Chapter 11 and CCAA

A Cross-Border Comparison

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A Comparison of the Key Differences Between Chapter 11 of the U.S. Bankruptcy Code and the Companies' Creditors Arrangement Act

CHAPTER 11	CONCEPT	CCAA EQUIVALENT
A debtor need not be "insolvent" to file a voluntary Chapter 11 petition.	INSOLVENCY PREREQUISITE	A debtor may make a voluntary application for relief under the *Companies' Creditors Arrangement Act* (CCAA) and, to be granted such relief, the debtor must, among other things: (i) be "insolvent" or committed an "act of bankruptcy" as defined in the *Bankruptcy and Insolvency Act* (ii) have in excess of C$5-million in liabilities (or in the case of a corporate group, have in excess of C$5-million in the aggregate); or (iii) be bankrupt or have committed an "act of bankruptcy" (as set out in the *Bankruptcy and Insolvency Act*)
Proceedings are generally commenced by the electronic filing of a petition with the appropriate Bankruptcy Court (the petition can be filed electronically in certain jurisdictions). Typically, within two days after filing the petition, the debtor attends at Bankruptcy Court to seek "first day" relief to allow it to continue to operate with Chapter 11 protection. Although unusual, unsecured creditors can initiate an involuntary Chapter 11 proceeding. There is no advance notice period for the filing of the petition.	COMMENCING PROCEEDINGS	Proceedings are commenced when an initial order is granted by the Superior Court of a Province (the Court) with jurisdiction over the debtor pursuant to an application (generally made by the debtor), which can be on a "no notice" basis. The application is usually made in the province of the debtor's head office or principal place of business. Although unusual, a creditor (secured or unsecured) can initiate an involuntary CCAA proceeding. In practice, very short notice is generally given to secured lenders and major stakeholders (although they are usually consulted in advance). An initial order is limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business for no longer than an initial 10 day stay period. Initial orders rountinely include a clause allowing interested parties to seek to amend or vary the terms of the initial order or seek other appropriate relief.

*Reflects amendments to the CCAA that came into force November 1, 2019.

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The Bankruptcy Code is a federal statute with national application, which purports to have worldwide jurisdiction.	JURISDICTION	The CCAA is a federal statute with national application, which purports to have worldwide jurisdiction.
Chapter 11 cases are brought before United States Bankruptcy Courts, units of the District Courts with subject matter jurisdiction over bankruptcy cases.	COURT SYSTEM	CCAA cases are brought before the Court of the applicable province. Some provinces have specialized commercial branches of the Court where CCAA applications may be brought.
A broad automatic stay is granted upon the filing of the petition, which includes a stay of enforcement actions and contractual remedies. There is no time limit on the stay.	STAY OF PROCEEDINGS	Although the stay of proceedings is not automatic, Courts typically exercise their discretion and issue orders on the initial application providing a broad initial stay up to a maximum of 10 days. The scope of the stay is ultimately in the discretion of the Court but typically enforcement actions and contractual remedies are stayed. The initial stay is typically extended upon application to the Court by the debtor. To obtain an extension of the stay, the debtor must demonstrate that it is acting in good faith and with due diligence. There is no prescribed limit to any stay extension or the number of extensions that may be sought.
Generally, the debtor's existing management remains in control of the business and coordinates the reorganization effort. A Chapter 11 trustee may be appointed upon request of a party in interest in extraordinary cases of fraud or gross mismanagement. If appointed, a trustee operates (or liquidates) the estate in the debtor's place. An examiner may also be appointed by the Bankruptcy Court to investigate certain allegations of fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management of the affairs of the debtor.	SUPERVISION OF THE DEBTOR	Generally, the debtor's existing management remains in control of the business and coordinates the reorganization effort. A licensed insolvency professional is appointed as "Monitor" by the Court to supervise the debtor, periodically report to the Court and stakeholders on the debtor's business and affairs, and assist with the restructuring. Occasionally, the Monitor can be authorized by the Court to direct certain of the debtor's corporate functions (this is colloquially referred to as a "Super Monitor").

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The U.S. Trustee, a division of the Department of Justice, conducts the meeting of creditors, monitors the debtor-in-possession's operation of the business and reviews operating reports and professional fees. The U.S. Trustee also imposes certain requirements on the debtor with respect to reporting its monthly income and operating expenses, and paying current employee withholding and other taxes.	GOVERNMENT OVERSIGHT	The CCAA does not have a direct equivalent to the U.S. Trustee, although the Monitor and Office of the Superintendent of Bankruptcy (OSB) (a department of the federal government) perform some of the same oversight functions. One of the mandates of the Monitor is to review for reasonableness periodic cash flow statements filed by the debtor. Specifically, the OSB licenses insolvency trustees that act as monitors, supervises the administration of insolvencies in Canada, maintains a public record of bankruptcy and insolvency proceedings and has certain investigative powers.
The filing of a Chapter 11 petition creates a separate legal bankruptcy estate. The estate contains all legal or equitable interests of the debtor in property as of the commencement of the case.	CREATION OF A SEPARATE LEGAL BANKRUPTCY ESTATE	A CCAA filing does not create a separate legal estate.
Although set-off rights are preserved, there is no right to set-off pre-petition claims against post-petition claims.	SET-OFF	The right of set off is expressly preserved under the CCAA. There is conflicting case law on this matter. Certain cases provide that pre-filing obligations can be set-off against post-filing obligations. However, such right can be subject to a "temporal stay" in appropriate circumstances. Other cases provide that pre-filing obligations cannot be set-off against post-filing obligations. The law remains unsettled.
The *Bankruptcy Code* provides that interest that is unmatured as of the petition date does not form part of either a secured or an unsecured claim.	INTEREST ON CLAIMS	Post-filing interest accrues on secured claims. Generally, interest stops accruing on unsecured claims at the filing date but may, in certain circumstances, accrue on and form part of unsecured claims where pre-filing unsecured claims are paid in full.

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The *Bankruptcy Code* provides that a lien on accounts or after-acquired property is effective only as to proceeds from those accounts or property existing as of the petition date, and not against accounts or property generated or acquired post-petition, which is the property of the separate legal bankruptcy estate. Accordingly, as adequate protection against the diminution of the value of a pre-petition secured creditor's collateral (see *Adequate Protection*, below), the Bankruptcy Court may grant the pre-petition secured creditor a replacement lien on post-petition acquired property (such as new inventory or accounts receivable).	REPLACEMENT LIENS	Canadian Courts do not need to grant "replacement liens" because a pre-filing secured creditor's security, if granted over after-acquired property (as typically would be the case), continues to apply and automatically extends to post-filing assets (such as new inventory or accounts receivable) acquired by the debtor.
At least one committee of creditors holding unsecured claims must be appointed to consult with the debtor about the administration of the estate, investigate the debtor's conduct and operation of the business, and participate in the formulation of a plan of reorganization.	CREDITORS' COMMITTEES AND REPRESENTATION	The CCAA does not provide for unsecured creditors' committees, although they have been formed on *an ad* hoc basis. Courts have, on a number of occasions, ordered the appointment of representative counsel to act on behalf of classes of claimants (e.g., pensioners, employees, investors).
Bankruptcy Courts generally authorize DIP financing and grant super-priority liens over the assets of the debtor in favour of the DIP lender as long as the Bankruptcy Court is satisfied that: (i) the debtor cannot obtain such financing on less burdensome terms (ii) non-consenting pre-petition secured lenders that are primed are "adequately protected" (see *Adequate Protection* below)	DIP FINANCING	Canadian Courts generally authorize DIP financing and grant super-priority charges over the assets of the debtor in favour of the DIP lender as long as the Court is satisfied that additional financing is required for the continued operations of the business. The Court will consider the recommendation of the Monitor, the duration of the proceedings, the debtor's property and management, whether the debtor has the confidence of its lenders and whether any creditor will be "materially prejudiced" by the security to be granted. Where DIP financing is sought under an initial order, the relief must be limited to the amount that is reasonably necessary for the continued operation of the debtor during the initial stay period of no more than 10 days. Approval of a full DIP facility for the duration of the proceedings must be sought on a subsequent motion.

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The *Bankruptcy Code* provides that a pre-petition creditor is entitled to "adequate protection" against diminution of the value of such creditor's collateral when the debtor: (i) obtains the automatic stay (ii) uses, sells or leases property, or (iii) obtains DIP financing The *Bankruptcy Code* does not define adequate protection, but provides that adequate protection may be provided by: (i) periodic cash payments (ii) an additional or replacement lien, or (iii) such other relief as will result in the realization by the creditor of the "indubitable equivalent" of the creditor's interest in the property	ADEQUATE PROTECTION	There is no concept of adequate protection in Canadian law, although Canadian Courts may provide protective relief to address material prejudice to a debtor's creditors.
Parties generally negotiate a carve-out from the DIP lender's lien for the payment of professional fees. Administrative expense claims (including professional fees incurred during the Chapter 11 case) are unsecured but receive priority status over pre-petition general unsecured claims.	PROFESSIONAL FEES	The CCAA provides for a Court-ordered priority charge on the debtor's property to secure payment of professional costs, including legal counsel to the debtor, the Monitor and its counsel and, in some cases, a chief restructuring officer or a financial adviser to the debtor or Court-appointed representative counsel, in priority to unsecured creditors as well as all other priority creditors.
Clauses in agreements purporting to alter or terminate the agreement solely because of a Chapter 11 filing ("***ipso facto clauses***") are unenforceable in bankruptcy.	*IPSO FACTO* CLAUSES	*Ipso facto* clauses purporting to alter or terminate agreements or claim an accelerated payment or forfeiture of the term under any agreement solely because of a CCAA filing are unenforceable.
Except with respect to executory contracts, no party can be required to advance further credit after the stay is in place.	ADVANCING FURTHER CREDIT	Generally, no party can be required to advance further credit to the debtor after the filing of CCAA proceedings, subject to certain provisions dealing with critical suppliers (see Critical Vendors/Suppliers below).

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The debtor may request that the Bankruptcy Court authorize it to immediately pay the pre-petition claims of "critical vendors" in exchange for such critical vendor selling to the debtor post-petition on credit.	CRITICAL VENDORS / SUPPLIERS	Courts can order critical supplier(s) to continue to supply goods and services on terms and conditions consistent with the supply relationship or that the Court considers appropriate, with or without payment of pre-petition claims. The Court may grant the critical supplier(s) a priority charge over the debtor's property for post-filing supply. In addition, the Court may also permit the payment of pre-filing claims of certain critical vendors in order to ensure uninterrupted supply (e.g., offshore vendors not subject to the stay, parties without supply contracts).
Subject to certain conditions, a seller who has sold goods to the debtor in the ordinary course of the seller's business while the debtor was insolvent may demand reclamation of such goods, in writing, within: (i) 45 days after receipt of the goods by the debtor, or (ii) 20 days of the commencement of the Chapter 11 proceedings if the 45-day period expires after commencement of the Chapter 11 proceedings	RECLAMATION CLAIMS	The CCAA does not contain reclamation rights for sellers of goods.
The *Bankruptcy Code* provides that, subject to Bankruptcy Court approval (and other specific limitations), the debtor may assume or reject executory contracts. The Bankruptcy Court must approve the assumption of an executory contract, while rejection is automatic if the contract is not assumed within a certain time. Counterparties to rejected executory contracts can assert an unsecured claim for breach of contract damages that may be available under state law and will be entitled to share in any distribution of proceeds on a *pro rata* basis along with other unsecured creditors.	ASSUMPTION AND REJECTION / DISCLAIMER OF EXECUTORY CONTRACTS	The debtor is not required to expressly assume or reject executory contracts. Generally, the debtor must fulfill its post-filing obligations under all agreements unless the debtor disclaims (i.e., rejects) the agreement in accordance with the CCAA. Disclaimers by the debtor are subject to approval by the Monitor and/or by the Court. Disclaimers approved by the Monitor are still subject to review by the Court if the counterparty objects. Counterparties to disclaimed agreements can assert an unsecured claim for damages and will be entitled to share in any distribution of proceeds on a *pro rata* basis along with other unsecured creditors.
Even where a contract does not permit assignment or has contractual restrictions on assignment, the debtor will generally have the right to assign the contract with Bankruptcy Court approval. The *Bankruptcy Code* does require the curing of pre-petition defaults and adequate assurance of future performance by the assignee.	ASSIGNMENT OF CONTRACTS	Even where a contract does not permit assignment or has contractual restrictions on assignment, the debtor will generally have the right to assign the contract with Court approval. As part of any non-consensual assignment, pre-filing monetary defaults must be cured and the Court will consider the proposed assignee's ability to perform the debtor's obligations.

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The *Bankruptcy Code* provides that if the debtor rejects an executory contract in which the debtor is a licensor of a right to intellectual property (other than trade-marks), the licensee may elect to: (i) treat such contract as terminated by such rejection, or (ii) retain its rights under such contract for the duration of the contract, including the right to enforce any exclusivity provision of such contract	TREATMENT OF INTELLECTUAL PROPERTY LICENSES	Licensees of intellectual property (including trade-marks) have protections that are analogous to the provisions of the *Bankruptcy Code*. A disclaimer does not affect the counterparty's right to use intellectual property, including the right to enforce the exclusive use of the intellectual property during the term of the relevant agreement, provided that the counterparty continues to perform its obligations under the agreement. Further, licensees can continue to use intellectual property where that intellectual property is sold in a CCAA restructuring.
The debtor may assume or reject an "unexpired" lease of residential real property at any time before confirmation of a plan but the Bankruptcy Court may order the debtor to determine whether to assume such lease within a specified period of time. The debtor has 120 days from the petition date to assume or reject an unexpired lease of nonresidential real property. If the debtor does not assume or reject the unexpired lease by that time, the lease will be deemed rejected.	TREATMENT OF REAL PROPERTY LEASES	Treatment of real property leases is the same as the treatment of other contracts, except where the debtor is the lessor, in which case disclaimer is not available.
Section 1110 of the *Bankruptcy Code* provides that, for qualifying aircraft creditors, the automatic stay provisions affecting aircraft are limited by the special "60-day" rule for aircraft. Basically, an air carrier has 60 days to affirm the financing contract and cure all defaults or return the aircraft to its creditor (while the U.S. has ratified the *Cape Town Convention*, it did not adopt Alternative A because of the availability of section 1110).	TREATMENT OF AIRCRAFT OBJECTS	As part of its ratification of the *Cape Town Convention* and *Aircraft Protocol*, Canada adopted Alternative A in respect of remedies for aircraft objects (commercial-size aircraft and engines). Alternative A is an enhanced version of U.S. section 1110, which contains a 60-day stay limitation for aircraft objects but also requires the aircraft operator to maintain the aircraft pursuant to its contract and preserve the value of the aircraft as a condition of the continuing stay.
The debtor may assume or reject a CBA in accordance with and subject to the provisions of the *Bankruptcy Code*, which provide that, prior to filing an application to reject a CBA, the debtor shall make a proposal to the authorized representative of the employees and provide the authorized representative with the relevant information required to evaluate such proposal.	TREATMENT OF COLLECTIVE BARGAINING AGREEMENTS (CBAS)	The CCAA provides that, if the debtor is unable to reach a voluntary agreement with the bargaining agent to revise a CBA, the debtor may apply to the Court for an order authorizing it to serve a notice to bargain under applicable labour laws. However, any CBA that the debtor and bargaining agent have not agreed to revise remains in force. The debtor cannot disclaim the CBA and the Court may not unilaterally alter its terms.

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The *Bankruptcy Code* authorizes the debtor to bring avoidance actions, including to void preferences and fraudulent transfers.	VOIDABLE / FRAUDULENT TRANSACTIONS	By incorporating the relevant sections of the *Bankruptcy and Insolvency Act* into the CCAA, the CCAA authorizes the Monitor to commence an action to void preferences and transfers at undervalue. If the Monitor refuses to pursue the action, a creditor may seek to obtain an order authorizing it to do so in its own name and at its own expense.
Asset sales or sales of the debtor as a going concern may be conducted through section 363 of the *Bankruptcy Code* or a plan. Section 363 sales typically involve stalking horse bidders and bidding procedures. The *Bankruptcy Code* expressly provides for credit bidding.	GOING CONCERN SALES / ASSET SALES	Asset sales or sales of the debtor as a going concern may be conducted through section 36 of the CCAA or a plan. The CCAA does not expressly provide for credit bidding, but credit bids have been authorized by numerous Courts. Similarly, Courts have routinely established a stalking horse process through Court order.
A plan may place a creditor claim in a particular class only if such claim is "substantially similar" to the other claims in such class. The plan must treat all members within a class equally. Unsecured claims generally constitute one class. Equity interests may also constitute one class.	CLASSIFICATION OF CREDITORS / CLAIMS	A debtor may divide creditors into separate classes based on "commonality of interest" for the purpose of voting on a plan. The plan must treat all members within a class equally. Unsecured claims generally constitute one class. Equity interests do not constitute a class and may not vote on the plan.
The debtor has the exclusive right to file a plan for 120 days after the petition date and the exclusive right to solicit acceptances of the plan during the first 180 days after the petition date (the Exclusivity Periods). Bankruptcy Courts may extend the Exclusivity Periods up to 18 months (to file a plan) and 20 months (to solicit acceptances of the plan). After the Exclusivity Periods have expired or are terminated by the Bankruptcy Court, any party in interest may file a plan.	FILING A PLAN	There is no period of time where the debtor has the exclusive right to file a plan. Plans may be filed by the debtor, any creditor, a trustee in bankruptcy or a liquidator of the debtor. In practice, plans are almost always filed by the debtor or filed by a creditor with the consent of the debtor.
Express provisions in the *Bankruptcy Code* allow for the subordination of debt claims if certain types of misconduct of the debtor can be established.	EQUITABLE SUBORDINATION	Courts have consistently declined to apply the doctrine of equitable subordination in CCAA cases with one appellate court finding the doctrine does not further the remedial purposes of the CCAA.

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The debtor has to act in good faith in connection with the filing of a plan. Relief may also be sought against an entity in connection with the acceptance or rejection of a plan that has not acted in good faith.	GOOD FAITH	The debtor company is required to have been found to have acted in good faith in order to be granted an extension of the stay of proceedings. The CCAA also imposes an express duty of good faith on any interested person participating in any proceedings under the CCAA. Court-appointed monitors must also act in good faith.
Impaired classes of creditors are entitled to vote on the plan; unimpaired classes are deemed to have accepted it. For a plan to be approved by a class, at least 2/3 in value of voting claims and a majority in number of voting creditors in a class must vote in favour of the plan. As long as there is at least one impaired accepting class, the Bankruptcy Court may "cram down" a plan over dissenting classes of creditors as long as the plan is "fair and equitable" to the dissenting classes of creditors (including secured creditors) and does not discriminate against them. A plan is "fair and equitable" in its treatment of a class of secured creditors if it provides that the creditors will (1) retain their liens; and (2) receive deferred cash payments with a "present value" equal to the amount of their secured claims. Equity interests may vote on the plan but any class whose members are to receive nothing under the plan is deemed to reject the plan without a vote.	CREDITOR VOTE ON PLAN AND CRAM DOWN	Each class of creditors to which the plan is proposed is entitled to vote on the plan. For a plan to be approved by a class, at least 2/3 in value of voting claims and a majority in number of voting creditors in a class must vote in favour of the plan. There is no "cram down" in the CCAA and the plan must be approved by each class of creditors affected by the plan.
A plan is "fair and equitable" to a dissenting class of creditors only if the dissenting class is to be paid in full or if the holder of any claim or interest that is junior to the dissenting class will not receive or retain any property under the plan on account of such junior claim or interest.	ABSOLUTE PRIORITY RULE	The Court may not approve ("sanction") a plan that provides for the payment of an equity interest unless all creditor claims are paid in full before the payment of such equity interest.
After requisite creditor approval, the Plan must be approved ("confirmed") by the Bankruptcy Court. The Bankruptcy Court can only confirm a plan if it complies with the relevant provisions of the *Bankruptcy Code*, was proposed in good faith, is feasible, pays creditors more than they would have received in liquidation, and has been accepted by at least one impaired class.	COURT APPROVAL	After requisite creditor approval, the Plan must be sanctioned by the Court. The Monitor files a "fairness" report and the Court will grant the Sanction Order if the plan is "fair and reasonable," and the debtor has complied with required procedural steps. Creditor approval is a significant factor in determining whether the plan is fair and reasonable and thus should be sanctioned by the Court.

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If a plan is rejected, any party in interest can: (i) propose another (or an amended) plan (ii) move to lift the automatic stay to exercise its rights, or (iii) file a motion to dismiss the Chapter 11 proceedings or convert the case to a Chapter 7 liquidation	CONSEQUENCES OF REJECTION OF PLAN	If a plan is rejected, any party in interest can: (i) propose another (or an amended) plan (although, in practice, usually the debtor proposes another plan), or (ii) move to lift the stay to exercise its rights, including seeking to bankrupt the company or seeking to appoint a receiver

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