Global Restructuring and Insolvency Guide - Canada

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

Please select a topic from the menu.

*This content was last reviewed around July 2022.*

# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Plan of arrangement (Companies Creditors Arrangement Act "CCAA")**

Yes

**Bankruptcy (Bankruptcy and Insolvency Act "BIA")**

Yes

## What is the nature of the insolvency process?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

The CCAA offers a court-driven process that is a flexible and powerful tool for restructuring or liquidating companies in financial difficulty. The purpose of the CCAA is to avoid bankruptcy by allowing the debtor to restructure its affairs under the supervision of the court. It is Canada's preferred process for large and complex restructuring and reorganizations.

As a first step, the insolvent company will make an application to the court under the CCAA. Once the application is granted, the court will make an initial order granting the insolvent company a stay of proceedings. The CCAA grants broad discretion to the court to make orders necessary to facilitate the restructuring. Typically, the court will exercise its discretion to grant CCAA protection if a restructuring or orderly liquidation would benefit creditors.

Once CCAA protection is granted, the insolvent company will attempt to develop a plan of arrangement or compromise for its creditors. There are no restrictions on what terms this plan may include. Frequently, there is an offer to pay a fixed amount divisible among creditors, either as a lump sum or over time. Conversion of debt to shares is also common. Once the company develops the plan, it will be put to the creditors for approval and must be sanctioned by the court. If a plan is not approved, the insolvent company can pursue other restructuring options. If there is none, the senior secured creditor or unsecured creditors will typically seek to lift the stay of proceedings to exercise their available remedies against the insolvent company. This typically results in the insolvent company being placed into bankruptcy.

Alternatively, the CCAA proceeding may also be used as a mechanism to effect the sale of all or part of the debtor's assets or business either through a sales process or a pre-packaged sale transaction arranged prior to the CCAA filing but subject to court approval.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

The BIA provides for both restructuring and bankruptcies of insolvent individuals and corporations. The BIA is more rule-based with a more detailed set of processes and procedures than the CCAA and it was designed to create orderly and predictable liquidations or restructurings. Restructuring under the BIA tends to be shorter in duration and less expensive.

A debtor seeking to restructure under the BIA will file a proposal or a notice of intention (NOI) to file a proposal. The debtor making the proposal remains in control of its property, but a trustee will be appointed to oversee the process and assist the debtor with the restructuring.

The goal of a BIA proposal is to facilitate a restructuring of a debtor's obligations with its creditors. The creditors and the court must approve the proposal. If the proposal is not approved, the debtor will automatically go into bankruptcy. Like with the CCAA, the proposal proceedings can be used to effect a sale of all or part of the debtor's business or assets.

The bankruptcy of an individual under the BIA entails liquidation and the distribution of assets followed by a discharge from any debts existing at the time of bankruptcy. It is the same process for a corporation, but there is no discharge. In a bankruptcy, a trustee becomes vested with all of the bankrupt's property, subject to the rights of secured creditors. Once the trustee has liquidated the assets, the trustee distributes the proceeds to creditors based on the priorities set out in the BIA.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

To initiate a CCAA restructuring, the corporation must be insolvent and must have, either alone or with its affiliates, at least CAD 5 million of debt. "Insolvent" is not defined in the CCAA, and the concept has been broadly interpreted to enable greater restructuring opportunities.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

"Insolvent", for the purposes of the BIA, is an individual or a company with liabilities to creditors exceeding CAD 1,000 and:

for any reason is unable to meet its obligations as they generally become due

has ceased paying current obligations in the ordinary course of business as they generally become due

has the aggregate property that is not, at a fair valuation, sufficient or — if disposed of at a fairly conducted sale under a legal process — would not be sufficient to enable the payment of all obligations, due and accruing due

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

No. The CCAA applies to any legal entity or person incorporated in Canada (either federally or provincially) that has assets in Canada or that carries on business in Canada. There is no additional need to demonstrate COMI.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

No. The BIA applies to any legal person or entity that resides or has property or business in Canada. There is no additional need to demonstrate COMI.

## Is restructuring of both secured and unsecured claims possible?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

In certain circumstances, it is possible to restructure secured claims. However, in most cases, it is not possible to compromise secured claims without the secured party's consent.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

The insolvent company typically forms classes of creditors as part of the proposed plan of arrangement. A "commonality of interest" test is used to group creditors into classes of similarly situated claims. Creditors can ask the court to revise creditor classifications if the insolvent company unfairly attempts to use the classes to swamp a dissenting group with unique rights.

The CCAA states that no plan that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid. Parties having equity claims are to be in the same class in relation to those claims and may not, as members of that class, vote on a plan unless the court orders otherwise.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

In a BIA proposal proceeding, the classification of claims will be part of the proposal. The BIA requires that classes of secured creditors be formed according to their "commonality of interest." Unsecured creditors may also be divided into classes, but it is typical for unsecured creditors to form a single class.

All creditors with equity claims must be in the same class and may not, as members of that class, vote on any proposal unless the court orders otherwise.

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

No

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

No

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

There are no provisions allowing an inter-class "cram-down". If the requisite majorities are not obtained for any class then the plan will not be binding on that class. A plan must be approved by a double majority of creditors (a majority of creditors in the class and two-thirds of the creditors in value within that class) and the court. This means that a dissenting creditor can only be bound if:

it is placed in a class of creditors where it does not have a veto

that class approves the plan despite the creditor's negative vote

a majority of creditors in other classes approve the plan

the court subsequently sanctions the plan

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Creditors and the court approve a BIA proposal in a manner similar to a CCAA plan. The court must be satisfied that the proposal is for the general benefit of the creditor and that the debtor's creditors are better off under the proposal than they would be if the company were liquidated through bankruptcy.

# Commencing the Process

## Who can commence?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Either the debtor or a creditor can initiate CCAA proceedings by application to the court. However, it is unusual for a creditor to bring the application.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

The debtor can commence restructuring by filing a proposal or an NOI to file a proposal by a trustee or receiver that has already been appointed over the debtor. Bankruptcy can be commenced either by the debtor filing a voluntary assignment into bankruptcy or by one or more creditors owed at least CAD 1,000 through an application to the court for a bankruptcy order.

## Is shareholder's consent required to commence proceeding?

**Plan of arrangement (Companies Creditors Arrangement Act "CCAA")**

No.

**Bankruptcy (Bankruptcy and Insolvency Act "BIA")**

No.

## Is there an ability to consolidate group estates?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes.

Protection under the CCAA can apply to a debtor company or a group of affiliated debtor companies. It is rare for a Canadian court to substantively consolidate the estates of multiple debtors.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Yes.

## Is there any court involvement?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

The court supervises a CCAA restructuring — often by a single judge — from beginning to end.

The court will appoint an independent party that is a licensed insolvency trustee as the "monitor". The monitor's primary function is to report to the court and creditors on the business and financial status of the insolvent company and to assist the insolvent company in developing a restructuring plan.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

In a proceeding under the BIA, the court will be involved from the commencement of a bankruptcy or restructuring under the BIA.

The court must approve any significant transaction that is outside the ordinary course of business while a company is going through a restructuring.

## Who manages the debtor?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

The debtor (through its management) remains in control of its assets and operations. The court-appointed monitor will scrutinize the debtor's actions and report to the court if any material adverse changes occur.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

In a bankruptcy, the debtor's property is entrusted to the bankruptcy trustee, an officer of the court with power over the assets. The trustee is charged with collecting and liquidating the assets of the bankrupt and distributing the proceeds to creditors.

In a BIA proposal, the debtor continues to manage the business. The proposal trustee's role is to monitor the debtor's actions, assist the debtor in developing the proposal, and advise the court if any material adverse changes occur.

## What is level of disclosure of process to voting creditors?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Throughout the restructuring process, the monitor provides regular reports to the court and creditors on the insolvent company's business and status and the restructuring's progress. To fulfill these duties, the monitor has full access to the debtor company's property, books and records.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

The BIA stipulates certain notices that must be sent to creditors, including a statement of the debtor's assets and liabilities and a list of all creditors owed CAD 250 or more.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Banks, trust companies, insurance companies, loan companies, building societies and certain trading companies are excluded from the CCAA regime. These entities may only commence proceedings under the Winding-up and Restructuring Act.

Individuals and smaller business entities with less than CAD 5 million in liabilities are subject to the BIA.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

The BIA is broadly available, but it does not apply to entities subject to the Winding-up and Restructuring Act.

## How long does it generally take for a creditor to commence the procedure?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Creditors do not typically commence proceedings under the CCAA against an insolvent debtor.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

If they are owed at least CAD 1,000, a creditor may commence proceedings as soon as the debtor has committed one of the statutorily defined "acts of bankruptcy".

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

The debtor normally continues operations while it attempts to restructure. While incumbent management may remain in control, it is increasingly common for the senior lenders or interim financiers to require that an agreed chief restructuring officer be appointed to direct the restructuring process since it is unusual for existing management to have the specialized expertise needed to guide a company through a successful restructuring process.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

In a BIA proposal, the directors and management retain control of the debtor's business and oversee the development of the proposal. In a bankruptcy under the BIA, the directors give up control of the debtor's assets to the bankruptcy trustee, which liquidates the assets and distributes the proceeds.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

If the court is satisfied that the insolvent debtor has a reasonable prospect of restructuring, it will make an initial order that grants the debtor up to 10 days of protection from its creditors. The initial order is limited to relief that is reasonably necessary for the continued operations of the debtor in the ordinary course of business for no longer than the initial 10-day stay period. Before the expiry of that period, the debtor must return to court to request an extension. Typically, the stay of proceedings is extended upon further applications by the insolvent company, often resulting in a stay period spanning many months or, in some cases, several years. There is no fixed limit on the extension of the stay of proceedings, so long as the extension is not prejudicial to the creditors as a whole and a viable process is underway. Any affected party may oppose or seek to lift the stay of proceedings. A party seeking to lift the stay must prove that they are likely to be materially prejudiced by the continuance of the stay or that it is equitable on other grounds that the stay is lifted. Absent compelling reasons, courts are typically reluctant to lift the stay.

As a federal statute, the CCAA has applications throughout Canada (and purports to have worldwide jurisdiction).

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

In a BIA proposal, an automatic stay of proceedings applies to secured and unsecured creditors as soon as the proposal or notice of intention to make a proposal is filed. There are exceptions to the stay for secured creditors if the secured creditor has given notice ten days before the BIA proposal is filed of the secured creditor's intention to enforce its security. The initial stay for restructuring is 30 days and may be extended up to an additional five months by the court. In a bankruptcy, the automatic stay of proceedings applies only to unsecured creditors. The bankruptcy trustee may seek a limited stay against secured creditors to preserve the value of the debtor's estate, but secured creditors are generally free to enforce their security outside the bankruptcy process. In certain circumstances, the stay of proceedings may be lifted to permit actions by creditors to proceed.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes. The CCAA grants the court overseeing the proceeding to make orders granting super-priority charges that will rank ahead of secured creditors to the extent such creditors have received notice of the proposed changes.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Yes. The BIA also grants the court authority to grant super-priority charges.

## Can procedure be used to implement a debt-to-equity swap?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes.

It is fairly common to see a debt-to-equity conversion as part of a plan of arrangement or compromise.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Yes.

Debt-to-equity conversion may be part of a restructuring proposal under the BIA.

## Are third party releases available?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes. The broad discretion under the CCAA permits granting third-party releases. Subject to court approval, a debtor may enter into third-party releases as part of its plan of arrangement or compromise in a CCAA proceeding where the third-party releases are reasonably connected to the restructuring. Factors that the court will consider include whether:

the parties to be released are necessary and essential to the restructuring

the claims to be released are rationally connected to the purpose of the plan

the plan can succeed without the releases

the parties being released were contributing to the plan

the releases benefit the debtors as well as the creditors generally

the creditors voting on the plan have knowledge of the nature and the effect of the releases

if the releases are fair, reasonable and not overly-broad

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Yes. A BIA proposal may provide releases for non-debtor third parties as long as the releases are: (i) rationally related to the proposal; (ii) essential to the success of the proposal; (iii) not overly broad or offensive to public policy; and (iv) the parties benefiting from the releases have contributed to the proposal.

## Are the proceedings recognised abroad?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes.

Proceedings under the CCAA can be recognized in other jurisdictions, subject to their respective domestically adopted versions of the UNCITRAL Model Law, bilateral or multilateral treaties, or conflict of laws principles.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Yes.

Proceedings under the BIA can be recognized in other jurisdictions, subject to their respective domestically adopted versions of the UNCITRAL Model Law, bilateral or multilateral treaties, or conflict of laws principles.

## Has the UNCITRAL Model Law been adopted?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes.

A modified version of the Model Law was adopted in 2009.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Yes.

A modified version of the Model Law was adopted in 2009.

## Can a debtor continue to carry on business during insolvency proceedings?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Yes.

It is common for the debtor company to continue operations during a proposal proceeding. However, it is unusual in a bankruptcy. If the debtor continues to carry on business, it will do so under the control of the bankruptcy trustee.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Canadian law does not prohibit companies from carrying on business while insolvent, and directors have no express obligation to initiate bankruptcy or restructuring proceedings. However, directors face liability under Canadian law for non-payment of statutorily required remittances, if they authorize the payment of dividends while the company is insolvent, or if the company fails to pay certain statutorily specified employee entitlements. Directors can also face claims that the debtor conducted its affairs in a manner oppressive to stakeholders. Accordingly, prudence may dictate that directors consider insolvency proceedings to avoid these personal claims.

The CCAA authorizes the court to indemnify directors and officers against post-filing liabilities to encourage them to remain in office throughout the restructuring.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

The same consideration applies as under a CCAA proceeding.

## What is the order of priority of claims?

Generally speaking, creditor claims rank as follows in an insolvency proceeding in Canada:

Super-priority claims including valid trust claims, real estate taxes, certain specified statutory claims, certain unpaid supplier claims and court-ordered charges

Secured claims

Preferred claims include certain limited landlord claims and other limited claims that are given priority under the statute

Unsecured claims

## Do pension liabilities have any priority over other unsecured claims?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes. Under the CCAA, the court cannot approve a plan of arrangement, compromise or an asset sale unless it is satisfied that statutorily required payments for unpaid wages and pension plan contributions will be made.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Yes. The BIA does not permit the court to approve a restructuring plan unless it is satisfied that the debtor can and will make all statutorily required payments for unpaid wages and unpaid pension plan contributions.

## Is it possible to challenge prior transactions?

**Plan of arrangement (Companies' Creditors Arrangement Act "CCAA")**

Yes. Prior transactions can be challenged under the CCAA and other statutes if they have the effect of preferring one creditor or party to other stakeholders. In general, this applies only to transactions entered into during or shortly before the insolvency where there is an intention to diminish the estate for the benefit of one creditor over the others.

**Restructuring or liquidation (Bankruptcy and Insolvency Act "BIA")**

Yes. The three main types of prior transactions that may be challenged in BIA proceedings are:

transactions at an undervalue (i.e., where the debtor received less than the fair market value of the asset in consideration)

transactions that have the effect of preferring one creditor or party to others (as under the CCAA)

dividends paid out during the time that a corporate debtor is insolvent

©Copyright © 2024 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion**: All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites. **Attorney Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction or copying of the Content on this Site without express written authorization is strictly prohibited.