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# **GLOBAL INSOLVENCY PRACTICE COURSE (ONLINE)**

**2021 / 2022**

**Module B: Session 18 Materials -  
Other Important Jurisdictions - Brazil,  
Canada, India and Singapore**



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PowerPoint Slides to support session (Canada)



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# Introduction to Insolvency Law and Practice in Canada

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# Canada – historical context

Historically liquidation regime.

Strong restructuring policy since, particularly since the early 1980s.

Two primary statutes: *Bankruptcy and Insolvency Act (BIA)* and *Companies' Creditors Arrangement Act (CCAA)*.

Also *Winding-up and Restructuring Act* for banks, insurance companies and other financial institutions and the *Farm Debt Mediation Act*.



# Canada – fundamental principles of the system

1. Maximizing value of debtor's assets
2. Going-concern restructuring where possible
3. Fair and equitable treatment of creditors and other stakeholders
4. Protection of the public interest



# Canada – issues that impact the insolvency system

Recent increase in use of restructuring statute to liquidate

Challenges due to changing nature of debt: private equity, syndication, securitization, foreign debt.

Cross-border pressures from United States creditors and rising costs of proceedings



# Canada- restructuring options

Plans of Arrangement and/or compromise under *CCAA*

Proposals under *BIA*

Must be insolvent to access either statute, but liberal definition of insolvent: whether there is a reasonably foreseeable expectation at time of filing that there is a looming liquidity condition or crisis that will result in debtor running out of money to pay its debts as they generally become due, without the benefit of the stay and ancillary protection.

Filing can be initiated by the debtor or creditors but debtor files in most cases.

Unique role of monitor under *CCAA* and proposal trustee under *BIA*



## CCAA

- Initial order usually accompanied by initial stay order - max 10 days, then apply to extend.
- Criteria: circumstances exist that make the order appropriate; applicant has acted and continues to act in good faith and continues to act with due diligence.
- Debtor stays in possession in most cases.
- Post-commencement financing (interim and exit) is available on approval by the court on a primed basis- financing in first 10 days only what is reasonably necessary to “keep the lights on” during that period.

## BIA proposal

- Stay is automatic with filing proposal or notice of intention (NOI); 30 days, can be extended by court in 45-day increments to max of 6 months; then, if no proposal, debtor automatically bankrupt.





# Canada - tests for interim financing

In deciding whether to make an order for interim financing on a priority basis, court is to consider, among other things,

- (a) period during which the company is expected to be subject to proceedings;
- (b) how company's business and financial affairs are to be managed during proceedings;
- (c) whether company's management has the confidence of its major creditors;
- (d) whether loan will enhance prospect of viable compromise/arrangement
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as result of the security or charge; and
- (g) the monitor's report [under *BIA*, the proposal trustee's views]



# Amendments effective November 1, 2019

Good faith: Any interested persons in proceedings under the *Act* must act in good faith with respect to the proceedings.

Disclosure of economic interest: On application by any interested person likely to be affected and on notice, court may make order requiring the person to disclose any aspect of their economic interest in respect debtor, on terms court considers appropriate. In deciding whether to make an order, the court is to consider:

- whether the monitor approved the proposed disclosure
- whether disclosed information would enhance the prospects of a viable plan in respect of the debtor
- whether any interested person would be materially prejudiced as result of disclosure

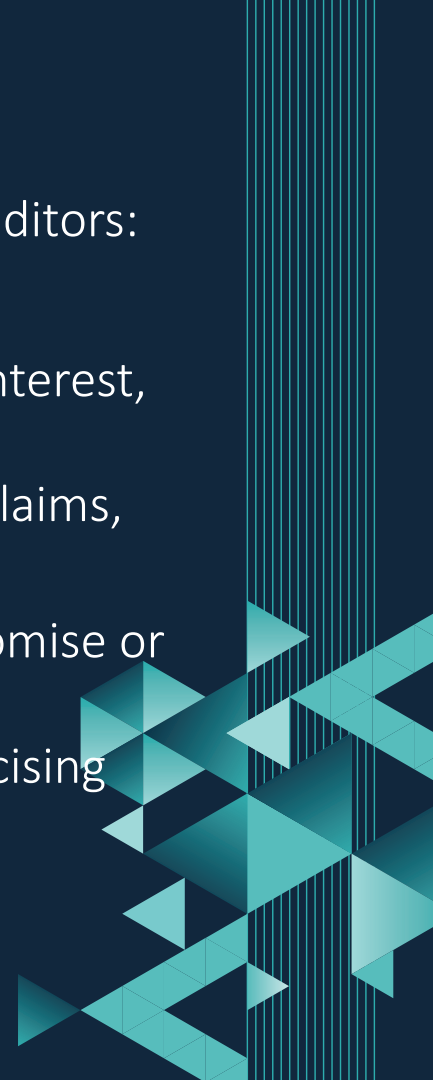
Economic interest defined broadly: claim, an eligible financial contract, option, pledge, lien, or any other security interest.



# Classification of creditors

Court is to consider the following factors in determining classes of creditors:

- same class if their interests or rights demonstrate commonality of interest, taking into account
  - the nature of debts, liabilities or obligations giving rise to their claims,
  - the nature and rank of any security in respect of their claims,
  - remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and
  - extent to which the creditors would recover their claims by exercising those remedies.



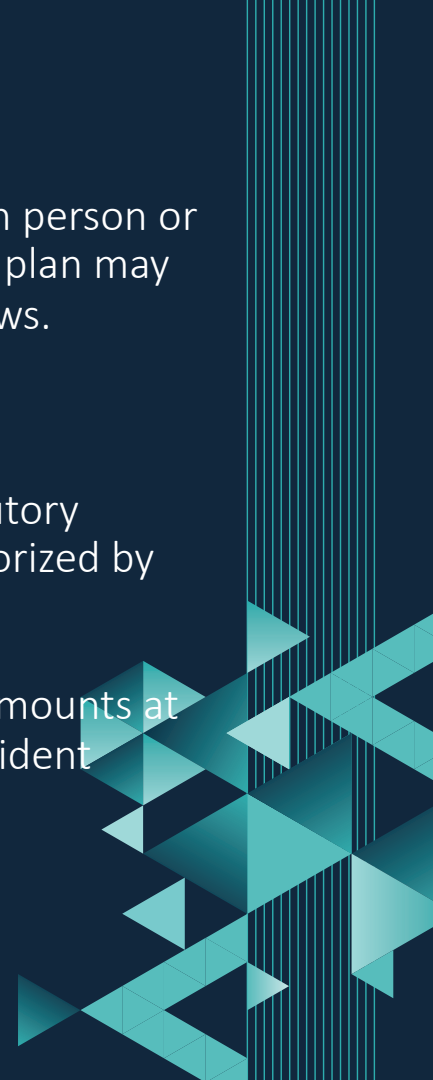
# Plan approval by the Canadian court

If a majority in number and 2/3 in value of each class of creditors voting either in person or by proxy at meetings of creditors agree to any compromise or arrangement, the plan may be approved by the court. Excludes equity owners from voting unless court allows.

If sanctioned, plan is binding on all creditors.

Criteria for approval: whether there has been strict compliance with all the statutory requirements; whether all materials filed and procedures carried out were authorized by the *CCAA*; and whether the plan is fair and reasonable.

Court can only approve plan if it makes provision for payment to employees in amounts at least equal to what they would receive in bankruptcy liquidation, and court confident debtor can and will make the payments.



# Limited priority for employee claims

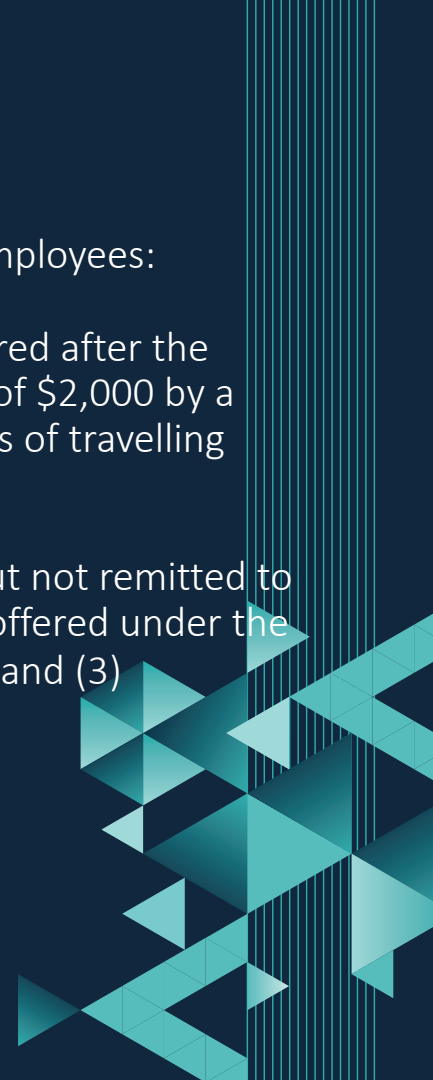
Objective of 2008/9 amendments to insolvency law - to enhance protection for employees:

*BIA* secures the claim of an employee for unpaid compensation for services rendered after the period that commences 6 months before bankruptcy/receivership/plan, to a max of \$2,000 by a statutory security on the employer's current assets, plus up to \$1,000 for expenses of travelling salesperson

Also priority for pensions: (1) contributions deducted from employees' salaries but not remitted to the pension fund, (2) contributions owed by an employer for the cost of benefits offered under the pension plan, excluding amounts payable to reduce an unfunded pension liability, and (3) contributions owed by an employer to a defined contribution plan

Codified protection of collective agreements

*Wage Earner Protection Program Act*



## Canada – Recognition of foreign proceedings

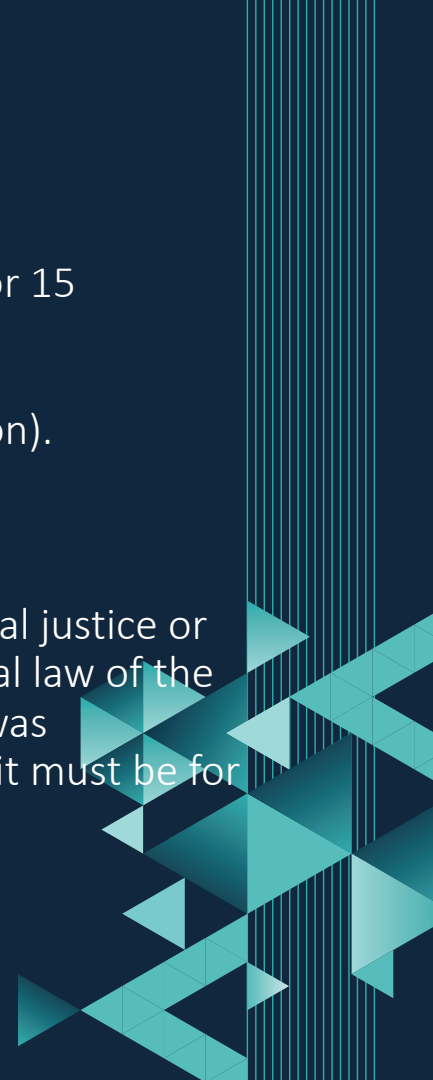
Adopted Model Law in 2009; slight difference in language, e.g. establishment

Cross-border proceedings very common, particularly CCAA and US Chapter 11 or 15 proceedings. Increasingly also joint hearings- Canada and US courts.

Strong jurisprudence on recognition of in-bound proceeding (seeking recognition).

No long-arm legislation, but strong commitment to comity and cooperation.

Recognition of foreign judgments - “absent evidence of fraud, violation of natural justice or of public policy, enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered.” In order for a foreign judgment to be recognizable and enforceable, it must be for a debt or definite sum of money, and final and conclusive.



Looking forward:

- Be aware of judicial concerns re reverse vesting orders (RVO)

