



## Court Protection Under the

# COMPANIES' CREDITORS ARRANGEMENT ACT

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The year 2020 has already ushered many challenges, for both public health and the economy. Between the announcements of the COVID-19 pandemic by the World Health Organization, the numerous government decrees, the forced closure of a large number of businesses, remote work, confinement and physical distancing recommended for all, some companies are no doubt struggling to pay their bills.

In a [previous article](#) published recently, we discussed the mechanism of the debt-restructuring proposal to avoid bankruptcy. This article examines the **Companies' Creditors Arrangement Act** ("CCAA"),<sup>1</sup> which **allows businesses to restructure and honour their commitments while enjoying legal protection**.

Despite the reopening and gradual resumption of certain businesses and activities, some well-known companies have already relied upon the CCAA because of the current COVID-19 crisis.

This legal mechanism is all the more topical since the **Supreme Court of Canada**, as recently as May 8, 2020, rendered a **decision regarding the powers of the judge overseeing the restructuring under the CCAA** ("*Callidus*"). The Supreme Court reversed the Quebec Court of Appeal and confirmed that the **role of a supervising judge is to focus on fairness to all parties**, which is, discussed herein, among the particular goals of the CCAA.<sup>2</sup>

### The purpose of the CCAA

The CCAA provides a set of tools meant to **rescue businesses**. It allows companies in a difficult financial position, especially if they are insolvent or even bankrupt, to **continue their activities while trying to reorganize or obtain creditor approval for some transactions**.<sup>3</sup> Indeed, "the reorganization serves

the public interest by allowing the **survival of companies** that supply goods or services essential to the health of the economy or by preserving a large number of jobs”.<sup>4</sup>

Courts have said that the goal of the CCAA is to **avoid**, as much as possible, the **social and economic repercussions of bankruptcy and to allow companies in difficulty to continue operating**,<sup>5</sup> as well as to minimize losses and to protect communities affected by companies’ financial distress.<sup>6</sup>

However, the CCAA is fundamentally insolvency legislation, and, as such, it must also simultaneously **maximize creditor recovery** and generally **enhance the credit system**.<sup>7</sup>

## Who can rely upon the CCAA?

The CCAA applies to **companies that have more than \$ 5 million in debt**.<sup>8</sup>

**To benefit from the measures available under the CCAA**, companies must, among other things, be bankrupt or insolvent, or have committed an act of bankruptcy<sup>9</sup> within the meaning of the *Bankruptcy and Insolvency Act* (“BIA”).<sup>10</sup> The most commonly used definition of bankruptcy is the fact of having ceased to honor its obligations in general as they come due.<sup>11</sup>

**Any corporation incorporated by federal or provincial law or any corporation that owns assets or carries on business in Canada as well as any income trust** can fall under the protection of the CCAA.<sup>12</sup> However, some companies cannot take advantage of the CCAA. This is the case, for example, with insurance companies, banks, trust and loan companies.<sup>13</sup>

## Filing a CCAA Application

Any company seeking protection under the CCAA must file an **initial application**<sup>14</sup> **before the appropriate court**, depending on the province. **In Québec**, the court having jurisdiction to hear this type of case is the Superior Court.<sup>15</sup>

**The procedure is filed** in the province where the company's head office or main business office is located in Canada, or, if the company does not have a business office in Canada, in the province where some company assets are located.<sup>16</sup>

The court hearing the initial application can make various orders that it considers necessary. It can stay, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company, until otherwise ordered by the court. The court can also suspend further proceedings in any action, suit or proceeding against the company; it can prohibit the commencement of any action, suit or proceeding against the company.<sup>17</sup> Clearly, the court can also deny a company CCAA protection.

Furthermore, the court may make **changes to the conclusions of the request**, if this is necessary for various considerations. **In the case of *Industries Show Canada Inc.* (*Arrangement relatif à*)**,<sup>18</sup> the court had to determine whether it was justified to grant a priority charge that would compensate the directors of the debtor company against lawsuits or convictions for any sum for which these directors would be



held personally responsible as director.<sup>19</sup> The court concluded that, in the circumstances, it would not be appropriate to place such a burden.<sup>20</sup>



As each case is determined on its merits, **the court analyzes the circumstances and the facts and can, where justified, even amend the parties' conclusions accordingly.**

The court has **wide discretion** that it must exercise in order to promote the notion of “basic fairness that permeates Canadian insolvency law and practice”.<sup>21</sup>

**In *Callidus***, the Supreme Court of Canada clarifies the scope of this judicial discretion and highlights that it is actually even broader than with the application of the BIA.<sup>22</sup> In *Callidus*, the Supreme Court held that **the supervising judge has the discretion to bar a creditor from voting on an arrangement plan, if the creditor is seen to be acting for an improper purpose**, even in the absence of an explicit provision to that effect in the CCAA.<sup>23</sup> That judge could also **approve third party litigation funding as interim financing**, pursuant to section 11.2 CCAA.<sup>24</sup>

## The arrangement plan

A company under the protection of the CCAA must **plan an arrangement with its creditors.**

This plan must in particular **provide for the payment of employees of the company** of an amount equal to or greater than what is due to them as well as the **reimbursement of any unpaid contributions to the pension plans** of said employees, if the company participates in such a plan.<sup>25</sup> In addition, **unpaid deductions at source** will also have to be paid, as will other amounts owed to the state.<sup>26</sup>

**Failure to comply with these conditions** will result in the arrangement plan not to be approved by the court.

The court will also have to ensure that a **majority in number representing two thirds in value of the creditors accepts the arrangement** in order to approve the said plan.<sup>27</sup>

## Why choose the CCAA

There are **many advantages** to consider using the CCAA:

- First, it is a way to try to **avoid bankruptcy** and allow the company to **continue operating**, to reorganize and ultimately to give it a new lease on life.
- Under the CCAA, it is **not mandatory** for the debtor company **to notify its creditors, employees or other stakeholders of its intention to file an initial claim.**
- The CCAA allows **greater flexibility than the BIA and provides a greater judicial discretion.**<sup>28</sup> These CCAA benefits are useful among other things for large companies, since they **facilitate more complex and large-scale restructuring.**

- From the beginning, the court appoints a **controller**, who is an authorized trustee, to administer the process to its term.<sup>29</sup>
- **The company's protection extends across Canada.** However, the protection does not apply to persons who have personally guaranteed or otherwise guaranteed the obligations of the company.<sup>30</sup>
- The CCAA allows the company to obtain **temporary financing** by encumbering its assets in favor of a new lender. To do this though, it will be necessary to obtain court authorization.<sup>31</sup>
- Upon request to the court, the latter may declare **any person as being an essential supplier of the company** and order that supplier not to cease supplying the debtor company.<sup>32</sup>
- Unlike the BIA, the CCAA **does not provide specific deadlines to prepare and file the arrangement plan.** It will be up to the court to provide for this period, which the court can also extend.<sup>33</sup> For example, if it turns out that the initial period was not sufficient to reach an arrangement with the creditors and the debtor company engages in serious discussions or negotiations to obtain new investors, the court may conclude that it is justified to extend the initial deadline.<sup>34</sup>
- Unlike the BIA, **the court's refusal to approve the arrangement does not always imply the automatic bankruptcy of the debtor company.**

## Conclusion

The CCAA offers **many benefits** and can be a good choice in the event that a business experiences financial difficulties and to the extent that the said business is eligible.

The **greater flexibility** it offers makes it easier for debtor companies and creditors to find common ground.

**Creditors also have an interest in cooperating** with a company that owes money and that has placed itself under the protection of the CCAA. The creditor is therefore more likely to recover amounts owed.

Despite the fact that everyone is going through difficult times and tries to adapt to the new realities since the beginning of the COVID-19 crisis, both socially and in business, several remedies such as those provided for in the CCAA may be available to assist companies in financial difficulty.

**The information and commentary set forth herein are for the general information of the reader and are not intended as legal advice or as an opinion to be relied upon in relation to any particular circumstances.**

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<sup>1</sup> R.S.C. 1985, c. C-36.

<sup>2</sup> 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, par. 75 and 107 (“Callidus”).

<sup>3</sup> *Id.*, par. 40 and 41; Government of Canada, *You are Owed Money — The Companies' Creditors Arrangement Act*, online : <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02284.html>.

<sup>4</sup> *Century Services Inc. v. Canada (Procureur général)*, 2010 SCC 60, par. 18; Callidus, *supra* note 2, par. 41; S. E. Edwards, “Reorganizations Under the Companies' Creditors Arrangement Act” (1947), 25 *Canadian Bar Review* 587, p. 593

<sup>5</sup> *Routhier v. Ameublement Tanguay*, 2018 QCCS 2043, par. 31.

<sup>6</sup> *Callidus, supra.*, note 2, par. 42.

<sup>7</sup> *Id.*

<sup>8</sup> Art. 3(1) CCAA.

<sup>9</sup> Art. 2 CCAA.

<sup>10</sup> L.C. 1985, c. B-3.

<sup>11</sup> Art. 42(1) BIA.

<sup>12</sup> Art. 2 CCAA.

<sup>13</sup> Art. 2 CCAA.

<sup>14</sup> Art. 11 and following CCAA

<sup>15</sup> Art. 2 CCAA.

<sup>16</sup> Art. 9(1) CCAA.

<sup>17</sup> Art. 11.02(1) CCAA.

<sup>18</sup> 2009 QCCS 5788 (“Industries”).

<sup>19</sup> Art. 11.51 CCAA.

<sup>20</sup> *Industries, supra.*, note 17.

<sup>21</sup> *Callidus, supra.*, note 2, par. 73 and 75.

<sup>22</sup> *Id.*, par. 73.

<sup>23</sup> *Id.*, par. 2, 3, 58, 65 to 70, 78.

<sup>24</sup> *Id.*, par. 2 et 3, 90, 93, 96, 97 and 105.

<sup>25</sup> Art. 6(5) and (6) CCAA.

<sup>26</sup> Art. 6(3) CCAA.

<sup>27</sup> Art. 6(1) CCAA.

<sup>28</sup> *Callidus, supra* note 2, par. 73.

<sup>29</sup> Art. 11.7(1) CCAA.

<sup>30</sup> *Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc. (Arrangement relatif à)*, 2015 QCCS 4716.

<sup>31</sup> Art. 11.2(1) CCAA

<sup>32</sup> Art. 11.4(1) and (2) CCAA.

<sup>33</sup> *Conporec inc. (Arrangement relatif à)*, 2009 QCCS 999.

<sup>34</sup> *Id.*, par. 5 to 12.