

TABLE OF CONTENTS

Acknowledgments	iii
About the Author	v
Table of Contents	vii
CHAPTER 1 INTRODUCTION AND OVERVIEW OF THE CCAA	1
I. INTRODUCTION.....	1
1. Brief Introduction to the Framework of the CCAA.....	6
2. The CCAA in the Context of the Canadian Insolvency System.....	7
3. Policy Objectives of the CCAA.....	13
4. Policy Instruments	17
5. What is the Measure of Success?	19
6. Challenges for Learning about CCAA Proceedings	20
7. Learning Objectives and Methodology of the Text.....	21
II. OVERVIEW OF THE CANADIAN RESTRUCTURING SYSTEM.....	21
1. The CCAA Process — Historical Development.....	21
2. Overview of the Statutory Requirements.....	26
3. Commencing a CCAA Proceeding	28
4. The Five Million Dollar Threshold	34
5. Affiliated Companies	34
6. Advantages and Disadvantages of Using the CCAA as Compared with the BIA Proposal Process.....	36
7. Québec Bijuralism and Harmonization	46
8. Considerations for Choice of Proceeding under which to Conduct a Workout.....	46
9. Receivership in the Context of a CCAA Application.....	48
CHAPTER 2 ACCESS TO THE CCAA PROCESS	51
I. THE INITIAL ORDER.....	51
II. THE INITIAL STAY ORDER	52
1. Objective of the Stay Order	52
2. Granting the Initial Stay Order	53
3. Come-back Provisions.....	58
4. The Scope of the Stay Order	60
i. Stay of Claims Against Directors.....	63
ii. Stay on Specified Crown Claims.....	63

5.	Terms and Conditions of the Initial Stay Order	65
6.	Limits on the Scope of the Stay	67
	i. Aircraft Objects	68
	ii. Performance or Duties of Specified Roles under Federal Statutes	69
	iii. Regulatory Bodies Can Continue to Investigate	69
7.	Extension of the Stay	76
8.	The Problem of Overreach	85
9.	Model Orders — Creating Consistency in the System	87
10.	Lifting or Setting Aside the Stay	88
	i. Lifting the Stay	88
	ii. Setting Aside the Stay Order	94
11.	Appeal of the Stay Order	96
III.	THE DEFINITION OF DEBTOR COMPANY AND INSOLVENCY	97
	1. Definition of Debtor Company	98
	i. Income Trusts	100
	2. Definition of Insolvency	101
IV.	THE ISSUE OF NOTICE	107
	1. What is the Purpose of Notice?	107
	2. Who is Entitled to Notice?	108
	3. Transparency and Potential Prejudice in Current Practice ..	111
	4. Legislative Reform	115
	CHAPTER 3 THE ROLE OF THE COURTS IN CCAA PROCEEDINGS	117
I.	THE JURISDICTION OF THE COURTS	117
	1. Statutory Authority, Exercise of Judicial Discretion and Inherent Jurisdiction	119
	2. Jurisdiction of Filing	128
	3. Length of Proceedings	132
	4. The Court in its Supervisory Capacity	136
	5. Sanctioning a Plan of Compromise or Arrangement	140
	i. The Fairness and Reasonableness Test	142
	6. Releases from Liability on Sanctioning of the Plan	147
	i. Releases for Directors and Officers	148
	ii. Third-Party Releases	148
	7. Judicial Discretion and the Scope of the Stay	157
	8. Judicial Authority and the Public Interest	158
	9. Judicial Discretion and Liquidating CCAA Proceedings	167
	10. Legislative Reform	170
II.	CASE MANAGEMENT OF CCAA PROCEEDINGS AND TIMELINESS OF THE PROCESS	170
	1. Dispute Resolution Tools	173

2.	Meetings of Creditors	177
3.	Termination of Proceedings	178
4.	Costs of Motions	179
5.	E-Delivery Pilot Project, Toronto Region Commercial List...	180
III.	THE ROLE OF THE APPELLATE COURT IN A CCAA RESTRUCTURING	181
1.	The Test for Leave to Appeal	181
2.	Disputes as to Whether Leave to Appeal is Required	185
3.	The Role of Intervenors	190
4.	Circumstances in which Leave has been Denied	190
5.	Stay of CCAA Order Pending Appeal	196
CHAPTER 4 FINANCING OPERATIONS DURING AND AFTER RESTRUCTURING		
		197
I.	THE NEED FOR IMMEDIATE OPERATING CAPITAL	197
II.	INTERIM FINANCING	197
1.	Interim Financing Authority Expressly Set Out in the Statute	201
2.	Historical Development of the Court's Exercise of Authority	208
i.	Pre-Amendment <i>Ex Parte</i> Interim Financing Orders ..	212
3.	Cross-Border Interim Financing Facilities	213
4.	Guarantees	214
5.	Priority for Legal and Professional Fees	216
6.	Limitation on What Ranks as a Cost of Administration	222
7.	The Changing Nature of Lenders in Restructuring Proceedings	222
i.	CDS Counterparties and Eligible Financial Contracts	224
ii.	Amendments to Credit Documentation	225
iii.	Influence on Restructuring	226
iv.	Challenges and Conflicts Created by Economic Interests	227
8.	Amending the Terms of the Interim Financing Facility	230
9.	Benefits of Oversight Controls in Interim Financing Arrangements	230
10.	Use of Interim Financing Agreements to Control Governance	233
i.	Overreach	240
11.	Cross-collateralization and Roll-ups	242
12.	Access to Information Regarding the Terms	247
13.	Interim Financing by Tranche and Accountability	247

	14. Appeal of Interim Financing Orders	248
III.	ALLOCATING THE COSTS OF RESTRUCTURING PROCEEDINGS	250
IV.	CRITICAL SUPPLIERS	254
	1. Other Post-Filing Charges in Respect of Suppliers	256
	2. Critical Suppliers and Payment of Arrears	257
V.	ASSET SALES DURING THE CCAA PROCESS	263
	1. Court Approval of Sale of Assets	263
	2. Sale to Related Party	272
	3. Caselaw on Sale of Assets Prior to 2009	275
	4. Stalking Horse Bids.....	279
	5. Credit Bidding	287
VI.	EXIT FINANCING OTHER THAN THROUGH SALE OF THE ASSETS OR THE BUSINESS	292
CHAPTER 5 GOVERNANCE OF THE INSOLVENT CORPORATION DURING THE CCAA PROCEEDING		295
I.	CHALLENGES FOR GOVERNANCE OF THE FINANCIALLY DISTRESSED FIRM	295
	1. Who Should Govern the Financially Distressed Firm?	297
II.	THE ROLE OF THE CORPORATE BOARD.....	298
	1. Conflicts and Contributions.....	299
	2. Court Authority to Remove and Replace Directors.....	299
	3. Fiduciary Obligations during Insolvency	300
	4. Statutory Duty of Care to Creditors.....	306
	5. Stay of Claims against Directors.....	308
	6. Indemnification of Directors during the Proceeding	308
	7. Debtor Company Obligated to Assist the Monitor	313
III.	CLAIMS AGAINST DIRECTORS.....	314
	1. Types of Claims against Directors and Officers.....	314
	2. Compromise of Claims	314
	3. Claims that Cannot be Compromised under a Plan	316
	4. Claims against Directors Outside of CCAA Proceedings.	318
	5. Oppression Remedies	321
	i. The Definition of Complainant under Oppression Provisions.....	326
	ii. Limits of the Oppression Remedy	328
	iii. The Conditions under which an Oppression Remedy may be Granted	330
	iv. Reasonable Expectations and Creditors	332
	v. Trustees and Oppression Remedies	334
	vi. Examples of Oppression Cases Involving Creditors...	335

	vii. Business Judgment Rule	337
	viii. Scope of Remedies	340
IV.	CORPORATE MANAGERS – INFORMATIONAL CAPITAL OR ENTRENCHMENT?	345
V.	THE ROLE OF THE CHIEF RESTRUCTURING OFFICER.	350
	1. Compensation of CRO	352
	2. Issues of CRO Accountability	353
VI.	A GOVERNANCE ROLE FOR EMPLOYEES?	354
	CHAPTER 6 EMPLOYEES	357
I.	INTRODUCTION	357
II.	PROTECTION OF WAGES ON INSOLVENCY	358
	1. Security and Priority under the <i>BIA</i>	359
	2. Employee Hardship Claims	365
	3. The National Wage Earner Protection Program	366
III.	PENSION CLAIMS	370
	1. Ownership of Pension Surplus Amounts	383
IV.	DISABILITY AND LONG-TERM HEALTH BENEFITS	383
V.	CONCURRENT LABOUR RELATIONS AND INSOLVENCY LAW SYSTEMS	388
	1. Collective Agreement Remains in Force	389
	2. Notice to Bargain	392
	3. Claims where Parties to Collective Agreement Agree to Revise	393
	4. Caselaw Prior to the 2009 Amendments	394
	CHAPTER 7 TREATMENT OF CLAIMS	401
I.	INTRODUCTION	401
II.	PROVABLE CLAIMS	404
	1. Determination of Amount of Claims	407
	2. Lien Claims	409
III.	SET-OFF	409
IV.	INTERACTION WITH PROVINCIAL PERSONAL PROPERTY SECURITY LEGISLATION	417
V.	RESILIATION, ASSIGNMENT OR DISCLAIMER OF CONTRACTS.	423
	1. Court May Assign Rights and Obligations of the Company	433
	2. Exceptions to Court's Ability to Assign	434
	3. Intellectual Property Licenses	434

4.	Caselaw Prior to 2009	435
5.	Aircraft Leases	439
6.	Claims Relating to Real Property Leases	439
7.	Supply Agreements	444
8.	Public Utilities	448
9.	Eligible Financial Contracts	449
	i. History of the Eligible Financial Contract Provisions	451
	ii. Challenges Posed by the Current Provisions on Eligible Financial Contracts and Ideas for Legislative Reform	458
10.	Other Licenses	464
VI.	CROWN CLAIMS AND DEEMED TRUSTS	465
	1. Deemed Trusts	467
	2. Workers' Compensation	470
	3. Governmental Involvement in CCAA Proceedings	470
VII.	EQUITY CLAIMS	472
VIII.	PREFERENCES AND TRANSFERS AT UNDERVALUE	482
IX.	ENVIRONMENTAL CLAIMS	483
X.	TORT CLAIMS	494
XI.	RELATED PARTY CLAIMS	499
XII.	PUBLIC INTEREST GENERALLY	500
XIII.	INTERIM DISTRIBUTION OF ASSETS PENDING A WORKOUT	502
XIV.	CLAIMS PROCEDURES	504
	CHAPTER 8 APPROVING PLANS OF COMPROMISE AND ARRANGEMENT	507
I.	INTRODUCTION	507
II.	CLASSIFICATION OF CREDITORS	508
	1. The Statutory Criteria	509
	2. Examples of Specific Classification Disputes	510
III.	CLAIMS BAR ORDER AND EXTENSION OF TIME FOR FILING CLAIMS	519
IV.	ORDERING A VOTE AND CREDITOR APPROVAL	524
	1. Disputes about Who Has a Vote	526
V.	CONSOLIDATION OF PROCEEDINGS	527
VI.	COURT APPROVAL OF THE PLAN	529
	1. Compliance with the Statutory Requirements	529

2.	The Fairness and Reasonableness Inquiry	530
i.	Differential Treatment of Creditors can be Fair and Reasonable.....	535
3.	Objections to the Proposed Plan.....	537
4.	Deference to Business Judgment at the Plan Sanctioning Hearing.....	540
5.	Modification or Interpretation of an Approved Plan	540
6.	Sealing Orders and Public Policy	542
7.	Appeal of Plan Sanctioning Orders.....	547
8.	Powers of the Court after Sanctioning a Plan	547
VII.	CONVERSION TO AND FROM <i>BIA</i> PROPOSAL PROCEEDINGS	553
VIII.	OUTCOME OF PROCEEDINGS.....	556
	CHAPTER 9 THE ROLE OF THE COURT'S OFFICERS	563
I.	INTRODUCTION.....	563
II.	THE ROLE OF THE MONITOR.....	564
1.	Evolution of the Role	564
2.	Appointment of the Monitor.....	566
3.	Scope of the Monitor's Role.....	567
4.	Deference to the Monitor.....	573
5.	Protection from Liability	574
6.	Employees and Pensions — Protection against Liability ...	577
7.	Monitors and Environmental Conditions or Damage.....	578
8.	Monitors' Fees.....	579
9.	Interim Financing and Monitors.....	581
10.	Pre-filing Proposed Monitor Reports	582
11.	The Auditor as Monitor	584
12.	Officer of the Court.....	587
13.	Monitor's Reports and the Issue of Compellability	591
14.	The Monitor as Financial or Business Advisor	594
15.	The Monitor as Claims Adjudicator.....	595
16.	Mediators in a CCAA Proceeding	595
17.	Information Officer.....	595
18.	Legislative Reform.....	598
III.	INTERIM RECEIVERS AND RECEIVERS IN CCAA PROCEEDINGS.....	603
IV.	TURNAROUND EXPERTS: COURT OFFICER OR DEBTOR AGENT?.....	604
V.	REPRESENTATIVE COUNSEL.....	606

CHAPTER 10 USE OF CORPORATIONS STATUTES TO EFFECT A RESTRUCTURING	611
I. INTRODUCTION	611
II. THE SOLVENCY REQUIREMENT	616
III. FAIR AND REASONABLE TEST	617
IV. PROCEDURAL REQUIREMENTS	619
V. STAY ORDERS UNDER THE <i>CBCA</i> AND SIMILAR CORPORATIONS STATUTES	623
CHAPTER 11 CROSS-BORDER PROCEEDINGS	633
I. INTRODUCTION	633
II. DEVELOPMENT AND GROWTH OF CROSS-BORDER PROCEEDINGS	634
III. PRE-2009 PRINCIPLES CONTINUE TO BE VALID	638
IV. ADOPTION OF PART IV OF THE <i>CCAA</i>	646
1. Purpose of the Cross-Border Insolvency Provisions	646
2. Definition of Foreign Proceedings and Foreign Representatives	647
i. Attornment	648
3. Presumption of Centre of Main Interest (COMI)	649
i. The COMI of Entities in a Corporate Group	654
4. Recognition of Foreign Proceeding	658
5. Recognition of a Foreign Non-Main Proceeding	661
6. Effect of Recognition Order — Automatic Stay of Proceedings	662
7. Discretionary Orders Made after Recognition Order	663
8. Cooperation	668
9. Representative Seeking Recognition in a Foreign Jurisdiction — Call in Aid of Foreign Courts	672
10. Notice of Proceedings and of Substantial Change	672
11. Public Policy Exception	673
12. Commencement of Proceedings after Recognition of a Foreign Proceeding	675
13. Dividends and Property Received by a Creditor in a Foreign Proceeding	675
14. Examinations of Debtor or Other Persons	676
15. No Adequate Protection Provision	676
16. Interim Financing in Cross-Border Proceedings	677
17. Multiple Proceedings	686
18. Sanctioning a Plan from a Foreign Main Proceeding	688

V.	SALE OF ASSETS IN A CROSS-BORDER PROCEEDING	690
VI.	EMPLOYEE CLAIMS IN CROSS-BORDER PROCEEDINGS	695
VII.	ENVIRONMENTAL CLAIMS IN CROSS-BORDER CASES	697
VIII.	CROSS-BORDER PROTOCOLS	697
IX.	COURT TO COURT COMMUNICATION AND JOINT CROSS-BORDER HEARINGS	700
X.	CORPORATE GROUPS	703
XI.	THE CHALLENGE OF LONG-ARM LEGISLATION IN MULTI-JURISDICTIONAL PROCEEDINGS	705
XII.	CONVERSION OF CLAIMS TO CANADIAN CURRENCY.....	709
CHAPTER 12 THE ROLE OF THE SUPERINTENDENT OF BANKRUPTCY IN CCAA PROCEEDINGS		711
I.	THE ROLE OF THE SUPERINTENDENT OF BANKRUPTCY	711
	1. The Superintendent May Review the Conduct of a Monitor	712
	2. Record of Proceedings.....	714
	3. Written Decision must be Timely.....	714
II.	REVIEW OF THE ACT	714
CHAPTER 13 CONCLUSION.....		715
APPENDICES		
Appendix 1	<i>Companies' Creditors Arrangement Act</i>	717
Appendix 2	<i>Nortel Networks</i> Initial Stay Order	777
Appendix 3	<i>Nortel Networks</i> US Recognition Order	797
Appendix 4	Ontario Model Initial Order	803
Appendix 5	Explanatory Notes for Long Form and Short Form CCAA Orders — Ontario	819
Appendix 6	British Columbia Model CCAA Initial Order.....	831
Appendix 7	British Columbia Explanatory Notes.....	853
Appendix 8	Alberta Model Order, Post-Amendments.....	859
Appendix 9	Alberta Template Initial CCAA Order — Exploratory Notes..	875
Appendix 10	Saskatchewan Model Initial Order	885
Appendix 11	Saskatchewan Explanatory Notes.....	907
Appendix 12	Québec Superior Court Model Order.....	917

Appendix 13	Québec Claims Meeting Procedure	933
Appendix 14	Plan Sanction Judgment in <i>AbitibiBowater</i>	943
Appendix 15	<i>AbitibiBowater</i> CCAA Plan of Arrangement.....	959
Appendix 16	Cross-Border Insolvency Protocol in Re 360Networks Inc. . .	1043
Appendix 17	Chart Comparing the CCAA Cross-border Provisions with UNCITRAL Model Law and Chapter 15 of the <i>US Bankruptcy Code</i>	1057
Appendix 18	Ontario Superior Court of Justice Commercial List, Protocol Concerning Court-to-Court Communications in Cross-Border Cases	1095
Appendix 19	Learning Materials — Chapter Questions for Discussion ...	1103
Table of Cases	1111
Index	1157