ontario Business Corporations Act* (“OBCA”)
- **Liquidations (Chapter 7 type)**
 - receiverships
 - bankruptcy

CCAA Overview

- The CCAA is a federal restructuring statute intended for more complicated cases. The CCAA is not a detailed statute like the Bankruptcy Code. Instead, it gives significant discretion to the Court to fashion appropriate remedies.
- The goal is to restructure the debtor.
- A company must have amounts owing to creditors in excess of \$5 million. Companies that do not meet this threshold fall under the *Bankruptcy and Insolvency Act*.

Impact on Suppliers

- Freeze on pre-filing payments; no guarantee of post-filing payment.
- No §503(b)(9) (20 Day Goods Priority) equivalent
- Suspend 30 day good rights
- Pre-filing debt dealt with in plan
- Obligation to continue to supply if there is an on-going contract
- Critical supplier designation does exist.
- Set off survives
- Assignment and disclaimer of executory contracts

The Stay

- The process begins when the company applies to the Court for protection under the CCAA.
- Unlike under Bankruptcy Code § 362, the Stay is not automatic. The Court will issue an order (“CCAA Order”) giving the debtor 30 days of protection from its creditors if satisfied that the Stay is appropriate (usually not a high hurdle). There is no time limit on how long the Stay can be extended.
- The Stay stops payment of pre-filing obligations, judicial and regulatory proceedings, and the enforcement of private remedies such as “*ipso facto*” provisions in contracts.

The Stay (cont'd)

- The Stay usually includes an injunction requiring existing suppliers to continue to provide goods and services in the ordinary course but there is no obligation on any party to provide goods or services on credit.
- The Stay does not apply to letters of credit or eligible financial contracts (e.g., swaps)

The Monitor

- A Monitor is an independent third party who is appointed by the Court to monitor the debtor's ongoing operations and assist with the filing and voting on the Plan.
- The Monitor's duties include monitoring the business, reporting to the Court on any major events that might impact the viability of the debtor, assisting the debtor in the preparation of the Plan, notifying the creditors (and shareholders) of any meetings, and tabulating the votes at those meetings.
- The Monitor does not guarantee payment of post-filing debts.

The Monitor (cont'd)

- The Monitor is usually an independent firm of accountants appointed by the Court.
- The Monitor is responsible for distributing and reviewing creditors' proofs of claims, forming an independent opinion on the provisions of the Plan of Arrangement and on the alternatives for the creditors, and chairing the meeting of creditors.

DIP Financing

- Similar to DIP financing under the Bankruptcy Code.
- Provides source of payment to suppliers for post filing supplies.
- Secured by a Court-ordered charge generally ranking in priority to all pre-filing security interests and other Court-ordered charges except for the Administration Charge.

Critical Suppliers

- On motion of debtor, the court can designate a supplier as critical
- No definition of “critical”.
- A critical supplier can be ordered to supply on existing terms or terms set by the Court.
- Payment of critical supplier is protected by a Court-ordered superpriority charge. The ranking of critical supplier charge is unclear *vis-à-vis* other court-ordered charges, but probably falls after Administration Charge.
- No requirement to pay pre-filing debt but this is becoming customary particularly with respect to a foreign supplier.

CCAA Claims Process

- The CCAA does not contain provisions regarding the claims process. Instead, the debtor/monitor must apply to Court for directions to establish a claims process and setting of bar date.
- Proofs of claim sent to known creditors and advertising for unknown creditors.
- Disputed claims are adjudicated by a “claims officer” appointed by the Court.

Assignment of Contracts

- A debtor can seek an order compelling the assignment of a contract.
- The Court will approve the assignment if it determines that the assignee would be able to perform the contractual obligations and that it would be appropriate to assign such rights and obligations to that assignee.
- All Monetary defaults under the contract must be cured upon the assignment, but (unlike under the Bankruptcy Code) non-monetary defaults need not be cured.

Disclaimer (Rejection) of Contracts

- A debtor may disclaim (reject) an executory contract if it is not beneficial to the debtor or its business.
- Disclaimer may be done with or without the approval of the Monitor or a Court order. A counterparty to a contract may seek a Court order prohibiting the disclaimer.
- When deciding whether to prohibit a disclaimer, the Court will consider whether disclaiming the contract would enhance the prospects of a viable Plan of Arrangement and whether the counterparty would suffer significant financial hardship if the contract was disclaimed.
- Damages resulting from disclaimer are dealt with in the Plan of Arrangement.

Asset Sales

- Assets may not be sold outside of the ordinary course of business unless the sale is approved by the Court on notice to all secured creditors likely to be affected by the sale.
- The process is similar to a sale under Bankruptcy Code § 363.
- Where the proposed sale is to a “related party,” the transaction is subject to heightened scrutiny. CCAA s. 36

Plan of Arrangement

- The Plan of Arrangement (“Plan”) is a proposal the debtor presents to its creditors explaining how it intends to deal with the debt it owes at the time of the initial filing with the Court. A Plan is similar to a plan of reorganization under the Bankruptcy Code.
- There are no restrictions on what a Plan can entail. It is not uncommon for debtors to pay a percentage of creditors’ claims, either as a lump sum or over a period of time.
- Plans can include an offer of shares of the debtor in exchange for the debt outstanding ,or a combination of cash and shares.

Plan of Arrangement (cont'd)

- The debtor can identify a particular creditor or group of creditors as “unaffected.” Unaffected creditors are included in the Plan and are not to be paid in the normal course. One of the benefits of the CCAA is that it allows for this flexibility when trying to put together a Plan.
- The Plan must be approved by creditors and the Court.
- Creditors are deemed to accept a Plan if 2/3 in value and 50% of the creditors in attendance at the creditor meeting vote in favor of it.
- The Court will approve a Plan if it is found to be “fair and reasonable”.

BIA

- BIA Proposals are intended to address less complex corporate restructurings than those eligible for relief under the CCAA.
- The Court will impose a Stay similar to the CCAA Stay, but it can be extended for only up to six months.
- Rights of suppliers, assignment/disclaimer, Plan issues are similar to the CCAA under the BIA are similar the rights afforded under the CCAA.

Receivership

- Receivership is initiated by one a secured creditor to seize and sell its collateral.
- The debtor must be given at least 10 days notice before the appointment of a receiver.
- Upon the appointment of a receiver, the debtor's assets are frozen and the debtor, its officers and directors are barred from exercising any control over them.
- The goal of receivership is to sell the assets of the debtor or the business as a going concern.

Impact on Suppliers

- Freezes payments of pre-filing debt
- 30 day good rights triggered
- No critical supplier provision
- Order to continue to supply on COD terms
- Receiver personally liable for the cost of goods supplied post filing

Repossession in Receivership

- Goods supplied within 30 days of receivership (or bankruptcy) may be repossessed.
- A written demand must be made within 15 days of the appointment of a receiver.
- The good must be identifiable and in the same state.

Bankruptcy

- A debtor may also file bankruptcy. The proceeding is similar to a chapter 7 filing in the U.S.
- The debtor's assets are liquidated by a Court-appointed trustee.
- Process:
 - First meeting of creditors
 - Affirm trustee
 - Appoint inspectors
 - Liquidate assets
 - Pursue preferential payments
 - Distribute funds to creditors

Preferences

- Section 95(1) of the BIA provides that a transfer of property or payment made in favor of a creditor dealing at arm's length with an insolvent person with a view to giving that creditor a preference over other creditors is void if made in the 90 day period before the bankruptcy.
- In the case of non-arm's length creditors the preference period is 12 months.
- This provision applies to bankruptcies, BIA proposals, and CCAA proceedings. Does not apply to receivership proceedings.

TUV to Non-Arm's Length Party

- If the court finds that the transaction was a transfer at undervalue or the transfer was not made at arm's length, and that the other party was not at arm's length, the court may grant judgment for the difference between the actual consideration and the fair market value if (1) the transfer took place within one year before the date of the initial bankruptcy event or (2) the transfer took place within one to five years before the date of the initial bankruptcy event and the debtor was insolvent at the time of the transfer or intended to defeat the interests of creditors.

TUV to Arm's Length Party

- If the court finds that the transaction was a transfer at undervalue and that the parties were dealing with each other at arm's length, the court may grant judgment for the difference between the actual consideration and the fair market value if the transfer took place within one year before the date of the initial bankruptcy event and the debtor was insolvent at the time of the transfer and the debtor intended to defeat the interests of creditors.

TUV to Non-Arm's Length Creditor

- If the transfer was made to a non-arm's length party within one year of commencement of the CCAA proceeding, the debtor's intent to defeat creditors need not be proved. The trustee only needs to show the transaction had the effect of preferring the creditor.

TUV to Arm's Length Creditor

- If the transfer was made to an arm's length creditor within three months, the trustee must establish that there was an intention to prefer that creditor over another. Where the transaction had the effect of preferring the arm's length creditor, a rebuttable presumption arises of an intention to prefer by the debtor.

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- The BIA's transfer at undervalue and preference provisions are incorporated into the CCAA by reference.

Attorney Bios



Sharon L. Levine

Partner

Co-Chair, Bankruptcy, Financial Reorganization & Creditors' Rights Department

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Sharon blogs for the Wall Street Journal's [Bankruptcy Beat](#)

Sharon L. Levine has been at the forefront of some of the largest and most complex bankruptcy cases in recent years, and she has earned a national reputation among clients and peers as a tenacious and accomplished bankruptcy lawyer. As Vice Chair of the Bankruptcy, Financial Reorganization & Creditors' Rights Department of Lowenstein Sandler, Sharon is highly regarded for her litigation and negotiation skills in the practice of restructuring, debtor-creditor law restructuring and bankruptcy litigation. Her representations include purchasers, debtors and creditors (committees and individuals). Sharon has a well-established reputation as a formidable force in bankruptcy courts across the country, where she has tried contested and litigated matters in venues including federal bankruptcy courts in New York, Delaware, California, Texas, Detroit and New Jersey, among many others..

Clients rely on Sharon's adept strategic ability to provide bankruptcy advice on "out of court" corporate reorganizations, corporate and structured finance matters, and acquiring assets out of bankruptcy, as well as in circumstances when one of the parties may be insolvent.

Sharon is a frequent lecturer on various bankruptcy topics and served as Co-Chair of the Trade Credit Committee of the American Bankruptcy Institute (ABI), and as a member of the Board of Trustees and the Women's Committee of the Turnaround Management Association. She also served as Co-Chair of the Labor and Benefits Issues Advisory Committee to the ABI's Commission to Study the Reform (amend or modify) of the Bankruptcy Code treatment of Pension and Retiree Medical Benefits. She is active in serving her community and is on the Advisory Board of Women's Campaign International.

Attorney Bios

Sharon Levine (continued)

REPRESENTATIVE ENGAGEMENTS

- Represented the official unsecured creditors' committees in cases such as Standard Register, Nirvana, Inc., Linear Construction Company, Karmalooop, Crumbs, Phoenix Payment Tech, Universal Cooperatives Inc., Gridway Energy Holdings Inc., Exide Technologies, KidsPeace, Oreck, Ormet, Handy Hardware, Southern Air, Global Aviation, Blitz U.S.A., Inc., Chef Solutions, Hussey Copper, Manistique Papers, Inc., Harry & David Holdings, Inc., American Safety Razor, Pinnacle Films, Inc., Consolidated Horticulture Group, Lear Corporation, Hayes Lemmerz, ION Media, Leiner Health Products, Inc., Star Tribune, Pliant Corporation, Foamex International, Papas Telecom and Marcal Paper.
- Represented the debtors in Wire Company Holdings, Inc. and Wire Property Holdings, ConnectEdu Inc., Consolidated Aluminum Corporation, Coach America, American Coach Lines, Royal Tours of America, Inc., Gilbert Express, Jobson Medical Information, Meridian Behavioral Health, LLC, IFL Corp., International Fight League, Summit Global Logistics, Inc., and Creative Group, Inc.
- Served as lead counsel for the ad hoc committee of bondholders under Global A&T Electronics (GATE) 10% Senior Secured Notes due 2019.
- Serves as bankruptcy counsel to the United Mine Workers of America (UMWA) in the Chapter 11 bankruptcies of Patriot Coal Corp., Walter Energy, Inc., and Alpha Natural Resources, Inc..
- Served as bankruptcy trial counsel to the International Association of Machinists and Aerospace Workers (IAM) and represented the IAM in the Chapter 11 cases of Northwest Airlines, Hawker Beechcraft, Hostess, United, US Airways (I and II), Hawaiian Airways, Aloha Airlines (I and II), TWA, AeroThrust Corporation, Motor Coach Industries International, Inc., and the creditors' committee and creditor trust in the Fedders bankruptcy proceedings.
- Represented individual committee members in MF Global, Lyondell, AMR, American Airlines, American Eagle, Hawker Beechcraft, Hostess, Estes, and Bigler LP.
- Served as bankruptcy trial counsel to the Transport Workers Union of America, AFL-CIO in the Chapter 11 cases filed by AMR, American Airlines and American Eagle.
- Served as special bankruptcy counsel to the IAM National Pension Fund in the Hostess case and to the American Federation of Musicians and Employers Pension Fund in the Philadelphia and certain other orchestra cases.
- Represents the American Federation of State, County and Municipal Employees (AFSCME) in Detroit's Chapter 9 bankruptcy.

Attorney Bios

Sharon Levine (continued)

OTHER DISTINCTIONS

- **Litigation Counsel of America (2014)** – Selected as a Fellow.
- **Chambers USA: America's Leading Lawyers for Business (2008–2015)** – Sharon has been lauded as “an excellent litigator...Clients are quick to praise her, noting that ‘she is just extremely smart and gets to the heart of the matter promptly; she is top-notch.’”
- **The Best Lawyers in America (2012–2016)**
- **Super Lawyers (2005–2014)** – Sharon has been consistently acknowledged by her peers for her work in bankruptcy and creditor/debtor rights.
- **International Women’s Insolvency & Restructuring Confederation (IWIRC-NJ) - Woman of the Year (2014)**

Attorney Bios



S. Jason Teele
Partner

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Jason restructures companies and protects creditors' rights. He focuses on complex corporate restructurings and bankruptcy litigation. Jason's clients include corporations, official and unofficial committees of creditors, boards of directors (including board committees and individual board members), management teams, and individual creditors.

Jason furthers client goals through creative and practical legal strategies. He is not afraid to take a case to trial when litigation presents itself as the best – or only – option for advancing client interests.

Jason is recognized in *Best Lawyers in America* (2012-2016), *Super Lawyers* (2006 to present) for his work in insolvency and reorganization law, and the *New Jersey Law Journal's* annual "Forty Under 40" list of leading attorneys (2011).

Jason regularly writes articles on timely legal topics, contributes to legal treatises, and speaks about new developments in the law.

REPRESENTATIVE ENGAGEMENTS

Debtors: Adventure Entertainment, LLC; Consolidated Aluminum Corporation; Coach America; US Eagle Corporation; Meridian Behavioral Health, LLC; EPV Solar, Inc.; Creative Group, Inc.; IFL Corp.

Official Committees: Coldwater Creek, Inc.; Hedwin Corporation; Oreck Corporation; Liberty Medical Supply, Inc.; Ormet Corporation; Southern Air, Inc.; Global Aviation Holdings, Inc.; Graceway Pharmaceuticals, Inc.; General Maritime, Inc. (Special Litigation Counsel); and Mount Vernon Money Center.

Attorney Bios

S. Jason Teele (continued)

Creditors: Management Team of a Leading Television and Film Post-Production Company; Transport Workers Union, AFL-CIO; International Association of Machinists and Aerospace Workers, AFL-CIO; Mount Vernon Money Center Litigation Trust; and, Multiple Creditors of Lehman Brothers Holdings, Inc., Lehman Brothers, Inc. and Residential Capital LLC.

Published Opinions

- *In re AMR Corp.*, 477 B.R. 384 (Bankr. S.D.N.Y. 2012)
- *In re Global Aviation Holdings Inc.*, 478 B.R. 142 (Bankr. E.D.N.Y. 2012)
- *In re Robert Plan Corp.*, 439 B.R. 29 (Bankr. E.D.N.Y. 2010)
- *In re Palermo*, 370 B.R. 599 (Bankr. S.D.N.Y. 2007)
- *Mercury Capital Corp. v. Milford Connecticut Associates, L.P.*, 354 B.R. 1 (D.Conn. 2006)
- *In re Northwest Airlines Corp.*, 346 B.R. 307 (Bankr. S.D.N.Y. 2006)
- *In re U.S. Airways, Inc.*, 329 B.R. 793 (Bankr. E.D.Va. 2005)

OTHER DISTINCTIONS

- **M&A Advisor Turnaround Awards (2013)** – The restructuring and sale of Coach America, led by Sharon Levine, Steven Siesser and Jason Teele, was recognized as “Restructuring Deal of the Year (\$100 million to \$500 million)” and “Industrial Goods and Basic Resources sector Deal of the Year.”
- ***The Best Lawyers in America (2012-2016)*** – Recognized in the bankruptcy and creditor debtor rights and insolvency and reorganization categories.

Attorney Bios



Ashley John Taylor
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Practice

Ashley Taylor is a litigation partner and co-head of the Insolvency and Restructuring Group in Stikeman Elliott's Toronto office who practices exclusively in the area of insolvency law and represents debtors, court-appointed officers, secured lenders and purchasers. He has frequently appeared in Commercial List matters before the Ontario Superior Court of Justice and the Court of Appeal, focusing on Companies' Creditors Arrangement Act proceedings, court-appointed receiverships and bankruptcies.

Mr. Taylor has an internationally recognized practice, including:

- Chambers and Partners' The Guide to the World's Leading Lawyers for Business 2015 and the 2016 Chambers Canada guide as a recommended lawyer for Restructuring/Insolvency;
- The Best Lawyers in Canada 2016 for his expertise in Insolvency and Financial Restructuring Law;
- Benchmark Canada: The Definitive Guide to Canada's Leading Litigation Firms & Attorneys 2015, in the areas of
- General Commercial, Class Action, and Insolvency Litigation;
- The Legal 500 Canada 2016, recognized for his Restructuring and Insolvency expertise;
- The Canadian Legal Lexpert Directory 2015 as a leading practitioner in the Insolvency & Financial Restructuring sector; and
- Who's Who Legal: Restructuring & Insolvency, The International Who's Who of Business Lawyers, and Who's Who
- Legal: Canada for Restructuring & Insolvency law;
- Legal Media Group's Expert Guides: Insolvency and Restructuring.
- Professional Activities

Mr. Taylor has lectured on restructurings at the University of Western Ontario Law School and Osgoode Law School and at numerous conferences. He is a member of the Insolvency Institute of Canada and the Turnaround Management Association.

Attorney Bios

Ashley John Taylor (continued)

Representative Work

- Lead counsel for Ernst & Young Inc., in its capacity as the Court-appointed Monitor of Landrill Inc. in its CCAA proceedings commenced August 21, 2012
- Lead Canadian counsel for Northstar in its cross-border CCAA/Chapter proceeding commenced June 14, 2012
- Lead counsel for Timminco Limited in its CCAA proceeding commenced January 3, 2012
- Lead counsel for Prizm Limited in its CCAA proceeding commenced March 31, 2011
- Lead counsel for FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of Indalex Limited in its CCAA proceedings commenced April 3, 2009
- Lead Canadian insolvency counsel to Ciena in the purchase of the MEN Division from Nortel from cross-border CCAA and Chapter 11 proceedings commenced January 14, 2009
- Counsel to FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of Canwest in two CCAA Proceedings commenced in 2009 and 2010
- Counsel to the Secured Lending Syndicate in the SEM Canada Group CCAA Proceedings commenced in Calgary in 2008
- Lead insolvency counsel for Bell Canada in the purchase of Circuit City from CCAA Proceedings commenced in 2008
- Lead counsel for Hoop Canada in its CCAA proceedings commenced in 2008
- Lead counsel to Collins & Aikman Group in two related CCAA Proceedings commenced in 2007
- Lead counsel to PricewaterhouseCoopers Inc., in its capacity as the Court-appointed Monitor of General Chemical in its CCAA Proceedings commenced in 2005, and lead counsel to the Receiver in the General Chemical receivership proceedings commenced later that year
- Counsel to Air Canada in its CCAA Proceedings commenced in 2003

Attorney Bios

Ashley John Taylor (continued)

Publications and Conferences

Speaker, CCAA & BCA Restructurings and Mining Insolvencies, Stikeman Elliott CLE Seminar, Vancouver (February 2014)

Author/Speaker, An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings (November 2013)

Speaker, Companies' Creditors Arrangement Act and Stakeholder Rights at Osgoode Hall Law School, Corporate Remedies (April 23, 2013)

Speaker, Restructuring CCCA, and related opportunities, "The 7-Minute Miner", Stikeman Elliott CLE Seminar (March 2013)

Speaker, Indalex Decision: Its impact on insolvency, pension and banking professionals, Stikeman Elliott CLE Seminar (February 2013)

Speaker, Re: Indalex - Has the Supreme Court of Canada Resolved the Problem?, Ontario Bar Association Pensions & Benefits Law Section (February 2013)

Speaker, "Accessing the U.S. Bankruptcy Courts", Chapter 15 of the United States Bankruptcy Code: Accessing the U.S. Bankruptcy Courts, Stikeman Elliott CLE Seminar (December 2012)

Speaker, "Advanced Corporate Insolvency and Restructuring", Osgoode Hall Law School (November 2012)

Author/Speaker, "Indalex, Northwind Professional Institute", 9th Annual Pension Fund Invitational Forum, Langdon Hall (October 2012)

Author/Speaker, "Practice Gems: Bankruptcy, Insolvency and Receivership Essentials 2012", Law Society of Upper Canada (September 2012)

"Companies' Creditors Arrangement Act and Stakeholder Rights," Osgoode Hall Law School, Corporate Remedies (October 2011)

Speaker, "Preferences and Transfers at Undervalue - Amendment to the BIA - What has Changed?" The Six-Minute Debtor-Creditor and Insolvency Lawyer, hosted by The Law Society of Upper Canada (October 2010)

Speaker, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations," The 6th Annual Review of Insolvency Law Conference (February 2009)

Co-author, "Pensions at Work: Employer Insolvency and the Pension Plan," prepared for the Ontario Bar Association Annual Institute (February 2008)

Speaker, "Rights and Obligations in the Zone of Insolvency," Osgoode Hall Professional Development Conference (November 2007)

Author, "The Companies' Creditors Arrangement Act, Franchisees and the Restructuring of Country Style Donuts (What to do when you knead the dough, and other stale jokes)," the Third Annual Franchise Law Conference (February 2003)

Author, "Licensor Insolvency and Licensed Rights in Technology," prepared for The Business of Software: Issues in Software Contracting Seminar hosted by KPMG and Stikeman Elliott (November 2002)