
# AMENDMENTS TO THE CCAA, BIA AND CBCA NOW IN FORCE

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The Act of Parliament that implemented the 2019 federal budget also included significant changes to Canada's principal corporate and restructuring statutes. These included changes to the *Canada Business Corporations Act* ("**CBCA**"), the *Bankruptcy and Insolvency Act* ("**BIA**") and the *Companies' Creditors Arrangements Act* ("**CCAA**").[1] One of the reasons for the changes is to make insolvency proceedings more fair, transparent and accessible for workers and pensioners.[2] The changes are now in effect and will have a significant impact on Canadian insolvency law and practice.

The CCAA, Canada's main legislation governing large Court-supervised restructurings, was amended to reduce the length of the initial stay of proceedings for companies that seek protection under it. There are also new limits on the scope of relief that companies can obtain at the outset of a CCAA proceeding, and a duty of good faith is now imposed on all participants in Court-supervised insolvencies. Courts have new powers to reverse certain compensation paid to management in the year before a company's bankruptcy, and parties can apply to the Court to obtain disclosure of the economic interests of other parties in a CCAA proceeding.

Amendments to the CBCA, the statute governing federally incorporated companies, have codified judge-made law on the scope of the fiduciary duty owed by directors and officers to their corporations, and explicitly permit management to consider the interests of workers and pensioners in fulfilling their corporate duties.

More particulars of the changes and their implications are described below.

**Changes to First Day Relief in CCAA Proceedings**

The length of the initial stay of proceedings upon a company's application for CCAA protection has been reduced from 30 days to 10 days. The CCAA also now limits the relief that a company can obtain from the Court during the initial 10 day period to "relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business". Similar language limits the amount of DIP (interim) financing that a court can approve at the first day hearing.

The new limits to relief available to companies on the first day of a CCAA proceeding appear designed to curtail a common practice of requesting substantial relief from the Court with little or no notice to affected parties. For example, before the amendments it was common in CCAA proceedings for debtors to seek and obtain the

approval of large DIP loans, key employee retention plans, and even the approval of sale procedures on the initial application. However, the intended impact of the changes might be undermined by the reality that substantial relief is often required at the outset of a CCAA proceeding to allow the debtor to continue its normal course operations. Even before the recent amendments, initial orders in CCAA proceedings were often subject to a "comeback" provision, allowing affected parties to challenge the propriety of relief 10 days after it was granted. However, comeback provisions have been treated somewhat inconsistently by courts, especially in respect of the burden born by parties on a comeback motion.[3] The changes to the CCAA will likely impose greater discipline on the scope of relief that courts are willing to grant at the time that a CCAA protection is granted.

**A Duty of Good Faith**

Both the BIA and CCAA have been amended to require that all participants in insolvency proceedings "act in good faith". The statutes now give courts unfettered discretion to craft an appropriate remedy where this obligation is breached.

The amendments do not provide guidance as to any specific requirements to meet the "good faith" standard, which is likely to be problematic. The concept of "good faith" exists in many areas of Canadian law and is notoriously imprecise.[4] A leading Canadian insolvency commentator previously warned that the imposition of a duty of good faith on creditors may bring uncertainty, which could paralyze the efficient and expeditious administration of insolvency proceedings.[5] The CCAA and BIA both already imposed duties of good faith on Court officers, including trustees in bankruptcy, receivers and monitors in CCAA proceedings, and also on companies seeking to obtain or extend a stay of proceedings.[6] Those duties have been the subject of some judicial consideration, but are different in kind from a general duty that is now owed by all participants in insolvency proceedings.

In the performance of contracts, the Supreme Court of Canada has held that "good faith" is a broad "organizing principle" and specifically does not require a party to disclose material information to a counterparty.[7] The Supreme Court of Canada is set to reconsider this aspect of good faith next month. This may *not* be the same standard that is contemplated in the recent amendments to the BIA and CCAA for participants in insolvency proceedings.

Now that it is in force, the new duty is likely to generate uncertainty and litigation over its scope and implications for participants in Canadian insolvency proceedings.

**Disclosure of Economic Interests in CCAA Proceedings**

Section 11 of the CCAA has been amended to promote transparency in CCAA proceedings. The amendment

empowers the Court, on application *by any interested person*, to order another party "to disclose any aspect of their economic interest" in the debtor. The party's "economic interest" would include a claim, eligible financial contract, or security interest, *as well as the consideration paid* for the interest.

In considering an application for such disclosure, the Court will consider the CCAA monitor's position on the proposed disclosure, whether disclosure would enhance the possibility of a successful compromise or arrangement, and material prejudice to any interested party. Interestingly, the prescribed factors for the Court's consideration do not include whether the disclosure is relevant to the merits of a party's claim against the estate. This new mechanism for compelling disclosure of economic interests is a powerful tool potentially subject to tactical abuse by parties in CCAA proceedings. It will be of interest to see what guidance emerges from early applications of this power as to its appropriate use.

**Court Power to Reverse Management Compensation**

Section 101 of the BIA has also been amended. This section allows the Court to review dividends paid within one year of the company's bankruptcy to determine whether the company was insolvent at the time or was rendered insolvent by the dividend. The amendment adds termination pay and other benefits paid to managers of the company to the list of reviewable transactions. It also gives courts the power to grant judgment against the managers in respect of such pay or benefits where certain requirements are met.

**Stakeholder Interests and the Fiduciary Duty to CBCA Corporations**

Last, the CBCA was amended to specify certain stakeholder interests that a director or officer may consider when exercising their fiduciary duty to the corporation they serve. The fiduciary duty requires directors and officers to act "honestly and in good faith in the best interest of the corporation".[8] This is different from the "*Revlon* duty" applicable in the United States, which emphasizes attention that directors and officers must pay to maximizing shareholder value to satisfy their fiduciary duty. In a series of decisions culminating in *Re BCE*, the Supreme Court of Canada held that the fiduciary duty under the CBCA is owed to the corporation itself, and that directors and officers *may* (but are not required to) consider the interests of various stakeholders of the corporation when exercising that duty.[9]

With the new changes, the CBCA now specifies that directors and officers may consider (a) the interests of stakeholders such as shareholders, employees, retirees and pensioners, creditors, consumers and governments, (b) the environment and (c) the long-term interests of the corporation. Parts (a) and (b) of this list repeat the same examples of interests that the Supreme Court of Canada identified in Re BCE, but explicitly add the interests of retirees and pensioners. The explicit addition of retirees and pensioners to the list in the statute may cause the directors and officers of troubled CBCA companies to give greater consideration to the implications of an insolvency proceeding for these stakeholders. The change should offer management some

comfort that they are protected when exercising their powers with those interests in mind.

**Conclusion**

The recent statutory amendments are intended to add transparency and fairness to Canada's corporate and insolvency regimes. Many of the changes to the BIA, CCAA and CBCA are an effort to codify recent developments in Canadian case law. However, the amendments also bring significant changes to the substantive and procedural rights of corporations' stakeholders, especially in insolvency situations. We expect that the changes will introduce some uncertainty. The commercial and insolvency bar will be watching closely as the Courts engage these amendments and provide new guidance on central aspects of Canadian corporate and restructuring law.

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[1] This bulletin discusses some of the changes to Canadian corporate and insolvency statutes that were initially tabled in Bill C-97, which received its first reading in Parliament on April 12, 2019. This is not an exhaustive review of the changes implemented by Parliament, which include amendments to the *Bank Act* and the *Pension Benefits Standards Act* among other things.[ps2id id='1' target=''/]
[2] *Investing in the Middle Class: Budget 2019*, p. 67.[ps2id id='2' target=''/]
[3] See for example *Canada North Group Inc.*, 2017 ABQB 550 at 74-77.[ps2id id='3' target=''/]
[4] In December 2019, the Supreme Court of Canada will hear two appeals on this subject in the context of commercial agreements.[ps2id id='4' target=''/]
[5] McElcheran, Kevin: *Commercial Insolvency in Canada* (3d), 4.621.[ps2id id='5' target=''/]
[6] See BIA sections 50.4(9), 50(12)(a), 65.12(2)(b), CCAA sections 11.02(3), 25(3), 33(3)(b) and 36(4)(a). See also Rogers, Linc et. al., "What Does 'Good Faith' Mean in Insolvency Proceedings?" (2015).[ps2id id='6' target=''/]
[7] *Bhasin v. Hrynew*, 2014 SCC 71 at 33 and 86.[ps2id id='7' target=''/]
[8] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, Section 122(b).[ps2id id='8' target=''/]
[9] *BCE Inc., Re,* 2008 SCC 69 at 39-40.[ps2id id='9' target=''/]

**A Cautionary Note**