Corporate Proposals – Do We Still Need The CCAA?

Rick Van Beselaere, Q.C., Douglas Chivers, Scott Bomhof and Dean Hutchison [1]

I. Introduction

In 2009, various amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") were proclaimed into force, resulting in a host of new statutory powers and restructuring tools being available to corporate debtors facing financial distress (collectively, the "2009 Amendments"). As a result of the 2009 Amendments, the proposal provisions under Part III, Division 1 of the BIA now have many similarities with the provisions of the CCAA. With such similarity, and with their being no $5,000,000 in liabilities requirement to qualify under the BIA, this raises the question, is the CCAA still needed? Considering the costs associated with CCAA proceedings[2] and the ease of which proposal proceedings can be commenced under the BIA, if a corporate proposal can be done more cost effectively and efficiently under the proposal provisions of the BIA, the CCAA seems outmoded. However, on a closer examination, in particular with respect to the flexibility afforded under the CCAA in the form of "inherent jurisdiction of the Court" and "statutory discretion", together with the significant consequences which automatically incur to a debtor company with a failed proposal under the BIA (bankruptcy), notwithstanding the 2009 Amendments to the BIA, the CCAA continues to offer things to corporations trying to restructure that proposals under the BIA do not. In light of this, the CCAA continues to have a place in Canadian insolvency and restructuring practice. With some further amendments to the BIA however, and if the same flexibility found under inherent jurisdiction and statutory discretion in CCAA proceedings can find its way into the jurisprudence concerning corporate proposals under the BIA, then perhaps the CCAA could be rendered redundant.

---

[1] Rick Van Beselaere, Q.C. is the Managing Partner of the Regina and Saskatoon office of Miller Thomson LLP and is a Partner of that firm's Insolvency & Restructuring Group. Douglas F. Chivers is a Chartered Accountant, Trustee in Bankruptcy and is a Vice- President of The Bowra Group Inc. in Vancouver. Scott A. Bomhof is a Partner in the Insolvency & Restructuring Group of Torys LLP in Toronto. Dean A. Hutchison is an Associate in the Insolvency & Restructuring Group of MacPherson Leslie & Tyerman LLP in Calgary. The authors acknowledge and thank Lily Coodin, an Associate in the Insolvency & Restructuring Group of Torys LLP in Toronto, for her invaluable assistance in the development of this paper.

[2] The costs of CCAA proceedings is the topic of another presentation at the 9th Annual Pan-Canadian Insolvency and Restructuring Law Conference and accordingly this paper will not go into detail with this topic.

This paper will examine what was in the minds of legislators when the 2009 Amendments were made, the similarities and difference of the CCAA and the proposal provisions under the BIA, look at data with filings under the CCAA and Part III, Division I of the BIA since 2009, and weigh the pros and cons of the differences that still remain between the CCAA and the corporate proposal provisions of the BIA. In addition, this paper will examine some philosophical issues concerning corporate restructuring so that the reader can decide for themselves whether the CCAA should remain as a significant fixture on the Canadian corporate insolvency and restructuring landscape.

II. BIA Proposals And The CCAA: Coming Together Or Drifting Apart

A. What the Legislators Had In Mind

The 2009 Amendments were introduced following a detailed review of Canada's insolvency regime, resulting in a Report of the Standing Senate Committee on Banking, Trade and Commerce (the "Senate Committee") entitled "Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*"[3] (the "Senate Report"). The Standing Committee summarized their approach as follows:

> This report comments on the Committee's philosophy regarding the fundamental principles that should guide the design of insolvency laws in Canada, with particular reference to the two statutes that are the subject of this review: the BIA and the CCAA. It also discusses the socio-economic importance of insolvency legislation, and describes the magnitude and nature of the insolvency problem in Canada. Most importantly, the testimony presented to the Committee by witnesses, as well as our recommendations for changes to the statutes and conclusions reached, are highlighted. . . . .
>
> As the Committee began this study, we focussed on what we believe should be the fundamental principles guiding the design of insolvency laws in this country. Certain prerequisites for a well-functioning insolvency system continually struck us as important: fairness, accessibility, predictability, responsibility, cooperation, efficiency and effectiveness. These are all critical hallmarks to remember as legislative changes are proposed.
>
> Canada's insolvency system must be – and must be perceived to be – fair. Fairness is an essential consideration not only for Canadians, but also for residents of other countries. It must be fair for debtors, who should be provided with tools to avoid bankruptcy if that is the best option or with a true "fresh start" when they are discharged from their bankruptcy, and for creditors, who extend credit with the expectation of full repayment on a timely basis or, when this circumstance does not occur, are provided with a

[3] http://www.parl.gc.ca/Content/SEN/Committee/372/bank/rep/bankruptcy-e.pdf

> predictable, fair and orderly means by which loss is both shared appropriately and minimized to the extent possible.[4]

One of the issues addressed by the Senate Committee was whether it made sense for the CCAA to remain an independent statute, or whether the CCAA should be rolled into the BIA (presumably in substitution for the then existing proposal provisions). After summarizing the evidence presented, the Senate Committee recommended that the *status quo* be continued, with the continuation of two restructuring routes for corporate debtors:

> The Committee believes that, fundamentally, the current system is working well, which does not mean that changes are not required for the benefit of all domestic and international stakeholders. For example, changes may be required to ensure the collection of data about proceedings under the CCAA, and some matters that are not addressed in the CCAA – but are covered in the BIA – should be considered. Stakeholders have now gained experience with the process under both statutes and jurisprudence has developed. We believe that the CCAA should continue to exist for companies with a relatively high level of indebtedness, while the BIA should be available for all organizations; the level of indebtedness required to take action under the CCAA should, however, be reviewed on an ongoing basis to ensure its continued relevance. There were historic reasons for two separate statutes, and these reasons continue to have importance today. The CCAA appears to be relatively effective in assisting larger companies in their reorganization efforts, while the BIA seems to be working well for smaller organizations.
>
> In deciding whether to recommend the status quo or an integration of the statutes, the Committee was mindful of the fundamental principles outlined in Chapter Two. In particular, we know that the flexibility that is inherent in the CCAA is probably inconsistent with consistency and predictability, and may not result in fairness. Nevertheless, tradeoffs must be made and an appropriate balance must be struck. We believe that the need for flexibility is paramount with the CCAA, but urge relevant parties to respect the principles of predictability, consistency and fairness – to the extent that they can – when involved in proceedings under the Act.[5]

The 2009 Amendments adopted the recommendation of the Senate Committee and continued the two track system for corporate restructuring in Canada, with the CCAA remaining the vehicle of choice for larger, more complex restructurings. Notwithstanding this approach, the 2009 Amendments introduced a number of changes that brought the Proposal provisions of the BIA and the CCAA into much closer alignment, while leaving open the structural differences between the two statutes. In Schedule "A", we prepared a summary of the provisions added, respectively, to the BIA, the CCAA or both as part of the 2009 Amendments. As noted in the

[4] Senate Report, at pp 3-5.
[5] Senate Report, pp 172-173.

Schedule, the 2009 Amendments added a number of restructuring tools to the BIA which were previously available solely under the CCAA, in most instances as the result of the use of the broad jurisdiction (often referred to as "inherent jurisdiction" or "statutory discretion" – which is discussed in detail below) available under the CCAA.

B. The $5,000,000 Debt Threshold – Continual Review Encouraged

One important issue that the Senate Committee in the Senate Report noted was that "the level of indebtedness required to take action under the CCAA should, however, be reviewed on an ongoing basis to ensure its continued relevance."[6] A corporate debtor only qualifies for relief under the CCAA if the debtor and its affiliates have aggregate debt of $5,000,000 or more[7]. As a result of this requirement, a large number of small businesses would not qualify for relief under the CCAA. The debt threshold may also explain why the CCAA is used more frequently in Ontario, Quebec, B.C. and Alberta, which tend to have a larger corporate base than the other provinces/territories, while certain provinces and territories have not reported a single filing under the CCAA since statistics for such filings were tracked by the Office of the Superintendent of Bankruptcy Canada (the "OSB"). (Such statistics are discussed in more detail below.) The lack of filings in certain provinces may also be reflective of a strong provincial economy over the last four years (Saskatchewan for example) where most businesses are thriving and the need for legislative protection from creditors has not been needed.

The $5,000,000 debt threshold was introduced when Bill C-5 was introduced in 1996. These earlier amendments to the CCAA had the effect of eliminating the technical requirement that a company have "trust deeds" issued as a condition of qualifying for relief under the CCAA[8]. In examining the proper threshold at the time that Bill C-5 was introduced, the Standing Committee recommended the $5 million threshold as appropriate for the following reasons:

3. Eligibility Threshold for the Companies' Creditors Arrangement Act (CCAA)

[6] Senate Report, p. 172.
[7] CCAA, section 3(1).
[8] This requirement was sometimes satisfied by the issuance of "instant trust deeds", which the Courts ruled satisfied the eligibility requirement for a CCAA proceeding (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289 (C.A.) at p. 313).

The present test for determining whether a company can reorganize under the CCAA requires that the company have issued bonds under a trust deed and that the company's reorganization proposal provides for compromising the claims of bond holders. Clause 121 of Bill C-5 would replace this test with a new threshold test based on the amount of a company's outstanding debt. In order for a company to reorganize under the CCAA, the amount of claims against the company would have to exceed $10 million.

The $10 million threshold is designed to ensure that smaller companies will reorganize under the BIA rather than the CCAA. However, the Committee was told that the proposed threshold might preclude companies in certain parts of Canada, particularly in the Atlantic and prairie regions, from reorganizing under the CCAA.

The Canadian Bar Association stated:

> *... a threshold of $10 million indebtedness for CCAA eligibility effectively precludes access to that Act in areas of the country where debt levels, even for large corporations with complex affairs, rarely reach that level. Practitioners in certain regions are concerned that this will prevent some debtors from successfully reorganizing where the BIA rules prove insufficiently flexible.(13)*

The CBA recommended that the threshold indebtedness for CCAA eligibility be lowered to make the Act accessible in all areas of the country, or alternatively, that judicial discretion be introduced to lower the threshold where a judge was satisfied that the circumstances warranted the application of the CCAA. (14)

The Insolvency Institute of Canada supported the introduction of the $10 million eligibility requirement but felt that its application to a group of companies making a single application under the CCAA should be clarified. The Institute suggested that it would be "fair and equitable to provide that where the group of affiliated companies has total liabilities in excess of ten million dollars, a CCAA filing could be made for the whole group." (15)

The Committee supports the creation of a monetary threshold to determine eligibility for relief under the CCAA. However, the Committee shares the concern of the CBA that the threshold proposed in Bill C-5 may be preclude companies operating in certain regions of the country from reorganizing under the CCAA. The Committee believes that a $5 million threshold along with provision for a single filing by a group of affiliated companies would accommodate businesses based in all regions of Canada without compromising the integrity of the BIA as a reorganization vehicle for small and medium-sized companies.[9]

Given the national scope of the CCAA and the Senate Committee's stated purpose of promoting a fair system for debtors and creditors across Canada, one has to ask whether an

[9] Proceedings of the Standing Senate Committee on Banking, Trade and Commerce Issue 17 - Twelfth Report of the Committee - Appendix: Observations and Recommendations of the Standing Senate Committee on Banking, Trade and Commerce on BILL C-5 - An Act to amend the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act* and the *Income Tax Act***.**

arbitrary debt level of $5,000,000 million remains as a viable line in the sand in 2013 to satisfy eligibility for relief under the CCAA.

III. The Statistics

The table below summarizes the total number of commercial proposals versus CCAA filings over the last 4 years. These statistics obtained from the OSB[10] are from period Q4 of 2009 to Q4 2012. (The OSB has only tracked CCAA filings since Q4 2009.)

	CCAA				Commercial Proposals			
	2012	2011	2010	2009 4th Quarter	2012	2011	2010	2009
Total	44	43	35	14	1117	1132	1154	1309
Newfoundland and Labrador	0	0	0	0	4	2	2	1
Prince Edward Island	0	0	1	0	4	2	6	4
Nova Scotia	1	2	0	0	20	18	29	20
New Brunswick	1	1	1	0	17	17	13	31
Quebec	4	11	8	3	531	558	579	632
Ontario	17	10	14	7	319	338	327	351
Manitoba	2	0	0	0	13	14	10	23
Saskatchewan	0	0	0	1	50	53	45	58
Alberta	12	6	7	3	82	77	86	81
British Columbia	7	13	4	0	76	51	54	105
Northwest Territories	0	0	0	0	1	2	1	0
Yukon	0	0	0	0	0	0	2	2
Nunavut	0	0	0	0	0	0	0	1

From 2009 to 2012, commercial proposals filed under the BIA decreased by approximately 15% (a total of 1,309 filing in 2009, down to a total of 1,117 filing in 2012). However, this could be representative of the slow-down in the insolvency and restructuring market place that occurred over that same time. There was a significant decrease in the number of commercial proposals from 2009 (1,309) to 2010 (1,132), but from 2010 to 2012 the total number of commercial proposals each year remained consistent at approximately 1,100 per year within Canada as a whole, and also remained consistent throughout each of the provinces. It should be noted that this includes all commercials proposals filed under the BIA, with no

[10] http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br01011.html

deciphering of the total amount of liabilities owed by the filing debtor company. There is current no way to identify if any of these commercial proposal were filed by debtor companies that could have qualified to file under the CCAA.

The total number of CCAA filings have increased slightly from 2010 to 2012 (35 to 44), although generally the numbers have remained relatively consistent from year to year at approximately 40 per year. Provincially, the filings are concentrated in Ontario, Alberta, British Columbia and Quebec, with the those four provinces accounting for 126 of the total 136 CCAA filing that were made from Q4 2009 to the end of 2012. This begs the question, considering the Senate Committee comments about threshold indebtedness to make the CCAA accessible to all regions of the country, whether a reduction in the $5,000,000 indebtedness threshold should be considered. However, examining the provincial data concerning CCAA filings against the BIA commercial proposal provincial data, those four provinces account for the majority of the BIA commercial proposals filings as well. (Hence, the clustering appears really more simply an issue of the demographics of the country, or a reflection of the relative health of the various provincial economies, than it is of indebtedness level threshold.)

The data indicates that there has been no notable increased use of the BIA over the CCAA when it comes to choosing a restructuring regime since the 2009 Amendments came into effect. However, given the limited sample size (only 4 years), coupled with the effects on the market place that took place over that period (such as the global difficulties in companies gaining access to capital and the varying strengths of economies within each province), it is difficult to determine with any certainty whether other factors played a role.

The authors believe generally that the CCAA is still viewed as a less rigid restructuring tool as compared to the BIA and therefore looked at more favourably for bigger, more complicated restructurings. This is reflected in the differences that are still present between the two Acts and the jurisprudence concerning them.

IV. The Significant Differences

A. The Flexibility and Pragmatism Through "Inherent Jurisdiction" and "Statutory Discretion"

Prior to the 2009 Amendments, section 11 of the CCAA provided, in part:

Powers of court

> 11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> > (a) staying, until other ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> (6) The court shall not make an order under subsection (3) or (4) unless
>
> > (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
> >
> > (b) in the case of an order under subsection (4) the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

It has been repeatedly stated that the CCAA is to be broadly and liberally interpreted as remedial legislation. A court has the power to do almost anything that is considered necessary to achieve the broad objectives of the CCAA, which are to facilitate compromises or arrangements between distressed companies and their creditors. It was often stated that the source of the court's power was an equitable or inherent jurisdiction in insolvency and restructuring matters aimed at empowering a court to enable restructuring or arrangements for insolvent companies. Significant debate existed about how far a court could go in proceedings under the CCAA. Prior to the decision of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney*

General)[11], the court's powers were characterized in terms of an "inherent jurisdiction" and in terms of a "statutory discretion", and in some situations it appeared that the terms were used almost interchangeably.

Prior to the Supreme Court of Canada decision in *Century Services*, one of the cases that addressed the issue and the differences between inherent jurisdiction and statutory discretion was *Re Stelco Inc.*[12], a 2005 decision of the Ontario Court of Appeal. Justice Blair, stated (at paragraphs 32 and 33):

> [32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives… Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s.11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act.
>
> [33] It is not necessary for purposes of this appeal to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the Judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

That reasoning was accepted and advanced by the majority of the Supreme Court of Canada in *Century Services*[13]. Deschamps, J., writing for the majority, concluded that the CCAA conveyed a statutory discretion upon a court to pursue the objectives of the CCAA. Justice Deschamps framed the answer to the issue of whether the court had an inherent jurisdiction or had a statutory discretion as follows (at paragraph 1):

> The broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally.

Justice Deschamps addressed where the court's jurisdiction under the CCAA came from, in terms of whether it was an inherent or equitable jurisdiction or whether it was a statutorily granted discretion. Justice Deschamps stated at paragraphs 64 -66:

---

[11] 2010 SCC 60, [2010] 3 S.C.R. 379 ("*Century Services*")
[12] [2005] O.J. No. 1171, 75 O.R. (3d) 5 (C.A.)
[13] *Supra*, note 11.

> [64] The first question concerns the boundary between a court's statutory authority under the CCAA and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during CCAA proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself (see, e.g. *Skeena Cellulose Inc*. Re, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C.C.A.), at paras. 45-47, per Newbury J.A.; *Stelco Inc*. (Re) 2005, 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, per Blair J.A.)
>
> [65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measure taken in a CCAA proceeding (see G. R. Jackson and J. Sara, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J.P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the CCAA will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).
>
> [66] Having examined the pertinent parts of the CCAA and the recent history of the legislation, I accept that in most instances the issuance of an order during CCAA proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statue at issue is capable of supporting.

Justice Deschamps also went further and stated, at paragraph 70:

> [70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority.

In reviewing the issues for this paper, the authors considered whether the 2009 Amendments have had an impact on the characterization and interpretation of the broad and liberal approach to the CCAA, the impact on the scope and application of the court's statutory discretion under the CCAA, and the consideration and application of the superior courts' inherent (or equitable) jurisdiction in insolvency matters. Prior to the 2009 Amendments, there was no real doubt that as between the CCAA and the BIA, the CCAA was less prescriptive and limiting, and the statutory discretion was broader and more flexible. The question which was

considered as part of our review was whether as a result of the amendments, the gap between the CCAA (and its statutory discretion) and the BIA (which in some respects is more prescriptive and "code-like" and is to some degree focused on dealing with the estates of insolvent persons and the rights of creditors) has diminished or perhaps even disappeared. In addition, we considered whether the two have converged sufficiently to justify the elimination of one of the two Acts and simply have one governing statute, perhaps with some statutory revision.

In some cases, the amendments have codified some general principles that had been developed by the jurisprudence. In others, the changes were additional to principles that evolved through jurisprudence. In still others, the changes were an amalgam of what had been seen as desirable or practical under one Act (primarily the CCAA) being imported and applied to the other Act (the BIA – the ability to obtain DIP financing for example).

i. CCAA Cases Since The 2009 Amendments

Statutory discretion is still very much a factor in the CCAA. It could be argued that the amendments could have the effect of curtailing the scope of the discretion as some of the "gaps" previously dealt with under the form of statutory discretion have now been filled in by the amended statutory provisions. However, the broad remedial purposes of the CCAA continue to be the underlying principle and statutory discretion provides the tool by which the remedial purposes are pursued. The CCAA still references and invites the exercise of the court's discretion in appropriate circumstances. Where the statutory discretion does not provide the answer, the inherent jurisdiction still has some application, although as noted above some persuasive arguments have been made that there is no need to resort to an inherent jurisdiction since the scope of the statutory discretion is sufficiently broad.

In one of the most significant (and the more recent) Supreme Court of Canada decisions concerning the CCAA post 2009 Amendments, *Re: Indalex Ltd.*[14], Justice LeBel, in dissent, was the only Judge of the court that spoke of inherent jurisdiction, and did so in the following terms (at paragraph 278):

> In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the court to craft equitable remedies, not only in

[14] 2013 SCC 6

> respect of procedural issues, but also of substantive questions. Section 9 of the CCAA is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is in order to grant justice to the parties (G.R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J.P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

In *Re Kerr Interior Systems Ltd.*[15], Justice Topolniski of the Alberta Court of Queen's Bench dealt with an application made by a corporate debtor after default had occurred in an approved and sanctioned CCAA arrangement. The debtor company sought an order for a second creditors meeting. The court stated (at paragraphs 25-27):

> [25] Proceedings under the CCAA are designed to be flexible and responsive, with a view to providing fairness, certainty and stability for the stakeholders. The CCAA is to be liberally interpreted to achieve those ends.
>
> [26] CCAA jurisdiction is conferred on superior courts vested with inherent and equitable jurisdiction. The present jurisprudential trend is for courts to employ their inherent and equitable jurisdiction only as a tool of last resort when the language of the CCAA cannot be interpreted to anchor an intended measure to be taken in the CCAA proceedings (G.R. Jackson and J. Sara, "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in J.P. Sarra, ed., *Annual Review of Insolvency Law* 2007 (Toronto: Thomson Carswell, 2008) 41 at 42, cited in *Century Services Inc.* at para. 65).
>
> [27] Extensive amendments to the CCAA in 2008 (2007, c. 36) codified various measures previously undertaken by the court through the exercise of what was referred to in *Century Services Inc.* at paras. 62 and 63 as "creative use of authority" and "judicial innovation;" for example, imposing priority charges for critical suppliers or debtor in possession ("DIP") financing (now termed "interim financing") and releasing claims against third parties.

The characterization of the amendments was that of codifying prior actions and approaches consistent with continuation of the liberal and broad approach to interpretation of the CCAA and the broad scope of statutory discretion has been recognized as still being available to courts in CCAA proceedings post the 2009 Amendments.

[15] 2011 ABQB 214, 517 A.R. 186 ("*Kerr Interior*")

In *Re Canwest Publishing Inc.*[16], Pepall, J. of the Ontario Superior Court considered section 11.2 of the CCAA in dealing with a DIP charge request. She observed that the list of factors that a court was to consider was not an exhaustive list. This should not be surprising as section 11 of the CCAA, in describing the general power of the court, refers to an Order being made on terms and conditions that are considered appropriate, subject to the restrictions contained in the CCAA. The case does however signal a continued inclination of the courts, post the 2009 Amendments, to rely upon the statutory discretion available in the CCAA, and where reliance upon the statutory discretion is not available or appropriate, an inclination to resort to the inherent or equitable jurisdiction that superior courts have in insolvency and restructuring matters. As demonstrated by Justice Morawetz in his decision in Re *Cinram International Inc.*[17], the flexibility enjoyed by the courts through their inherent jurisdiction, remains post the 2009 Amendments:

> As noted by Pepall J. in *Canwest Global Communications Corp., Re*, the recent amendments, including Section 11.4, [of the CCAA] do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

ii. BIA Cases Since The 2009 Amendments"

While the BIA is recognized as more of a bankruptcy "code", the court in dealing with matters related to insolvent corporations does retain the inherent jurisdiction applicable in insolvency and restructuring matters. The BIA does provide the bankruptcy court with equitable jurisdiction and ancillary powers, but not on the express and broad terms as is found in the CCAA.

In *Re Residential Warranty Company of Canada Inc.*[18], Justice Topolniski of the Alberta Court of Queen's Bench discussed the court's inherent jurisdiction under the BIA. In dealing

[16] 2010 ONSC 222, 63 C.B.R. (5th) 115
[17] 2012 ONSC 3767, 91 C.B.R. (5th) 46, at para. 67
[18] 2006 ABQB 236, 393 A.R. 340

with the issue of the court's ability under the BIA to effect contractual rights, she stated the following at paragraphs 26 and 27:

> [26] The BIA expressly preserves the Bankruptcy Court's equitable and ancillary powers. Accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. There are two preconditions to the Court exercising its inherent jurisdiction: (1) the BIA must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the BIA, including the proper administration and protection of the bankrupt's estate.
>
> [27] Solutions to BIA concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis. As astutely noted by Mr. Justice Farley in *Canada (Minister of Indian Affairs and Northern Development) v Curragh Inc.:*
>
> > While the BIA is generally a very fleshed-out piece of legislation when one compares it to the CCAA, it should be observed that s. 47(2)(c)*:* "The court may direct an interim receiver…to…(c) take such action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the court but in fact provided, with these general words, that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organised and operating under predicable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

It is also interesting to note the following comments by Justice Topolniski at paragraph 78 regarding "commercial restructuring cases under the BIA" and inherent jurisdiction of the court under the BIA versus the CCAA:

> [78] Except in the context of commercial restructuring cases under the BIA, caution must be exercised when considering developments concerning inherent jurisdiction emanating from the CCAA. The BIA and CCAA are very different in degree of specificity and the policy considerations involved. For example, courts in CCAA proceedings routinely rationalize financing for commercial restructuring that compromises creditors' traditional interests in the name of the greater

> good. There is an overarching policy concern favouring the possibility of a going concern solution and the potential of a long-term upside value for a broad constituency of stakeholders. Arguably, in some cases, super-priority financing and priming charges must be available if restructuring is to be a possibility.

The foregoing expresses a notable distinction between the court's use of inherent jurisdiction under the BIA versus the CCAA. Justice Topolniski however seems to imply that in the context of proposals concerning debtor companies under the BIA (or to use her words "in the context of commercial restructuring cases under the BIA"), there is not the same distinction and the flexibility afforded through the court's inherent jurisdiction has a place in BIA commercial proposal proceedings.

On appeal, the Alberta Court of Appeal[19] upheld Justice Topolniski's decision. In addressing the issue of the inherent jurisdiction of a bankruptcy court, the Alberta Court of Appeal stated at paragraphs 20 and 21:

> [20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case…
>
> [21] Further limitations are based on the nature of the BIA - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors.

At paragraph 37, the Alberta Court of Appeal listed a number of factors that should be considered when a court is considering whether to invoke the court's inherent jurisdiction, and those factors include:

(a) the stage of the proceeding and the effect of such an order on the proceedings;

(b) the need to maintain the integrity of the bankruptcy process. "The equitable distribution of the bankrupt estate must remain at the forefront";

(c) the realistic alternatives to invoking the inherent jurisdiction;

[19] *Re Residential Warranty Co. of Canada Inc*., 2006 ABCA 293, 417 A.R. 153

(d) the impact that the use of the inherent jurisdiction might have on the participants and the stakeholders including all the creditors; and

(e) the anticipated time and costs involved.

These factors were stated to be not an exhaustive list of factors to consider (and more were listed that were specific to the issues on the subject appeal). It should be noted that this was not a restructuring case under the BIA, but rather a bankruptcy, and some of the differences obviously lie in that distinction, particularly considering Justice Topolniski's comments in the Court of Queen's Bench decision concerning an exception in the breadth of the court's inherent jurisdiction in BIA proceedings in the context of commercial restructuring cases.

Justice Morawetz was dealing with such context in *Tucker v. Aero Inventory (UK) Ltd*[20]., a case in which CCAA and BIA matters were somewhat intertwined. After reviewing the Supreme Court of Canada decision in *Century Services*[21] and specifically citing paragraph 78 of that decision, Judge Morawetz stated at paragraph 163:

> This passage from *Century Services* clearly states, in my view, that the courts should be taking a pragmatic approach in determining issues which arise in proceedings where the CCAA overlaps with the BIA. This is one such proceeding. The overall objective should be to create a system under which the court can review transactions entered into between the debtor and creditors in the period just prior to formal insolvency proceedings. The policy should be to ensure that there is an appropriate review mechanism in place to challenge transactions that are not consistent with ordinary course activities and have had the effect of unfairly transferring value to a third party during the review period. It seems to me that the CCAA can operate in tandem with the BIA in an effort to return matters to the *status quo*.

These comments may only be directly applicable to the facts of that case as opposed to a more broadly based commentary on the two Acts, but it does seem to imply that the pragmatism and flexibility available under the CCAA can be used under in the BIA context in appropriate circumstances.

[20] 2011 ONSC 4223, 80 C.B.R. (5th) 1
[21] *Supra*, note 11

Again dealing with the need to take a pragmatic approach in BIA proceedings, in *Re Comstock Canada Ltd.*[22], Justice Morawetz dealt with an application under the BIA for the appointment of a receiver and a request that the receiver have the power to secure DIP-type financing and to create a priority charge for that financing. While the application was not opposed by the major creditor in that case (which creditor was to provide the sought DIP financing), Justice Morawetz granted the interim receiver the power to obtain the financing and granted a priority charge for that financing. Justice Morawetz concluded that the borrowing charge was to maintain business operations and promote stability for the company and in making the order for the charge, and notwithstanding the fact that subject provision of the BIA did not expressly address the issue at hand, he had the authority to grant the subject charge under the inherent jurisdiction of the court. At paragraph 20 he stated:

> Section 50.6 of the BIA provides the authority to grant super-priority for interim financing for an insolvent debtor. There is no similar provision to provide such financing for an Interim Receiver under section 47.1. However, there is no provision that prohibits the granting of such super-priority. In view of the urgency of this situation, its seems to me that the objectives of PART III of the BIA and the expected proceedings under the CCAA would be frustrated if the Interim Receiver's Borrowing Charge was not granted. I was satisfied that, in these circumstances, the charge could be granted under the inherent jurisdiction of the court.

The British Columbia Supreme Court considered the inherent jurisdiction under the BIA in *Re Pope & Talbot Ltd.*[23] and, citing Justice Topolniski's decision in *Re Residential Warranty Company of Canada Inc.*[24] and Justice Farley"s decision in *Canada (Minister of Indian Affairs and Northern Development) v Curragh Inc.*[25], stated the following (at paragraph 120):

> Resort to inherent jurisdiction may be made to further the objects of the BIA where the Act does not provide a specific mechanism. In essence, failing specific provision in the statute, the "gap" may be filled by statutory construction, or failing that, then by resort to inherent jurisdiction. According to Topolniski J., the BIA expressly preserves the Bankruptcy Court's equitable and ancillary powers. Resort to inherent jurisdiction is "maintained and available as an important but sparingly used tool"….

[22] 2013 ONSC 4700
[23] 2009 BSCS 1552, 61 C.B.R. (5th) 16
[24] *Supra*, note 19
[25] [1994] O.J. No. 953, 114 D.L.R. (4th) 176 (C.J. Gen. Div.)

iii. *Inherent Jurisdiction" and "Statutory Discretion"- CCAA Wins*

The starting point of the CCAA is more forgiving and liberal in terms of discretion, creativity and flexibility than that under the BIA. A court is directed under the CCAA to make appropriate orders and the purpose of the legislation is to permit corporations to attempt to come to arrangements and restructure their operations. There is freedom for the court to be creative and flexible under that regime, in particular through the application of statutory discretion.

One can draw from the comments of Justice Topolniski in *Re Residential Warranty Company of Canada Inc.*[26] at paragraph 78 that in considering commercial restructuring under the BIA and CCAA, the inherent jurisdiction which is applicable under the two Acts is not as distinct or divergent as the inherent jurisdiction that would exist under the BIA when bankruptcy and estate matters are being considered as compared to the CCAA. However, before resort is made to the inherent jurisdiction under the CCAA, the court has available to it the statutory discretion under the legislation which is broad, liberal and flexible. It is the authors' view that while there is potentially some statutory discretion under the BIA when dealing with proposals, that discretion has not been expressly recognized or discussed as such in any of the cases reviewed since the 2009 Amendments. The language of the BIA is clearly not as broad as the CCAA and it is therefore arguable that any statutory discretion under the BIA would not be as broad, liberal and flexible as the statutory discretion available under the CCAA. The respective authors share the common view that the statutory discretion under the CCAA is more express, is farther reaching and easier to access than that available under the BIA. The inherent jurisdiction under the CCAA and the BIA might be grounded in the same principles, but as noted in the cases, it is somewhat more of a reach to invoke inherent jurisdiction than it is to rely upon statutory discretion.

It should be noted that neither statutory discretion nor the inherent jurisdiction of the court can be invoked under either Act to avoid express provisions and restrictions in the legislation. Therefore with the 2009 Amendments, the scope of statutory discretion under the CCAA, and even the scope of the inherent jurisdiction under either Act, were somewhat lessened, but not in a way that significantly hinders the flexibility and pragmatism available to the courts. Only when relief is being sought that is completely contrary to an expressed

[26] *Supra*, note 16

provision or restriction under the applicable Act is the court's inherent jurisdiction or statutory discretion limited.

Unless or until the BIA has a statutory discretion for a court dealing with a proposal that invokes the same broad and liberal interpretation as is found in the CCAA, and embraces the same broad statutory discretion as exists under the CCAA, there will be a need for the CCAA in appropriate cases. There may be a migration towards the BIA in more cases going forward, for the simplicity and costs savings that might occur in a BIA proposal process. However, that does not appear to have occurred to date and there will still be cases where the flexibility and pragmatism of the CCAA is considered necessary and appropriate. If amendments were to be made to the BIA that would create the same general statutory discretion structure that as is applicable under the CCAA, and that would distinguish the restructuring provisions of the BIA from the other provisions of the BIA in terms of statutory discretion and inherent jurisdiction, an argument could be made that the CCAA would no longer be needed. Until and unless that occurs, it is the authors' opinion that the CCAA is still required and, to use the term used in a number of the cases, fills a "gap" that the BIA currently does not.

B. The Automatic Guillotine of Bankruptcy

Arguably the most significant difference between a corporate restructuring attempted under the BIA versus one attempted under the CCAA is the consequence if the restructuring plan fails. Pursuant to section 57(a) of the BIA, where the creditors refuse a proposal, the "insolvent person"/debtor company is deemed to have made an assignment into bankruptcy. In situations where the debtor company has filed a Notice of Intention ("NOI") under section 50.4 of the BIA, pursuant to section 50.4(8)(a), the consequence of a deemed assignment to bankruptcy results if the debtor company: (i) fails to fulfill their obligations under section 50.4(2) by filing a cash-flow statement vetted for reasonableness by the trustee, together with the accompanying prescribed report, within 10 days of the filing of the NOI with the OSB; or (ii) fails to file a proposal with the OSB within 30 days of the filing of the NOI or within any extension of that period granted by the court pursuant to section 50.4(9). In addition, pursuant to section 50.4(11) of the BIA, the court can declare terminated, before the actual expiration of the 30 day period to file a proposal pursuant to section 50.4(8) or any extension thereof granted under section 50.4(9), the time in which to file a proposal, in which case section 50.4(8)(a) continues to apply with its

corresponding consequences (deemed assignment to bankruptcy). Bankruptcy can also result should a proposal be approved by the requisite majority of creditors and the requisite amount of creditors in debt value but refused by the court when court approval of the proposal is sought as required by section 58 of the BIA.

Bankruptcy is a significant consequence. It immediately takes the debtor company out of possession of its assets and places the assets in the hands of the trustee in bankruptcy. Management of the operations is removed from the then directors, officers and management team of the debtor company, and placed in the hands of the trustee in bankruptcy. In the vast majority of cases, the business of the debtor company is now effectively finished and the trustee in bankruptcy is simply liquidating the assets of the debtor company for the benefit of creditors. Often times the secured creditors seek to have a receiver appointed to liquidate the assets. In those situations, the liquidation usually results in there being very little or nothing left for unsecured creditors in the bankruptcy once the claims of any priority statutory creditors and secured creditors are dealt with through the receivership.

What a deemed assignment to bankruptcy also does is take control of the future of the debtor company out of the hands of its creditors. Both a plan of arrangement under the CCAA and a proposal to creditors under the BIA, and more importantly the vote in the hands of creditors flowing from them, provide the creditors with some control in determining the future of the debtor company. It is extremely rare (at least in the authors' collective experience) that the expected outcome of a creditors meeting concerning a vote on a plan of arrangement in a CCAA proceeding or a vote on proposal in a BIA proposal proceeding is not known prior to the meeting. The debtor company will have negotiated with and lobbied creditors well before the creditors meeting to ensure that the required number and monetary amount of creditors are satisfied with the terms of the subject plan or proposal. The vote gives the creditors leverage to negotiate. Such negotiations give the creditors some ability to help develop or influence a restructure plan that is in their best interests. In some cases a creditor may feel that the bankruptcy of the debtor company is in their best interests (such as a landlord for example), but with a plan or proposal and the vote thereon, a creditor has at least some degree of control over the process. With a deemed assignment into bankruptcy that control is gone – the business of the debtor company is now effectively over and the trustee takes control of the process should the

debtor company not comply with their obligations under the BIA or should an unexpected result at the creditors meeting occur and the proposal does not get approved.

With CCAA proceedings, there are no such automatic or mandated consequences. Should a plan of arrangement not receive the requisite creditor or court approval, should the debtor company fail to comply with its requirements under the CCAA, or should the debtor company not receive an Order extending the stay period, there are no automatic consequences. In fact, following the principles in *Kerr Interior*[27], in appropriate circumstances a debtor company can still go back to the drawing board even after a plan is not approved by the requisite number and debt value of creditors and try to put forward an amended or different plan of arrangement to creditor vote. The only real consequence that usually flows is the stay gets lifted. With the lifting of the stay, the creditors are then at liberty to enforce the remedies available to them - such as enforcing security and seeking to have a receiver appointed, commencing a court action on the subject debt (in the case of an unsecured creditor to get a judgment and take judgment enforcement proceedings), entering into some sort of forbearance arrangement with the debtor company, or petitioning the debtor company into bankruptcy. The creditor retains control over what it should do with respect to the remedies available to it. It has the opportunity to decide for itself what is in its best interests.

Considering that in most situations concerning a financial distressed company it is the creditors' money (or at least the money owed to them) that the debtor company is attempting to address, are not the creditors the best to judge what is and what is not in their best interests? It is their money so should they not decide how best to collect it should an attempt by the debtor company to formally restructure under the CCAA or the BIA fail? Generally speaking, with larger companies and larger debt amounts, the creditors tend to be more sophisticated, often times extremely sophisticated, and are well versed on how to best recover what is owed to them and best able to assess whether what the debtor company proposes is reasonable and reasonably achievable. With proceedings under the CCAA, the creditors continue to have the ability to make that determination for themselves should the attempted restructuring fail. With a failed BIA proposal proceedings and the resulting deemed bankruptcy, they do not. Bankruptcy occurs and now all the creditors have is what remedies are available to them in a bankruptcy. With a

[27] *Supra*, note 13.

bankruptcy, the going concern value of the debtor company is usually gone and now creditors are simply "fighting over the scraps".

The deemed assignment into bankruptcy with failed restructurings under the BIA, and the lack thereof with failed restructurings under the CCAA, can be viewed as a significant reason for advocating the position that the CCAA is still very much needed in the Canadian insolvency and restructuring landscape. Some may say it is a primary reason why the CCAA is a superior restructuring regime to that under Part III, Division I of the BIA. However, others may view the CCAA regime as having no real punitive consequence when there is a failure to restructure. With no such consequences, one could argue that there is nothing to really keep debtor companies in line. They can keep creditors at bay through the court ordered stay flowing from the Initial Order while they spin their wheels developing a restructuring plan and if the plan does not work, the debtor's response might simply be "oh well".

There are a couple concerns with this "punitive consequences" view. First and foremost is the purpose of restructuring statutes. The OSB / Industry Canada describes the purpose of the CCAA as follows:

> The main purpose of the CCAA is to enable financially distressed companies to avoid bankruptcy or foreclosure or seizure of assets while maximizing returns for creditors and preserving both jobs and the company's value as a functioning business.[28]

Considering this purpose, anything that can be done to promote financially distressed companies attempts to restructure, preserve jobs, maximize returns for creditors and investors, and preserve value as a functioning business should be fostered. Insolvent companies should be encouraged to attempt to restructure to try to save jobs and preserve value. Having punitive consequences for failed restructurings would have the effect of discouraging financially distressed companies to seek the use of restructuring legislation. If the purpose of the CCAA is applied in the context of corporate proposals under the BIA, the deemed assignment into bankruptcy consequence could be viewed as extremely punitive, a consequence that dissuades insolvent companies (particular larger companies who can qualify for creditor protection under the CCAA) from attempting to restructure under the BIA regime and one that is contrary to the underlying purpose

[28] CCAA Team, Office of the Superintendent of Bankruptcy / Industry Canada, *You are Owed Money – The Companies' Creditors Arrangement Act*, online: Office of Superintendent of Bankruptcy Canada <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02284.html>

of restructuring. It could thus be argued that the consequence of a deemed bankruptcy for a failed restructuring has no place in restructuring legislation. This argument is strengthened if one is of the view (as discussed above) that the creditors themselves are the best decision makers as to how they should collect on their debts. Their ability to make that decision following a failed restructuring should not be taken out of their hands by an automatic bankruptcy. While the structure of the CCAA does not fully address this related issue, there are often cases where restructuring efforts might have been more successful if pursued earlier. With the penalty in the BIA of a deemed bankruptcy, the attitude of some debtors is to delay matters as long as possible to avoid the risk of bankruptcy in the hope that something else will happen that will provide the lifeline to their financially distressed business. If there was not the risk of bankruptcy, the disincentive to a BIA proposal would be removed and, considering the general lower costs involved with a BIA proposal as compared to a CCAA restructuring, there would be a willingness in some situations to act sooner when alternatives and opportunities are better.

C. The NOI – Does It Make It Too Easy To Obtain A Stay?

i. The Need For A Policing Function?

The foregoing does not take into consideration another fundamental difference between the BIA proposal regime and the CCAA, that being the ease with which a debtor company can obtain a stay under the BIA with the filing of an NOI. Section 50.4 of the BIA coupled with section 69, enables a financially distressed company to obtain a stay with the simple filing of a one page document with the OSB. The company need only file the NOI, convince a licensed trustee in bankruptcy to act as proposal trustee, and file with the OSB a cash-flow statement and accompanying prescribed report within 10 days of the filing of the NOI, and the company can enjoy a stay for 30 days. Unlike the CCAA, there is no need for the debtor company to apply to the court and provide evidence that a stay is appropriate in the circumstances. There is thus no real vetting or court oversight as to whether a 30 day stay period is appropriate under the BIA regime unless an interested party applies to the Court to take issue with it[29]. Considering this, should there not be some consequence to keep debtor companies honest and help ensure that they are not abusing the BIA proposal regime? With the ease in which a stay is obtained with the

[29] Such as by applying to the court to lift the stay under section 69.4 of the *BIA*, or applying to the court to terminate the period for making a proposal under section 50.4(11) for example.

filing of an NOI, should there not be a significant consequence if the filing company has done so frivolously? A deemed assignment into bankruptcy is surely a significant consequence and one that could be argued as providing motivation to debtor companies to not use the BIA proposal regime frivolously.

This subject raises the question of whether or not the NOI process should be done away with it. If it were, then one of the significant differences between the BIA proposal regime and the CCAA would be removed, and with it arguably one of the main reasons why financially distressed companies choose to use the BIA proposal regime over the CCAA. If the NOI and accompanying automatic stay provisions were removed from the BIA, then arguably the policing function that the deemed assignment into bankruptcy provisions of the BIA appear to play would no longer be needed and could be removed. If this were done, then perhaps the continued need for the CCAA would be removed, or at least lessened, as well.

ii. Section 11.6 of the CCAA – Enabling the Use of the NOI in the CCAA Regime

Also, with section 11.6 of the CCAA, a debtor company with $5,000,000 in liabilities, can apply to have proceedings that were commenced under Part III of the BIA taken up and continued under the CCAA if it has not yet filed a proposal in the BIA proceedings. This provision, coupled with sections 50.4 and 69 of the BIA, enable a debtor company to obtain an initial 30 day stay period by filing an NOI and then later apply to the court under 11.6 of the CCAA to convert the BIA proceedings that were commenced by the filing of the NOI to be taken up under the CCAA. What this effectively does is enable a debtor company to get an initial 30 days protection from its creditors without having to put before the court the evidence that is required for an initial application under section 11.02(1) of the CCAA. A debtor company can get an initial 30 day stay, and still get the benefit of the CCAA should its conversion application be successful, without making an initial application and putting before the court evidence that circumstances exist that make the granting of an Initial Order under the CCAA appropriate. It allows a debtor company to effectively get the benefit of the NOI within the context of the CCAA regime. Some may argue that this provides debtor companies with the ability to effectively usurp the requirements of section 11.02(1) and 11.02(3)(a) of the CCAA and enables them to obtain a stay without any real vetting or court oversight. This is further fodder for the

argument that the use of the NOI makes the obtaining of a stay far too easy for debtor companies. The authors recognize the contrary argument that the initial stay only provides the debtor company with a very short reprieve and the debtor company will eventually have to come forward with a reasonable story and have to put the requisite evidence before the court in order for the stay to continue. However, there is no denying that the NOI provide a near automatic free 30 days of breathing space.

Advocates for creditors, in particular secured lenders, would likely support that argument. Those in favor of providing financially distressed companies with all means possible to successfully restructure, saving jobs and maximizing value for all stakeholders, would argue that the NOI is a vital tool and should be available. The issue of whether the NOI and the corresponding 30 day stay period flowing from it should be removed from the Canadian insolvency and restructuring toolbox could be a topic of a paper all its own. For the purposes of this paper, the authors simply raise the question as to whether the current system regarding NOIs makes it too easy for a debtor company to obtain a stay. In the context of differences between the BIA proposal and CCAA regimes, with section 11.6 of the CCAA, the NOI is effectively a tool that can be used under both regimes.

V. Conclusion

While it can be said that the 2009 Amendments have certainly changed the Canadian insolvency and restructuring landscape, they have not changed it to the point where it can be said that the CCAA is no longer needed. The flexibility and pragmatism that is available under the CCAA, in particular through the statutory discretion that is etched into the legislation itself, together with the courts willingness to use its inherent jurisdiction to find pragmatic solutions, is something that remains less readily available or applicable with proposals under the BIA regime. In addition, the guillotine of bankruptcy that hangs over a debtor company's head with BIA proposals makes attempting to restructure under that regime less attractive than the CCAA. While the 2009 Amendments have brought the two regimes in line with one another, differences remain. It will take further amendments to the legislation and more flexibility will need to be found in the BIA proposal regime, whether it be in the form of statutory discretion or otherwise, before the BIA can be seen as useful a restructuring forum as the CCAA. Until that happens, there is still a need for the CCAA.

Schedule "A"

Provisions Contained in the *BIA* and the *CCAA* Post-Amendment[30]

	BIA	CCAA
Permission to Disclaim Certain Agreements	X	X
Permission to Assign Certain Agreements	X	X
Interim Financing Provisions	X	X
Subordination of Equity Claims	X	X
Authorization Requirement for Sales of Assets	X	X
Stay of Regulatory Bodies	X	X
Removal of Directors	X	X
Directors' and Officers', Professionals' and Stakeholders' Charge Provisions	X	X
Permission for the Debtor to Apply to the Court in Relation to Collective Agreements	X	X
Compromise of Non-Dischargeable Claims	X	X
Cross-Border Insolvency Provisions	X	X
Inclusion of Income/Business Trusts	X	X
Required Payment of Pension Contributions	X	X
Ability of the Court to Amend the Debtor's Constating Corporate Documents	X	X
Enhanced Aircraft Protocol	X	X
Inclusion of the Definition of "Eligible Financial Contracts" in the Regulations as Opposed to the Act	X	X
Employee Remuneration and Pension Charge Provisions	X	
Meetings of Creditors Provisions	X	

[30] The information contained in this chart was compiled from the work of Shea, Patrick E. *BIA, CCAA & WEPPA: A Guide to the New Bankruptcy & Insolvency Regime* (Markham: LexisNexis, 2009) at pp.1-239.

	BIA	CCAA
Crown Claims	X	
Employment-Related Claims by Relatives	X	
Avoidance Transactions and Augmentation of Estates Provisions	X	
Employee-Related Liability of Insolvency Administrators	X	
Bankruptcy Estates with No Inspectors	X	
Applications for Directions	X	
Vesting of Property in the Trustee	X	
Duty of the Trustee on Substitution	X	
Criminal Proceedings	X	
Employee Claims and Appointment of Representatives	X	
Reporting of Material Adverse Changes	X	
Cash-Flow Statements	X	
Receivers, Interim Receivers and National Receivers	X	
Unpaid Supplier Provisions	X	
Sale of Assets by the Trustee	X	
Landlord Rights Determined by Provincial Law	X	
Annulment, Warrants, Legal Costs	X	
Termination of Agreement		X
Certain Voting Rights of Creditors		X
Monitor Appointment, Restrictions and Duties		X
Jurisdiction to Establish the Bar Date		X
Classification of Creditors		X
Claims Subject to Compromise		X

	BIA	CCAA
Critical Supplier Provisions		X
Payment of Employee Remuneration Claims		X
Publication of Documents and Proceedings		X
Levy Provisions		X
Discharge of the Monitor		X