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# Aligning Nigeria’s Companies and Allied Matters Act with Restructuring Objectives: A Comparative Analysis Using Key Areas of Interest in Canada’s Insolvency Regime

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## ABSTRACT

Despite the commendable inclusion of restructuring options in Nigeria's *Companies and Allied Matters Act* 2020 ("*CAMA* 2020"), there are still some issues to be addressed in order to fully align *CAMA*'s restructuring regimes with its goals. This paper undertakes a comparative analysis of the *CAMA* and the relevant Canadian laws in this respect (particularly the *Companies' Creditors Arrangement Act* ("*CCAA*") which are aimed at restructuring insolvent corporations. Given the broad nature of a general comparison of insolvency regimes, the approach of this research will be to highlight some key areas of interest under both the *CAMA* and the *CCAA*. These will then serve as a basis for the comparative analysis as these issues go to the core of restructuring.

**Keywords**: Bankruptcy; Insolvency; Restructuring; Reorganization; Corporate rescue; Liquidation; Interim Financing; Judicial discretion; Administrator; Monitor.

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# INTRODUCTION

According to the United Nations Commission on International Trade Law (UNCITRAL)'s *Legislative Guide on Insolvency Law*, there is broad agreement that effective and efficient insolvency regimes should aim to achieve certain specific key objectives in a balanced manner.[1] The World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes also sets out key principles for evaluating insolvency regimes.[2] The World Bank and UNCITRAL, in consultation with the International Monetary Fund, designed the Insolvency and Creditor Rights Standard (the "ICR Standard") to establish the international consensus on best practices for evaluating and strengthening national insolvency and creditor rights systems.[3] The ICR Standard does this by combining the World Bank Principles for Effective Insolvency and Creditor/Debtor

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[1] UNCITRAL, Legislative Guide on Insolvency Law, p. 10-15. These objectives are: provision of certainty in the market to promote economic stability and growth; maximization of value of assets; striking a balance between liquidation and reorganization; ensuring equitable treatment of similarly situated creditors; provision for timely, efficient and impartial resolution of insolvency; preservation of the insolvency estate to allow equitable distribution to creditors; ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; recognition of existing creditor rights and establishment of clear rules for ranking of priority claims; and establishment of a framework for cross-border insolvency.

[2] The World Bank, Principles for Effective Insolvency and Creditor/ Debtor Regimes. Online <https://openknowledge.worldbank.org/bitstream/handle/10986/35506/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf> at p. 7. It provides that "although approaches vary, effective insolvency systems have a number of aims and objectives. Systems should aspire to: (i) integrate with a country's broader legal and commercial systems; (ii) maximize the value of a firm's assets and recoveries by creditors; (iii) provide for the efficient liquidation of both nonviable businesses and businesses whose liquidation is likely to produce a greater return to creditors and reorganization of viable businesses; (iv) strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one proceeding to another; (v) provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors; (vi) provide for timely, efficient, and impartial resolution of insolvencies; (vii) prevent the improper use of the insolvency system; (viii) prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments; (ix) provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information; (x) recognize existing creditor rights and respect the priority of claims with a predictable and established process; and (xi) establish a framework for cross border insolvencies, with recognition of foreign proceedings. Where an enterprise is not viable, the main thrust of the law should be swift and efficient liquidation to maximize recoveries for the benefit of creditors. Liquidations can include the preservation and sale of the business, as distinct from the legal entity. On the other hand, where an enterprise is viable, meaning that it can be rehabilitated, its assets are often more valuable if retained in a rehabilitated business than if sold in a liquidation".

[3] The World Bank, Creditor Rights and Insolvency Standard. Online < https://thedocs.worldbank.org/en/doc/538701606927038819-0130022020/original/ICRStandardJan2011withC1617.pdf>.

Regimes and the UNCITRAL Legislative Guide on Insolvency Law. The Financial Stability Board[4] has recognized and designated the ICR Standard as one of the key standards for sound financial systems and deserving of priority implementation depending on each country's circumstances. A common feature of the UNCITRAL Legislative Guide, World Bank Principles and the ICR Standard, is the goal of maximizing the insolvent company's value while ensuring the fair treatment of creditors.

Chapter 1 will discuss how these guiding principles have been incorporated into the *CCAA* and the *CAMA*. As will be explained in Chapter 1, the policy objectives of the *CCAA* can be summarized as follows: 1) the maximization of returns to creditors; (2) the protection of wider stakeholder interests and (3) debtor rehabilitation.[5] Likewise, the policy objective of the *CAMA* is corporate rescue: to keep the insolvent company operating as a going concern.[6] With this in mind, the subsequent sections will consider how court-supervised liquidation can be justified and can fit into the objectives of restructuring law. The comparative analysis undertaken in this paper is necessary because Nigeria's insolvency regime has been neglected for many years, and this has drastically affected Nigeria's ease of doing business ranking where Nigeria was ranked at 131 in 2020 and was recorded to have performed poorly in the area of "resolving insolvencies".[7] The

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[4] The Financial Stability Board (FSB) is an international body that monitors and makes recommendations about the global financial system. The FSB promotes international financial stability; it does so by coordinating national financial authorities and international standard-setting bodies as they work toward developing strong regulatory, supervisory and other financial sector policies. See, Financial Stability Board, About the FSB. Online <https://www.fsb.org/about/>.

[5] Stephanie Ben-Ishai & Thomas GW Telfer, eds, *Bankruptcy and Insolvency Law in Canada: Cases, Materials, and Problems* (Toronto: Irwin Law, 2019) at 507.

[6] Section 444(2) of CAMA provides that notwithstanding the other objectives of Administration, the rescue of the company is the primary objective of the Administrator in the performance of his functions, except where he is of the opinion that it is not reasonably practicable, or a better result can be achieved for the company's creditors by pursuing some other course in order of priority as specified in that subsection. Thus, the objectives of Administration are listed in order of priority under the Act.

[7] World Bank, *Doing Business 2020* (Washington, DC: World Bank).

overall objective will be to highlight the goals of restructuring law and improvements that could be made to Nigeria's insolvency regime using Canada as a benchmark. As much as it will make recommendations for improvement, this paper will also highlight the pitfalls of some practices in Canada, particularly by the courts, and why these practices should not be adopted in Nigeria. The recommendations will be structured to suit the Nigerian system by considering the economy and external factors which can affect the outcome of a restructuring in Nigeria. These recommendations would also be largely proactive and serve as a future guide to Nigerian courts and legislators due to the dearth of restructuring cases in Nigeria, from which a practical approach to restructuring can be drawn. This would be one of the significant differences with Canada, which already has a developed jurisprudence in this area of law.

More specifically, the areas to be addressed are: the role of a *CCAA* Monitor versus an Administrator under the *CAMA*; debtor-in-possession financing under the *CCAA* vis-à-vis debtor financing options under the *CAMA*; court-supervised liquidation under the *CCAA*, vis-à-vis the *CAMA* equivalent; the extent of discretion granted to supervising *CCAA* judges vis-à-vis the discretionary power of Nigerian courts in restructuring proceedings; and the use of corporate statutes to effect an insolvency restructuring in Canada, compared with similar corporate legislation in Nigeria.

**Methodology and Summary of Chapters**

The methodology for this research will be primarily comparative as well as doctrinal. The paper is set out in 5 chapters, as follows:

Chapter 1 will consider the policy objectives of the *CAMA* and the *CCAA*, as a prequel to analyzing the divergent approaches in these statutes despite their similarity in objectives. It will

examine and contrast the debtor-in-possession model under the *CCAA* and the management-displacement model under the *CAMA,* the rationales behind each model and arguments made in support of and against these models. It will conclude by highlighting the author's views and recommendations on both models and recommendations with reference to the respective policy objectives of the *CCAA* and the *CAMA*.

Chapter 2 will consider interim financing generally, by highlighting the need for interim financing in insolvency restructuring, the applicable provisions in the *CCAA* and the absence of similar provisions in the *CAMA*, which will then lead to recommendations on the need for interim financing options in the *CAMA.*

Chapter 3 will consider the nature and extent of discretion granted to *CCAA* judges and the courts under the *CAMA.* It will consider the significant role of the courts in restructuring proceedings and whether deference should be given to courts when decisions are made in insolvency proceedings.

Chapter 4 will consider the new trend of liquidation as an alternative to restructuring. It will consider the enabling provisions in the *CCAA* and *CAMA* and then make recommendations suggesting the cautionary use of liquidation as an alternative to restructuring.

Chapter 5 will consider arrangements under the *Canada Business Corporations Act* ("*CBCA*") and the *CAMA*, as well as the appropriateness of using arrangement provisions to restructure insolvent entities, especially with the express exclusion of insolvent companies in the applicability of *CBCA* arrangements.

The concluding chapter will highlight key recommendations for reforming the *CAMA* which could be expected to better align the *CAMA*'s provisions with its stated corporate rescue goals.

# CHAPTER ONE

## DEBTOR-IN-POSSESSION VERSUS MANAGEMENT DISPLACEMENT: THROUGH THE LENS OF A MONITOR UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT (CCAA)* AND AN ADMINISTRATOR UNDER THE NIGERIAN *COMPANIES AND ALLIED MATTERS ACT (CAMA)* 2020

## I. INTRODUCTION

This chapter examines the policy objectives of Canada's *Companies' Creditors Arrangement Act*[8] (*CCAA*) and Nigeria's *Companies and Allied Matters Act*[9] *(CAMA),* specifically as they relate to insolvency and restructuring. As this chapter will rightly reveal, the policy objectives upon which both the *CCAA* and the insolvency provisions of the *CAMA* are premised is simply "corporate rescue".[10] However, despite the prima facie "unity in objectives", the methodologies adopted by both statutes are rather different. For clarity, the *CCAA* adopts the debtor-in-possession (DIP) model in which the management of the debtor entity is not displaced despite the appointment of the Monitor, while the *CAMA* adopts the management-displacement model where the management of the debtor company is displaced upon the appointment of an Administrator, who then manages the entity. The questions that follow are: why are statutes with similar objectives employing two different models and which model or approach is best suited to achieve the underlying objectives of these statutes and of restructuring generally?

Part II will focus on the *CCAA*, beginning with understanding the policy objectives of the Act drawing from the jurisprudence which will lay the foundation for describing the evolution and role of the Monitor. Understanding the role of the Monitor will enhance appreciation of the debtor-in-possession

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[8] *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36) *(CCAA)*.
[9] *Companies and Allied Matters Act*, 2020 *(CAMA)*.
[10] Corporate rescue entails an intervention aimed at retaining the going concern value of a distressed corporation. For instance, "the *CCAA* has a broad remedial purpose, permitting various methods by which a company can continue the business with a view to becoming viable once again, including compromises or arrangements between an insolvent company and its creditors, and a going-forward strategy for employment, trade relationships and financing"; see Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act,* (Toronto: Thomson Reuters Canada Limited 2013) at 13.

regime adopted under the *CCAA*. Part III will focus on the *CAMA*, beginning also, with an understanding of the policy objectives of chapters 17 and 18 of the Act, which contain the statute's insolvency restructuring provisions, drawing from case law and academic commentaries. Similarly, this will lay a foundation for explaining the role of an Administrator and how it has evolved under Nigerian insolvency law. Part IV will be dedicated to tackling the research questions of this chapter by examining and contrasting the debtor-in-possession model and the management-displacement model. It will consider the rationales behind each model and arguments made in support of and against these models. Part V will conclude this chapter by highlighting this author's opinion on both models and recommendation on which best suits the "unified" policy objectives of the *CCAA* and the *CAMA*. Although arguments will be made in support of both models, this chapter will contend that the *CCAA*'s approach is the most attractive because it includes key elements of both the management-displacement and the debtor-in-possession model. While the *CCAA* gives the directors of the insolvent debtor a "second chance", it also makes provision for the impartial monitoring of their activities, on behalf of creditors, through the role of the Monitor. In a way, this is a "win-win" for all parties.

## II. THE *COMPANIES' CREDITORS ARRANGEMENT ACT (CCAA)*

### 1. Policy Objectives of the *Companies' Creditors Arrangement Act (CCAA)*

It is generally perceived that the *CCAA* has three main policy objectives, namely: (1) the maximization of returns to creditors; (2) the protection of wider stakeholder interests and (3) debtor rehabilitation.[11] Given that the *CCAA* does not contain a purpose clause, the purpose of the Act can only be gleaned from examining the relevant jurisprudence.[12]

In 2010, the Supreme Court of Canada in describing the *CCAA,* noted that it is Canada's first restructuring statute, and its purpose is to permit the debtor to continue to carry on business

[11] *Supra,* note 5.

[12] In *Re Dylex Ltd,* 1995 CarswellOnt 54 at para 10, the court held that "The history of *CCAA* law has been an evolution of judicial interpretation".

and, where possible, avoid the social and economic costs of liquidating its assets.[13] What can be gleaned from the Supreme Court of Canada's decision here is that the *CCAA* aims to preserve the going concern value of the insolvent company while also considering the economic impacts of either preserving the company's going concern value or selling off the company's assets to pay off its debts. Essentially, the *CCAA* strives to maintain a balance between the need to keep a company afloat and other viable options which best serve the interest of the majority stakeholders.

In *Indalex Ltd., Re*[14] the Supreme Court of Canada noted that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent.[15] The court also highlighted the *CCAA*'s remedial aspect, emphasizing that it aims to prevent the negative economic effects of bankruptcy while an effort is made to reorganize the debtor company's financial affairs under court supervision.[16]

In a more recent decision,[17] the Supreme Court of Canada relying on the two cases earlier discussed as well as other cases, noted that:

> The CCAA generally prioritizes avoiding the social and economic losses resulting from liquidation of an insolvent company (Century Services, at para. 70). As a result, the typical CCAA case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the BIA regime.[18]

Understanding the policy objectives of the *CCAA* is central to discussions of the role of a Monitor, a position created by the *CCAA* to further the objectives of the statute. Ultimately,

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[13] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 15.
[14] 2013 SCC 6.
[15] *Ibid*, at para 205.
[16] *Ibid*.
[17] *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10.
[18] *Ibid*, at para 41.

understanding the role of a Monitor will enable appreciation of the debtor-in-possession regime adopted under the *CCAA.*

**2. The Historical Origins of the Role of a Monitor**

The Monitor's role is codified in Section 11.7(1) of the *CCAA* which provides that when an initial application is made under the *CCAA,* the court shall appoint a person to monitor the business and financial affairs of the company.[19]

Monitors were recognized prior to the codification of the role of the Monitor in the *CCAA* albeit with a different nomenclature. In the 1980s and the 1990s, courts had to appoint "supervisors" to oversee insolvency proceedings owing to demands by debtors. The term "Monitor", was first coined by the Supreme Court of Canada in 1988 in *Re Northland Properties Ltd*[20] where the court held that it had the jurisdiction to "appoint an interim receiver and spell out the responsibilities of that office such that his true role would be that of a monitor or watchdog during this interim period".[21] Prior to the codification of the Monitor's role in 1997, Monitors were appointed based on the court's inherent jurisdiction.[22] At the time, Monitors were called "interim receivers" and their role was similar to interim receivers appointed under Section 46 of the *Bankruptcy and Insolvency Act.*[23] In *Re Fairview Industries Ltd,*[24] the Court concluded that the Monitor was an agent of the court and in *Re United Used Auto & Truck Parts Ltd,*[25] the Court held

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[19] Section 23 of the *CCAA* provides a comprehensive list of the duties and functions of the Monitor. Section 25 of the *CCAA* is also noteworthy as it codifies the Monitor's duty to act in good faith.
[20] (1988) CarswellBC 531.
[21] *Ibid,* at para 44.
[22] Julie Himo and Arad Mojtahedi, "The Evolving Role of the Eyes and Ears of the Court: Empowering the CCAA Monitor to Initiate Legal Proceedings Against Third Parties" [2020] Ann Rev Insol L 120, 2020 CanLIIDocs 3599, online: <https://canlii.ca/t/t1wn>.
[23] *Ibid*; *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3) *(BIA).*
[24] 1991 CarswellNS 35 at para 100 (SC (TD).
[25] 1999 CarswellBC 2673.

that the Monitor was an officer of the court, saddled with an "obligation to act independently and to consider the interest of the petitioners and its creditors".[26]

The Supreme Court of Canada in describing the responsibility of the Monitor, held in *Re Stokes Building Supplies Ltd*:[27]

> The Monitor is an agent of the court with the responsibility of helping the court discharge its obligations under the Act. The court on an ex parte hearing does not have the opportunity to realistically determine the scope of the Monitor's mandate. The Court must also determine whether the proposed Monitor has the necessary expertise to discharge its obligations.

The court went on to hold that it was crucial for courts to guarantee that neither the creditors nor the shareholders could have any influence over the Monitor. The Monitor must not be involved in a "conflict of interest" because they are an agent of the court, and the court is the Monitor's exclusive accountability.[28]

In 1997, Parliament amended the *CCAA* to expressly provide for the appointment of Monitors. Since then, the role of the Monitor has been enlarged. The Monitor's primary duties historically have been to reassure lenders of the impartiality of the process and to offer an unbiased evaluation of the debtor's financial situation and management's efforts to restructure the business while a plan of arrangement is being established. In other words, the Monitor's responsibility was to make sure the debtor stuck to their plan and did not abuse the *CCAA*.[29]

The appointment of a Monitor is key in the debtor-in-possession model because he or she will "monitor" the debtor during the proceeding, to ensure that the debtor does not engage in any conduct that will prejudice the interests of the creditors and other stakeholders. The Monitor also assists the debtor in remaining compliant with the terms of the initial court order, as there can be

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[26] *Ibid,* at para 20.
[27] 1992 CarswellNfld 20 at para 15 (SC).
[28] *Ibid,* at para 15.
[29] Julie Himo and Arad Mojtahedi, *supra* note 22.

confusion at the operational level regarding the scope of permitted activity once the stay protection is granted.[30]

## III. THE *COMPANIES AND ALLIED MATTERS ACT (CAMA)* 2020

### 1. Policy objectives of the *Companies and Allied Matters Act (CAMA)* 2020

*CAMA* is the principal legislation which regulates Nigeria's corporate sphere and provides a regulatory framework on how businesses should be conducted including pre-formation of the business, formation of the business, the existence of the business, the dissolution of the business as well as other incidental provisions. It is imperative to distinguish *CAMA* from the *CCAA*, especially in terms of its scope and applicability. While the *CCAA* can readily be classified as an insolvency statute, *CAMA* differs in the sense that only a portion of the *CAMA* contains provisions bordering on insolvency, while the rest of the Act provides a regulatory framework for how businesses in Nigeria should operate. Essentially, *CAMA* is a very broad statute with 870 sections and can properly be described as the codification of Nigeria's corporate law. Given the broad nature of *CAMA*, the policy objectives to be considered here will be primarily on the portions of the Act dedicated to Insolvency Law.

The *CAMA* 1990, which was in effect until it was repealed in 2020, was thought by many to be insufficient for addressing the problems with Nigeria's corporate law. Scholars have suggested that the *CAMA* 2020 will significantly alter the corporate landscape in Nigeria.[31] An observable lacuna in the corporate landscape before the enactment of the *CAMA 2*020 was the dearth of legislation and regulation in corporate insolvency practice in Nigeria.[32]

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[30] Janis Sarra, *supra* note 10 at 566.

[31] Uzoma Azikiwe, SAN Festus Onyia, FCIArb, UK and Mesuabari Mene-Josiah. *Nigeria: Innovations in Corporate Insolvency in Nigeria Under the Companies and Allied Matters Act, 2020 – Insolvency Practitioners,* online: <https://www.mondaq.com/nigeria/insolvencybankruptcy/1102386/innovations-in-corporate-insolvency-in-nigeria-under-the-companies-and-allied-matters-act-2020-insolvency-practitioners>.

[32] *Ibid.*

*CAMA* 2020 made significant changes to Nigeria's insolvency regime. Its underlying philosophy is the promotion of corporate rescue as opposed to the termination of the life of insolvent companies.[33] An important case to consider here is the Supreme Court of Nigeria's decision in *Air Via Ltd v Oriental Airlines Ltd*[34] where the Court stated the adverse nature of winding up proceedings and the fact that it should not be used as a substitute for a debt recovery action. Essentially, what existed before *CAMA* 2020 was liquidation/ winding up of insolvent companies without avenues for corporate rescue. Although this decision of the Supreme Court dates to 2004, corporate rescue has always been a consideration for the courts, but the repealed *CAMA* did not facilitate this regime. It can be argued that Nigeria's insolvency regime in the *CAMA* 2020, fosters efforts to retain a distressed company's going concern value.

It is important to note here that the insolvency regimes in *CAMA* 2020 are modelled after the United Kingdom's *Insolvency Act of 1986*.[35] *CAMA* 2020 introduced insolvency regimes for financially distressed companies such as Company Voluntary Arrangement (CVA) and Administration, and these are both aimed at fostering business rescue.[36] In a CVA, the directors of a corporation may propose a composition in fulfilment of the company's debts or a plan of arrangement of its affairs to help the corporation out of its bad financial situation to its creditors, A certified insolvency practitioner will also be appointed as either a trustee or nominee to oversee the proposal's execution under the proposal.[37] There is no precise definition of CVA in the Act but drawing from the practice in the United Kingdom, CVAs are a mode of rescuing the company

[33] Hon. Justice (Dr) Nnamdi Dimgba. *Changes to Nigeria's Insolvency System by the Companies and Allied Matter Act, 2020: A Judicial Perspective*, online: <https://www.clrnn.net/2021/03/05/changes-to-nigerias-insolvency-system-by-the-companies-and-allied-matter-act-2020-a-judicial-perspective/>.
[34] (2004) 4 SC (Pt.11) 3; [2004] 9 NWLR (Pt. 978) 298.
[35] Chioma Ezinne Adiele, *Developing a Corporate Insolvency Framework for Nigeria* (2020). Master of Laws Research Papers Repository 9, online: <https://ir.lib.uwo.ca/llmp/9> at 78; *Insolvency Act 1986 (c 45).*
[36] Perenami Momodu and Odinaka Okoye. *Nigeria: The Evolution of Business Rescue in Nigeria.* online: <https://www.mondaq.com/nigeria/insolvencybankruptcy/809026/the-evolution-of-business-rescue-in-%20nigeria>.
[37] Section 434, *CAMA*.

through an arrangement with the creditors, to accept to be paid all or less than what they are owed by the debtor.[38]

Likewise, the main objectives of Administration are (1) to rescue the company, the whole or any part of its undertaking as a going concern; (2) to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration; and (3) realize property in order to make a distribution to one or more secured or preferential creditors.[39] In Administration, an Administrator is appointed to manage the insolvent company's assets with the intention of retaining the company's going concern value.[40] The Administrator is required under the *CAMA* to be a qualified insolvency practitioner.[41] The Administrator is also entitled to remuneration payable from the property in the Administrator's custody. The key point here which differs from the *CCAA* is that once the Administrator is appointed, the control of the debtor company will vest in the Administrator while the management of the debtor company will lose the power or control they had over the company's affairs. This explains why the model adopted under the *CAMA* is management-displacement as opposed to the *CCAA* which is the debtor-in-possession model.

Interestingly, the most significant feature of Administration under the *CAMA* is the moratorium. The moratorium, as described under section 480 prohibits the filing of winding-up petitions, the implementation of security measures, the recovery of goods purchased on hire-purchase, and the use of the right of forfeiture by peaceful re-entry. These rights are not lost but

[38] *Supra,* note 35 *at* 79.
[39] Section 444, *CAMA.*
[40] *Supra*, note 35 at 83.
[41] Section 447(1), *CAMA*.

suspended during the 12-month administration process. The goal is to provide the Administrator with some breathing room so that he or she can fulfil his duties without being hampered.[42]

The above goes to show that the underlying policy objectives of the insolvency regime in *CAMA*, is corporate rescue: to keep the insolvent company as a going concern. Section 444(2) of *CAMA* provides that notwithstanding the other objectives of Administration, the rescue of the company is the primary objective of the Administrator in the performance of his functions, except where he is of the opinion that it is not reasonably practicable, or a better result can be achieved for the company's creditors by pursuing some other course in order of priority as specified in that subsection. Thus, the objectives of Administration are listed in order of priority under the Act.

Understanding the policy objectives of the *CAMA* is central to discussions on the role of an Administrator, a position created by the *CAMA* to further the objectives of the statute. Ultimately, understanding the role of an Administrator will enable appreciation of the management-displacement regime adopted under the *CAMA*.

## 2. The Historical Origin of the role of an Administrator

The law prior to the *Insolvency Act of 1986* (UK) did not make provisions for Administration but instead provided for receivership as the only form of an insolvency proceeding. Receivership "viewed liquidation as the centrepiece of corporate insolvency law and concerned itself primarily with the disposal of the business, where it could be sold as a going concern, or with individual assets on a break-up basis".[43] In the 1982 Cork Report, the Insolvency Law Review Committee proposed Administration with the view to "managing a company's business during a period of grace in the hope of reorganizing the company and restoring it to profitability".[44]

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[42] *Supra,* note 33.

[43] Roy Goode, *Principles of Corporate Insolvency Law'* 4th ed (London: Sweet & Maxwell, 2011), Ch. 11—03.

[44] Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* 2nd ed (Cambridge: Cambridge University Press, 2009) at 15.

Therefore, the Cork Report's proposals introduced the rescue culture, which was a shift from the excessively punitive and stigmatic than rehabilitative previous law.[45] This necessitated Administration proceedings as contained in the *Insolvency Act of 1986* (UK) with the objectives mentioned earlier. The goal was to establish a rescue culture.[46]

## IV. DEBTOR-IN-POSSESSION VS. MANAGEMENT-DISPLACEMENT: WHICH APPROACH BEST SUITS THE POLICY OBJECTIVES OF RESTRUCTURING?

Following the previous discussion of proceedings under the *CCAA* and Administration under the *CAMA*, it is clear that both statutes have similar objectives but divergent approaches. The *CCAA* employs the debtor-in-possession model as it permits the insolvent debtor to remain in control of its assets and affairs during a restructuring. In contrast, the *CAMA* employs a management-displacement model where the debtor's incumbent managers are replaced with a licensed insolvency professional. These differing approaches reflect the competing policy concerns about who should control the restructuring process and why.[47]

The debtor-in-possession model is premised on several factors, foremost among which is the likelihood that the debtor's current management is already familiar with the operations of the business, saving both money and time when compared to the case where an outside practitioner is appointed automatically and must quickly become familiar with the operations of the debtor's business. Another factor to consider here is that maintaining ownership of the company is another element that might persuade the current management to handle the debtor company's problems

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[45] Priscilla Chow, *The Administration procedure: How effective is it and can its objectives be reconciled with that of the policies underlying the rest of insolvency law?* online: <https://sites.google.com/site/349924e64e68f035/issue-6/the-administration-procedure-how-effective-is-it-and-can-its-objectives-be-reconciled-with-that-of-the-policies-underlying-the-rest-of-insolvency-law >.

[46] Keith Wilson and Alper Deniz, *A Short Guide to UK Insolvency Law: Administration*, online: <https://webstorage.paulhastings.com/Documents/PDFs/1028.pdf>.

[47] Vern W DaRe and Alfonso Nocilla, "Bestriding the Narrow World: Is It Time to Bifurcate the Role of the CCAA Monitor?" [2020] Ann Rev Insol Law 224, 2020 CanLIIDocs 3603, online: <https://canlii.ca/t/t1ws>.

sooner rather than later when restructuring is still a realistic option, to increase the likelihood of success.[48] Under a severe enforcement environment that could result in their removal from office, risk-averse management might become less motivated to work hard. In other words, the DIP presumption advances restructuring goals because management is not automatically replaced in favour of outsiders as a punishment. This is because the management is aware that the success of the company will work in their best interest and vice versa.

One may argue that having a DIP policy goes hand in hand with encouraging a company to employ reorganization processes as soon as there are indications of financial difficulty rather than delaying treatment until the condition may be irreversible. During the debate on the United States Bankruptcy Code, this idea was undoubtedly advocated. It was argued that the then-proposed Chapter 11, recognizes the need for the debtor to remain in control to some degree or else debtors will avoid the reorganization provisions in the Bill until it would be too late for there to be an effective remedy.[49] The desire of management to retain their jobs may lead them to "hang on" for as long as possible even when the company is in financial distress because an assignment in bankruptcy is likely to lead to the loss of their jobs.

The American Bankruptcy Institute Report[50] on Chapter 11 also strongly favoured preservation of the DIP model:

> The ability of the debtor in possession to continue to operate through its prepetition management team facilitates the company's seamless transition into chapter 11 and allows the debtor to avoid the additional time, cost, and resulting inefficiencies of bringing in an outsider who is not familiar with the debtor's business specifically or the debtor's industry generally. The prepetition management team may also have industry relationships or "know-how" that would benefit the debtor's restructuring efforts.[51]

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[48] American Bankruptcy Institute Commission Report, online: <https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h> at 22.
[49] Lynn LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (Ann Arbor: University of Michigan, 2005) at 173.
[50] *Supra,* note 46.
[51] *Ibid,* at 22.

The debtor-in-possession model's detractors point out that the debtor's financial or operational issues may be related, at least in part, to the behaviour or choices of the bankruptcy's prepetition directors and officers.[52] Some critics contend that retaining control of the debtor's management team, which was in charge during the company's financial fall, encourages poor performance and erodes stakeholders' faith in the reorganization process.[53] Some critics are also concerned that prepetition management may be driven by considerations that are not always in the company's best interests, like keeping their jobs or downplaying prepetition events that could link them to the debtor's financial problems.[54]

The regime under the *CCAA* fits into the DIP model and while arguments can be made in support of this model owing to the independence of the Monitor, in recent times, said independence has been questioned as the Monitor owes a duty to the court, the creditors and the debtor company. It may be impractical to expect a "conflict-free" insolvency proceeding when a single person represents three factions who are very likely to have opposing views, interests, and objectives. There is a possibility for Monitors to lose their objectivity as their responsibilities grow and they take on more of the role of an author and architect of a restructuring plan. Practically speaking, the Monitor might be compared to a tightrope dancer who is attempting to balance the interests of all parties involved while still reporting information objectively and impartially.[55]

A good restructuring inevitably necessitates sacrifices and compromises and rarely results in every party being content. After all, the procedure is fundamentally adversarial. Therefore, it is

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[52] A. Mechele Dickerson, *The Many Faces of Chapter 11: A Reply to Professor Baird,* (2004), 12 Amer Bankr Inst L Rev 109 at 135.
[53] Written Testimony of the Honorable Joan N. Feeney: ASM Field Hearing Before the American Bankruptcy Institute Commission to Study the Reform of Chapter 11, at 5 (Apr. 19, 2012).
[54] *Supra,* note 49 at 733.
[55] John I McLean & David P Bowra, "Conflicts and the Modern CCAA Monitor" [2011] Ann Rev Insol Law 16, online:<https://nextcanada.westlaw.com/Document/Ic7658b4ffd6545bae0440021280d79ee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0>.

understandable for several parties to refer to a specific judgment of the court or the Monitor and claim that it was unjust or arbitrary, showing a lack of independence, especially if it included the use of discretion. It would be illogical to question such instances of discretion on their own.[56] Essentially, the suspension of all creditor rights along with the continuation of the debtor corporation in the hands of the same management fit with the notion of allowing the debtor "breathing space" to negotiate a compromise or arrangement with its creditors with the aim to continue its existence and operate its business.[57]

Administration, on the other hand, takes a somewhat different route, where the Administrators will eventually gain control of the debtor company. This is referred to as “management-displacement”. It is premised on the belief that it was under the current management’s watch that the debtor company became insolvent and so leaving them in place could be described as akin to putting the fox in charge of the hen-house.[58]

In Australia, in order to help small businesses deal with the hardships inflicted by the Covid-19 pandemic, the debtor-in-possession model was adopted. It was argued that:

> Debtor in possession offers many advantages. The business dealing with the hardship will be given a small amount of time to negotiate with creditors and potentially avoid insolvency. Debtor in possession is substantially more advantageous than liquidation or administration as the costs are substantially lower. It is also estimated that the returns to creditors will be substantially higher. For a business needing to restructure its operations the opportunity that arises from these new rules are significant and have huge ramifications as they may be the difference between continuing to operate or needing to close down permanently”.[59]

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[56] *Re Winalta Inc*, 2011 ABQB 399 at para 80.

[57] Karma Dolkar, “Re-thinking rescue: A critical examination of CCAA liquidating plans” [2011] Banking and Finance Law Review *27*(1), 111-123.

[58] *Supra,* note 5 at 507.

[59] Craig Dangar was quoted in: *The Benefits of Debtor in Possession & the implications of the Small Business Insolvency Reforms introduced on 1st January 2021,* online: <https://cdrta.com.au/2021/01/20/the-benefits-of-debtor-in-possession-the-implications-of-the-small-business-insolvency-reforms-introduced-on-1st-january-2021/ >.

Another argument made in favour of the debtor-in-possession model is that the act of placing the debtor in possession and control of its affairs is a good mechanism which is perceived to aid the smooth running of the restructuring process. This is because the debtor is better equipped with the skills of tracing the business decisions the company made that led to its financial distress and will then work on returning the company to solvency.[60] This argument emphasises the importance of allowing management deeply versed in the debtor company's affairs, to play an active role in restructuring. It may be easier to pinpoint the problem unlike in an Administration where an outsider has to learn the debtor company's operations from scratch before an attempt to pinpoint the problem can be made.

Again, the priority given to creditors of a debtor-in-possession may make it a more desirable option, especially for highly influential creditors. The debtor-in-possession model provides senior creditors with a certain authoritative primacy. That is, debtor-in-possession financing means that a debtor's major lender(s) will exercise power over management tantamount to an overriding, supervisory authority.[61] This argument is interesting because it can also be relied on by the debtor company in support of the debtor-in-possession model because it qualifies them to obtain debtor-in-possession financing.[62]

Beginning with the *Insolvency Act of 1986* (UK) and with the amendments made through the *Enterprise Act of 2002*, Administration has been a viable insolvency alternative in the United Kingdom for many years. In the end, the Nigerian courts would use the concepts established

[60] *Supra,* note 35 at 132.
[61] Alejandro Gonzalez, *The Measure of a Monitor's Role,* (2021). Electronic Thesis and Dissertation Repository. 8038. online <https://ir.lib.uwo.ca/etd/8038> at 29.
[62] DIP Financing also known, as an "interim financing" is a term used in describing a situation where the debtor remains in possession of its affairs in a restructuring process and receives financing from either a current creditor or a third party. These lenders are referred to as a super priority lenders or DIP lenders. Patrick Cleary, *DIP financing basics and recent case law*, online: <https://www.ahbl.ca/dip-financing-basics-and-recent-case-law/>.

around those provisions in the case law as a reference when applying the administration provisions in *CAMA* 2020. This is because, even though the revised *CAMA* has been in force since 2020, there is a dearth of Nigerian case law in this regard.

## V. CONCLUSION

Ultimately, an opinion on whether the debtor-in-possession model is more advantageous than the management-displacement model will be highly influenced by a person's stance. For instance, creditors may favour the management-displacement model based on the perception that incumbent management is responsible for the debtor's insolvency and that an insolvency professional is more likely to be able to manage the debtor's affairs effectively. On the other hand, many debtors may prefer the debtor-in-possession model because management is not at immediate risk of losing their jobs[63] while the creditors may be hostile to the debtor-in-possession model because they may not be too trusting of the management which "led" the company to financial distress.

One cannot determine whether a management-displacement or debtor-in-possession model is superior, within a vacuum. Most statutes are products of cultural, societal, and political influences, which may be intentional or not.[64] For instance, in a country where bankruptcy or insolvency is frowned upon, management-displacement is likely to be the model adopted as it will serve as a deterrent as well as punishment for the management which led the company to ruin. As Honoré de Balzac commented, a bankrupt "is guilty of the most dishonourable action that can dishonour a man…. a thief whom the law unfortunately takes under its protection".[65] In a society where bankruptcy is viewed as such a grave "sin"

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[63] It is possible that some creditors may prefer the debtor-in-possession model. An example would be in a case where the corporation's management requires high skills or knowledge, and it may be more efficient to retain the directors who are skilled than try to employ new directors or vest control of the company on the Administrator who may require training.

[64] For instance, corporate restructuring initially evolved outside bankruptcy and insolvency law because legislators were suspicious of the potential abuses and frauds that could be perpetrated by debtors if business restructuring were permitted; see Torrie, Virginia. *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act*, (University of Toronto Press, 2020) at 23.

[65] Honoré de Balzac, *Eugénie Grandet* 108 (1833).

and no distinction is drawn between fraudulent bankruptcy and bankruptcy due to unavoidable and unforeseen circumstances, it will be out of place to expect the statute to allow the management, which is usually the directors, retain their jobs as this can be seen as "rewarding wrongdoing". On the contrary, in a society of "second chances" where there is the consideration that bankruptcy or financial distress is not always a result of mismanagement, the debtor-in-possession model would most likely be adopted, and the management of the debtor company will be given a "second chance" to bring the debtor company to life.

This chapter has considered the policy objectives of the *CCAA* and *CAMA* as well as proceedings under the *CCAA* and Administration under the *CAMA*. It has shown that the policy objectives of both statutes are similar, but the models adopted are different. The research questions of this chapter cannot be answered plainly as "the debtor-in-possession model is best" or vice versa, due to other underlying elements such as cultural influences. However, this paper contends that the *CCAA*'s approach is the most attractive because it includes key elements of both the management-displacement and the debtor-in-possession model. While the *CCAA* gives the directors of the insolvent debtor a "second chance", it also makes provision for the impartial monitoring of their activities, on behalf of creditors, through the role of the Monitor. In a way, this is a "win-win" for all parties. It is therefore recommended that this approach be adopted in the *CAMA*.

# CHAPTER TWO

## INTERIM FINANCING UNDER THE *COMPANIES CREDITORS ARRANGEMENT ACT (CCAA)*[66] VERSUS INTERIM FINANCING UNDER THE *COMPANIES AND ALLIED MATTERS ACT (CAMA)*[67].

### I. Introduction

In 2009, Parliament added section 11.2(1) to the *CCAA*, which set out the framework for interim financing.[68] It provides that "on application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made." The inclusion of this provision is premised on the fundamental nature of financing in any restructuring endeavour which is largely owed to the fact that a company undergoing restructuring under the *CCAA* is financially distressed, hence the need for corporate rescue mechanisms.

On the other hand, despite the fact that the *CAMA* 2020 marks a significant improvement in Nigeria's insolvency regime by providing corporate rescue mechanisms, interim financing was not contemplated by the Act. As this chapter will reveal, the importance of financing to a distressed company has been well acknowledged by the Nigerian legislature and measures have been put in place to support this. Unfortunately, these provisions only apply to banks and other financial

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[66] *Supra,* note 8.
[67] *Supra,* note 9.
[68] Interim financing or debtor-in-possession (DIP) financing can simply be described as a loan facility provided to a company undergoing restructuring (in this case under the *CCAA*) with the intention that the inflow of cash will help sustain the company's operations while the *CCAA* restructuring plan is being executed.

institutions. While the particular interest in seeing to the success of financial institutions is justified, due to their role in boosting the Nigerian economy, the question then becomes: "why was interim financing not provided for under the *CAMA* for non-financial institutions and what effect will this have on the restructuring regimes under the *CAMA*?"

This chapter will begin by considering the need for interim financing from the *CCAA* perspective. It will consider the rationale leading to judicial decisions and the subsequent codification of interim financing provisions under the *CCAA*. It will also consider various aspects of interim financing as addressed by the Canadian courts. The subsequent part will focus on the *CAMA* perspective of interim financing and as stated earlier, will reveal that this was not contemplated by the *CAMA*. It would compare this to the rescue system for failing banks and financial institutions in Nigeria, which is more detailed and makes provision for interim financing.

This chapter will conclude by recommending that there should be provisions for interim financing in Nigeria and that these should be codified and structured after that of the *CCAA* as the importance of interim financing in a restructuring endeavour cannot be overemphasized.

## II. The Need for Interim/ Debtor-in-Possession (DIP)[69] Financing (*CCAA Perspective)*

One of the many benefits of restructuring under the *CCAA* is the stay of proceedings.[70] The rationale of this stay is to provide the debtor company with "breathing room" to continue in business with the goal of improving the company's business outlook. However, at the point where *CCAA* proceedings have been initiated, the debtor company is already in financial distress, which

[69] Interim financing is also referred to as debtor-in-possession financing because the debtor company remains in possession and the financing is provided to the debtor company to enable it continue operations.

[70] Section 11.02 (1) of the *CCAA* provides that a court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days, (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*; (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

makes it difficult for the company to continue in business without some form of financing. This often necessitates an order granting interim/DIP financing.

In *Medipure Pharmaceuticals Inc. (Re)*[71], the British Columbia Supreme Court noted the following about interim financing:

> The underlying premise of interim financing is that it is a benefit to all stakeholders as it allows the debtor to protect going-concern value and continue its essential operations while devising a plan of compromise or arrangement acceptable to creditors. Courts have wide discretion in approving interim financing pursuant to s. 11.2 of the Companies' Creditors Arrangement Act, RSC 1985, c. C-36 ("CCCA"), subject to certain protections Parliament has mandated. An important protection under subsection 11.2(1) is the prevention of the interim financing charge from securing pre-filing obligations because partial "roll up" provisions prejudice other creditors and do not benefit the debtor. In enacting this restriction, Parliament has chosen to protect debtors when they are at their most vulnerable and to prevent the abuse of interim financing charges provided under the CCAA.[72]

It is critical to make the distinction between pre-filing and post-filing creditors here. Post-filing creditors lend to the debtor company after the *CCAA* proceedings have commenced and they are not subject to the restructuring plan. On the other hand, pre-filing creditors are those with outstanding claims against the debtor company prior to the *CCAA* filing and are subject to the plan of reorganization. Due to the increased risk associated with funding a company undergoing restructuring under the *CCAA,* interim financing is usually accompanied by a super-priority charge in favour of the lenders as an incentive and a measure to protect their interest.

## III. The Codification of Interim Financing under the *CCAA*

Prior to the codification of interim financing under the *CCAA,* courts made interim orders pursuant to their inherent jurisdiction and section 11 general authority. In *Royal Oak Mines Inc., Re,*[73] the Ontario Superior Court noted as follows:

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[71] *Medipure Pharmaceuticals Inc. (Re), 2022 BCSC 1771 (CanLII)* (*Medipure).*
[72] *Ibid,* at para. 49 [underlined for emphasis].
[73] 1999 CanLII 14840 (ON SC) at paras. 8, 9, 17 and 18. [underlined for emphasis].

> [8] In the utilization of the CCAA for this broad purpose a practice has developed whereby the application is "pre-packaged" to a significant extent before relief is sought from the Court. That is, the debtor company seeks to obtain the consent and support of its major creditors to a CCAA process, and to its major terms and conditions, before the application is launched. This has been my experience in the course of supervising more than a few such proceedings. The practice is a healthy and effective one in my view, and is to be commended and encouraged. Nonetheless, it has led in some ways to the problem which is the subject of these reasons.
> [9] The problem centers around the growing complexity of the Initial Orders sought under s. 11(3) of the Act, and the increasing tendency to attempt to incorporate into such orders provisions to meet every eventuality that might conceivably arise during the course of the CCAA process. Included in this latter category is the matter of debtor-in-possession ("DIP") financing, calling—as it frequently does—for a "super priority" position over all other secured lending then in place.
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> […]
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> [17] The Initial Order sought in this case was not unlike those sought -- and, indeed, those which have been granted -- in numerous other CCAA applications. While the relief granted is always a matter for the exercise of judicial discretion, based upon the statutory and inherent jurisdiction of the Court, it seems to me that considerable relief now sought at the Initial Order stage extends beyond what can appropriately be accommodated within the bounds of procedural fairness. It was at least partially for that reason that I declined to grant the Initial Order relief sought at the outset of this proceeding.
> [18] Upon reflection, it seems to me that the following considerations might usefully be kept in mind by those preparing for an Initial Order application, and by the Court in granting such an order.

The amendment to the *CCAA* in 2009 codified interim financing. Section 11.2 sets out the framework for ordering interim financing in *CCAA* proceedings. Section 11.2(1) of the *CCAA* provides:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

The requirement for notice to secured creditors addressed a number of previous problems regarding the grant of interim financing on an *ex parte* basis, without the court having the benefit

of hearing the submissions of the creditors most affected.[74] In *Royal Oak Mines Inc.*[75] the Court considered the requirement to provide notice to affected parties in a *CCAA* case as it pertains to initial orders sought. In the words of the Court:

> [12] What is at issue here is not the principle of the Court granting relief of the foregoing nature in CCAA proceedings. That principle is well enough imbedded in the broad jurisdiction referred to earlier in these reasons. In particular, it is not the tenet of DIP financing itself, or super priority financing, which were being questioned. There is sufficient authority for present purposes to justify the granting of such relief in principle: see, Canadian Asbestos Services Ltd. v. Bank of Montreal (1992), 1992 CanLII 7570 (ON SC), 11 O.R. (3d) 353 (Ont. Gen. Div.), (Chadwick J.) at pp. 359-361, supplemental reasons and leave to appeal granted (1993), 1993 CanLII 8498 (ON SC), 13 O.R. (3d) 291 (Ont. Gen. Div.); Bank of America Canada v. Willann Investments Ltd. (February 6, 1991), Doc. B22/91 (Ont. Gen. Div.), (Austin J); Dylex Ltd., Re (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.), (Houlden J.A.). It was the granting of such relief on the broad terms sought here, and the wisdom of that growing practice—without the benefit of interested persons having the opportunity to review such terms and, if so advised, to comment favourably or neutrally or unfavourably, on them—which was called into question.
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> [13] There is justification in the call for caution, in my view. The scope and the parameters of the relief to be granted at the Initial Order stage—in conjunction with the dynamics of no notice, short notice, and the initial statutory stay period provided for in subsection 11(3) of the Act—require some consideration.[76]

Prior to 2009, interim financing orders had been made *ex parte* in several cases, although the courts made clear their concern about this practice. For instance, in *Algoma Steel Inc.*,[77] the Ontario Superior Court of Justice granted an interim financing order in the initial stay order, without notice to the first-ranking secured creditors. It is evident that the Court had some concerns about making the order on an *ex parte* basis but was persuaded by the urgency of the request. The Court's endorsement emphasized that creditors who had not received notice should use the "come-back" clause and that "any interested party may apply to this Court to vary or rescind this order".

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[74] Janis Sarra, *supra,* note 10 at 201.
[75] *Supra,* note 73 at paras 12 and 13.
[76] Underlined for emphasis.
[77] (2001) CarswellOnt 1999(Ont. S.C.J. [Commercial List]).

The first mortgage noteholders, who had claims of more than a half-billion dollars, then sought leave to appeal the decision. The Court of Appeal for Ontario dismissed the motion for leave to appeal:[78]

> [7] In our view, the motion for leave to appeal is premature. Initial orders, made on a without notice basis, are specifically authorized by s. 11(1) of the *CCAA.* Proceedings under the *CCAA* are often urgent, complex and dynamic, the Algoma proceedings fit that description. Farley J. was faced with complex facts and a difficult decision potentially implicating the closure of one of the largest companies in Ontario. Moreover, he had to make his decision in a very timely fashion. In these circumstances, he recognized that his initial order might not be acceptable to all interested parties, including some of Algoma's creditors. That is why he included a comeback clause in his order and specifically invited parties to resort to it in his endorsement.
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> [8] The fact that the *CCAA* provides that an appeal of an initial order is only available with leave indicates that appeals in *CCAA* proceedings should be limited. An appeal court should be cautious about intervening in the *CCAA* process, especially at an early stage. On this point, we are attracted to the reasoning of MacFarlane J.A. (in chambers) in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]) at 272:
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> [T]here may be an arguable case for the petitioners to present to a panel of this court on discrete questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one….
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> …. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellant proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leace ought to be granted.

The security or charge obtained under this provision of the *CCAA* is not to secure an obligation which existed before commencement of the *CCAA* proceedings, and this is essentially aimed at preventing pre-filing creditors from pressuring the debtor company to cross-collateralize

[78] 2001 CarswellOnt 1742 at paras. 7 and 8.

pre-existing indebtedness with the super-priority interim financing lien as a condition of providing post-filing loans.[79]

Section 11.2(2) of the *CCAA* further provides for the major incentive to interim financers. It provides that the court may order that the security or charge rank in priority over the claim of any secured creditor of the company. Section 11.2(3) provides even more incentive. It contains a protective provision where the debtor accesses different interim financing facilities. It specifies that the court may order that the security or charge rank in priority over any security or charge arising from a previous interim financing order, only with the consent of the person in whose favour the previous order was made. This provision protects an interim lender that has taken the risk of providing financing early in the restructuring process by requiring that a later financing charge cannot rank ahead of its charge without its consent.

Section 11.2(4) of the *CCAA* further provides that in deciding whether to make an order, the court is to consider, among other things:

a. The period during which the company is expected to be subject to proceedings under this Act.
b. How the company's business and financial affairs are to be managed during the proceedings.
c. Whether the company's management has the confidence of its major creditors.
d. Whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company.
e. The nature and value of the company's property.

[79] *Supra*, note 74.

f. Whether any creditor would be materially prejudiced as a result of the security or charge; and

g. The monitor's report referred to in paragraph 23(1)(b), if any.

The first case to consider interim financing following its codification in the *CCAA* was *Canwest Global Communications Corp. (Re)*.[80] Here, Pepall, J. (as she then was) considered interim financing and noted the following:

> [31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the *CCAA* now expressly provide jurisdiction to grant a DIP financing charge.
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> […]
>
> [32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge…This approach is both consistent with the legislation and practical.
>
> […]
>
> [35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act…

Essentially, in addition to the factors for consideration enumerated in the *CCAA,* the court must consider whether notice has been given to secured creditors likely to be affected by the security or charge, and whether the amount of the DIP financing is appropriate and required, having regard to the debtor's cash flow statement. Consistent with subsection 11.2(3) of the *CCAA,* the court must ensure that the DIP charge does not secure an obligation which existed before the order was made.

The considerations above were expanded upon in *Re Canwest Publishing Inc*.[81] where the Court considered evidence of the reasonableness of the DIP financing terms and the fees charged

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[80] 2009 CanLII 55114 (ON SC) at paras 31, 32 and 35. [underlined for emphasis].

[81] 2010 ONSC 222 (CanLII).

by the DIP lender in association with the loan. Additionally, in determining whether to grant super-priority status to the lender, the Court gave weight to indications by the lender that they would be unwilling to provide a DIP financing facility without a priority charge. In the words of Pepall, J.:[82]

> [45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue…
>
> [46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

Interestingly, in this case, it was not anticipated that the DIP funds would be required as an immediate necessity. Nonetheless, the cash flow figures implied that there was a good chance the entities in question would need the extra liquidity provided by the DIP credit facility. Considering this, the Court granted the DIP credit facility, stating that being able to borrow money with a priority charge would enable the businesses' trade creditors, workers, and suppliers to remain confident in them:

> [43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).[83]

A similar result was achieved in *Re Cinram International Inc.*[84] where despite the fact that interim financing was not immediately needed, a credit facility was approved by the Court.

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[82] *Ibid,* at paras 45 and 46. [Underlined for emphasis].
[83] *Ibid,* at para. 43.
[84] 2012 ONSC 3767.

In *Re Crystallex International Corporation*[85] the Court of Appeal for Ontario considered the "business judgment rule". This essentially determines whether the court should consider or defer to the business judgment of the debtor company's directors when deciding on granting/ refusing the DIP financing. The Court held that the fact that a debtor's board of directors recommends interim financing is not a determinative factor, and in some cases may not be a material factor, in considering whether to make an order under section 11.2. It would be unusual if the board did not recommend the interim financing requested by the debtor.[86] The Court went further to reference the popular case of *Stelco Inc. (Bankruptcy), Re.*[87] The Court noted that *Stelco* should not be read as authority for the principle that the recommendation of the directors of a debtor under *CCAA* protection is entitled to deference in evaluating whether financing should be approved under section 11.2 of the *CCAA*, where the factors outlined in section 11.2(4) have not been complied with. In *Stelco,* the debtor did not seek court approval of a recommendation from the board. What happened in *Stelco,* was that the appellants sought an order of the Court, setting aside the order removing them as directors. This was premised on several grounds, one of which was that the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board. Thus, the application of the business judgment rule in *Stelco* was not the same as in this case. In the case of interim financing, the court must make an independent determination and arrive at an appropriate order, having regard to the factors in section 11.2(4). It may consider, but not defer to, and is not fettered by, the recommendation of the board.[88]

[85] 2012 ONCA 404.
[86] *Ibid,* at para 84.
[87] 2005 CanLII 8671 (ON CA) *(Stelco).*

[88] *Supra,* note 20 at para. 85.

In 2019, Parliament added section 11.2(5) to the *CCAA.* It provides that "when an application is made under subsection (1) at the same time as an initial application[89] referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period." This is essentially another factor to be considered by the courts in granting an interim order. Judicial consideration of this requirement was done by the Supreme Court of British Columbia in *Miniso International Hong Kong Limited v Migu Investments Inc.*,[90] albeit prior to its coming into force. The Court held as follows:[91]

> [78] Specific amendments in respect of interim financing are also found in Bill C-97 and dovetail the above restriction in s. 11.001 as to what is "reasonably necessary". Section 138 of Bill C-97 provides for the addition of a new s. 11.2(5) of the *CCAA*, as follows:
>
> **Additional factor — initial application**
>
> > **(5)** When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.
> >
> > [Emphasis added.]
>
> [79] Accordingly, the intent of Parliament under the new s. 11.2(5) is to curtail the discretion of the Court to grant interim financing in the stay period under an initial order (i.e. up to 10 days) to only what is "reasonably necessary" during that stay period.
>
> [80] This provision is not inconsistent with the current approach of Canadian courts when exercising its discretion under s. 11.2 of the *CCAA*. Indeed, the provisions of the new s. 11.2(5) are echoed in Justice Farley's comments in *Re Royal Oak Mines Inc.* (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)):
>
> > [24] It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent

[89] According to section 2 of the *CCAA,* "initial application" refers to the first application made under the Act in respect of a company.

[90] 2019 BCSC 1234 (CanLII).

[91] *Ibid,* at paras 78 to 80. [Underlined for emphasis].

> needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances—as opposed, for instance, to a receivership or bankruptcy—and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

From the excerpt above, the purpose of this provision is to curtail the discretion of the court to grant interim financing in the stay period under an initial order (i.e. up to 10 days) to only what is "reasonably necessary" during that stay period.

As noted earlier, ensuring that affected parties have notice is critical in an interim financing application. This is illustrated in *White Birch Paper Holding Company (Arrangement relatif à)*.[92] Here, on a motion to amend the initial order and approve interim financing, the majority lender under a second lien term loan argued that its position as a secured lender was affected by an interim financing charge. The creditor alleged that it was not notified of the originating motion and claimed that the debtors did not respect both the letter and spirit of the *CCAA* notice requirements. The defective notice resulted in a new hearing with respect to a previously granted DIP financing order and the Court's earlier decision to grant super-priority to the lender.[93]

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[92] 2010 QCCS 1176.

[93] *Ibid,* at para 26 where the court held: "Dune argues that it should be allowed to attend a new hearing where the whole issue of the opportunity of granting a DIP loan and corresponding super-priority should be debated "*de novo*". Given the above-noted facts, I agree with Dune's submission."

However, the length of notice required is dependent on the circumstances and an extremely short notice can be considered adequate. In *Re P.J. Wallbank Manufacturing Co. Limited*[94] an application for interim financing under the *Bankruptcy and Insolvency* Act *(BIA)*[95] was brought on less than 24 hours' notice to the affected creditors. This was viewed by the Court as adequate in the circumstances.[96]

There are instances where the court is faced with the decision of choosing between competing DIP financing proposals in determining which to approve. In *Great Basin Gold Ltd. (Re),*[97] the British Columbia Supreme Court held that the factors in section 11.2(4) of the *CCAA* should be applied. In its analysis, special emphasis was placed on which proposal would most likely enhance the prospects of a viable compromise or arrangement, whether any creditor would be materially prejudiced as a result of the security or charge, and the opinion of the monitor. In this case, one proposing party alleged that the other party's proposal would cause it to be prejudiced. The Court reasoned that while it is required to consider prejudice to other creditors, the prejudice must be weighed against the benefits of obtaining the financing.[98]

Although not pertinent to this chapter, it should be noted that the Supreme Court of Canada has held that Litigation Funding Agreements (LFA) can also be categorized as interim financing within the meaning of section 11.2. In *9354-9186 Québec inc. v. Callidus Capital Corp.*[99] the Supreme Court of Canada held:

> [84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the CCAA. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim

[94] 2011 ONSC 7641.
[95] *Bankruptcy and Insolvency Act*, *supra* note 23.
[96] Although this is a *BIA* case, it is still relevant because it relates to interim financing.
[97] 2012 BCSC 1773 (CanLII).
[98] Patrick Cleary, Dip Financing Basics and Recent Case Law. Online: < https://www.ahbl.ca/dip-financing-basics-and-recent-case-law/>.
[99] 2020 SCC 10.

> financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the CCAA more generally.
>
> [85] Interim financing, despite being expressly provided for in s. 11.2 of the CCAA, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (Rescue! The Companies' Creditors Arrangement Act, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; Royal Oak Mines Inc., Re (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; Boutiques San Francisco Inc. v. Richter & Associés Inc., 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the CCAA, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

## IV. The Need for Interim/ Debtor-in-Possession (DIP) Financing (*CAMA Perspective)*

The essence of interim financing for an insolvent company cannot be overemphasized. According to Bolanle Adebola, if rescue is to be achieved, both short and long-term finance problems faced by the distressed company must be resolved.[100] Section 572 of the *CAMA* sets out the definition of a company which is unable to pay its debts as follows:

> A company is deemed to be unable to pay its debts if—
>
> (a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N200,000, then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor ;
> (b) execution or other process issued on a judgment, act or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
> (c) the Court, after taking into account any contingent or prospective liability of the company, is satisfied that the company is unable to pay its debts.

[100] Bolanle Adenike Adebola, "Corporate Rescue and the Nigerian Insolvency System" at page 99 <https://discovery.ucl.ac.uk/id/eprint/1385156/7/1385156_Thesis.pdf>.

In *Global Eagles West Africa Ltd. v. Stonecraft Marble & Granite CFTZ*[101] the Court of Appeal of Nigeria addressed this issue by rehashing that “Section 409(a) of the Act provides that a company shall be deemed to be unable to pay its debts of a creditor, by assignment or otherwise to whom the company is indebted in a sum exceeding N2,000 then due has served on the company, by leaving it at the registered office or head office, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the Creditor."

There is need to point out that although this was a 2022 decision (post 2020 *CAMA* amendment) where the threshold as already stated in section 572 of the *CAMA* is now N200,000 (Two Hundred Thousand Naira), the Court referred to the now repealed *CAMA* (Section 409) which sets the old threshold as N2,000 (Two Thousand Naira). The reference of the Court to the old threshold could be attributed to the fact that the case was instituted prior to the amendment of the *CAMA* and so the previous threshold was relied on. In the earlier case of *Unifam Industries Limited v. Ecobank Nigeria Limited*[102] the Supreme Court of Nigeria held that for a company to be wound up on the ground of inability to pay its debt, the following ingredients must be present: - (a) there must be a debt; (b) the debt must be due; (c) the company to be wound up is unable to pay the debt.

The threshold is something I believe should be addressed. N200,000 when converted, is about $263.02 dollars[103]. The argument here could go two ways. It could be argued that the low threshold will encourage early insolvency filing which is one of the goals of restructuring laws and it could also be argued that this low threshold makes it a lot easier for many companies to be considered insolvent which will then

[101] (2022) LPELR-56561(CA).
[102] (2019) 1 NWLR (Pt. 1653) 187.
[103] Rate converted using Xe: <https://www.xe.com/currencyconverter/convert/?Amount=1&From=NGN&To=USD> on July 1, 2023.

increase the number of insolvent companies in need of some kind of interim financing. According to a 2020 Business Day report, the failure rate of startups in Nigeria was at 61%.[104] As of 2020, Nigeria's ease of doing business ranked 131st worldwide, with a general score of 56.9. The highest scores were obtained in the fields of starting a business, dealing with construction permits, and getting credits. On the other hand, Nigeria's performance in other fields was low, for instance in registering properties, trading across borders, and **resolving insolvencies**.[105] In the end, what would matter the most is not the measure of insolvency, but the steps put in place to help a company come out of the invisible "insolvency pit".

Unfortunately, despite the disturbing statistics showing the rate of failure of businesses in Nigeria, the *CAMA* does not make provision for any form of interim financing notwithstanding the fundamental role interim financing plays in a successful restructuring. With no regulation in this regard, insolvent companies in Nigeria will have to seek financing without some form of regulation which can pose a challenge as lenders will not be incentivized without a codification of super priority charge granted to them for providing funds to an insolvent company.

Interestingly, however, in Nigeria, the finance industry is highly monitored and regulated, with measures set up to prevent the collapse of a financial institution. No doubt, this is necessary because of the vital role the industry plays in the Nigerian economy, but it would also be advantageous if the success of non-financial institutions is also prioritized. For instance, the Banks and Other Financial Institutions Act, 2020 (*BOFIA* 2020) was passed into law on November 13, 2020. *BOFIA* 2020 repealed the Banks and Other Financial Institutions Act, of 1991 (*BOFIA* 1991). This amendment resulted in some changes to the insolvency framework for financial institutions. An example of the changes is contained in Chapter D of *BOFIA* 2020 which establishes a "Banking Sector Resolution Fund". This fund, among other things, is to

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[104] Frank Eleanya, *At 61%, Nigeria's startup failure rate tops African peers* <https://businessday.ng/technology/article/at-61-nigerias-startup-failure-rate-tops-african-peers/>.

[105] World Bank 2020 Doing Business Report.

be used for providing credit facilities to banks and other financial institutions as well as pay the cost of transfer of all or part of the business of a bank or financial institution arising from a resolution measure.[106]

In addition to this, section 34 of the *BOFIA* provides for the intervention by the Central Bank of Nigeria (CBN) which is the primary regulator of the finance industry in Nigeria[107] when a bank is failing. The authority given to the CBN under this section allows it to do the following among others, to a failing bank:

a. Suspend its payment or delivery obligations;
b. Require its third-party service providers to continue providing services to such bank for a period that the CBN may stipulate;
c. Transfer the bank or any part of it to private third-party buyer;
d. Issue a bail-in-certificate to cancel, modify, convert or change the form of any eligible instrument issued by the failing bank;
e. Suspend the right of the counterparty to a failing bank to terminate a contract ordinarily determinable due to the bank's insolvency;
f. Transfer the distressed bank's viable assets to a private asset management vehicle ("good bank") to maximize the value of such assets in an eventual sale or measured winding up; and
g. Employ any other intervention tool that the CBN deems fit.

[106] Seun Timi-Koleolu and Praise Adetunmibi "Revised Banking Law in Nigeria – BOFIA 2020" <https://www.mondaq.com/nigeria/financial-services/1009052/revised-banking-law-in-nigeria---bofia-2020>.
[107] The CBN is established by section 1 of the Central Bank of Nigeria Act, 2007. Section 2 goes on to provide that the principal objects of the Bank shall be to- (a) ensure monetary and price stability; (b) issue legal tender currency in Nigeria; (c) maintain external reserves to safeguard the international value of the legal tender currency; (d) promote a sound financial system in Nigeria; and (e) act as banker and provide economic and financial advice to the Federal Government.

It is argued that *BOFIA* 2020 prioritizes the prevention of banks from getting distressed, over rescuing them, which is very commendable.[108] This is owed to the very extensive and detailed measures put in place to save a failing bank instead of having to restructure an insolvent bank.

## V. Conclusion

There is a justifiable need for interim financing as has been discussed above and this need is not peculiar to Canada but to restructuring regimes generally. The concept of insolvency is premised on the absence of sufficient cash flow and while restructuring arrangements are put in place, without a source of cash flow, restructuring efforts will likely be futile. Without interim financing, large and complex restructuring in particular, are not likely to be successful.

It is highly recommended that Nigeria codifies interim financing in addition to the restructuring regimes and models it after the *CCAA*. There ordinarily would be some hesitation or reluctance to lend money to an insolvent company but with the structure of the *CCAA* in terms of the super-priority charge granted to the lenders, it serves as a huge incentive. Without this, failing businesses in Nigeria would struggle to raise funds which will likely not yield any result because they will have no incentive to offer in return. Lenders are investors and would need some form of reassurance or guarantee which failing businesses in Nigeria will not be able to provide. The current restructuring regime we have under the new *CAMA* is a significant improvement from what was in existence before. Regardless, there are still some areas that need to be addressed, one of which is the source of interim for companies undergoing restructuring under the *CAMA*.

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[108] KPMG Nigeria, "BOFIA 2020: Impact on the Financial Services Industry" <*https://assets.kpmg.com/content/dam/kpmg/ng/pdf/tax/bofia-2020-review.pdf*>.

# CHAPTER THREE

# DISCRETIONARY POWER OF THE COURTS UNDER THE *CCAA*[109] VERSUS THE DISCRETIONARY POWER OF THE COURTS UNDER THE *CAMA*[110]

## I. INTRODUCTION

Restructuring is a unique process with intricacies requiring some level of skill or expertise to understand and supervise. In the case of a *CCAA* proceeding, the supervising judge is well versed in the proceedings and is knowledgeable of the facts even where they are complex. The *CCAA* also vests the supervising judges with wide discretionary powers to make orders as they deem fit in the circumstances. Similarly, in the restructuring provisions under the *CAMA*, the court plays a supervisory role and is also granted discretionary powers. This chapter will therefore consider the extent to which these discretionary powers can be exercised and the extent to which they can be interfered with or overturned on appeal.

The first part will focus on the *CCAA* and will begin by considering the role of the courts in *CCAA* proceedings as well as the standard of review of decisions of *CCAA* judges and the deference given to decisions of *CCAA* judges. It will explain in detail the supervisory nature of the courts' role as well as the reluctance by appellate courts to interfere with decisions of *CCAA* supervising judges owing to the unique nature of *CCAA* proceedings and the wide range of discretionary powers the *CCAA* vests on *CCAA* supervising judges.

The subsequent part will consider the Nigerian perspective of discretionary powers. It will highlight the supervisory nature of the court in restructuring under *CAMA* and also highlight the deference given by appellate courts in Nigeria to discretionary decisions of trial courts. Unlike the

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[109] *Supra,* note 8.
[110] *Supra,* note 9.

*CCAA,* reliance here will be on cases setting out the general principles on the use of and application of discretionary powers. The rationale for deference when dealing with restructuring cases will be considered and it will be recommended that Nigerian appellate courts, accord the trial courts with the same level of deference accorded to decisions of *CCAA* supervising judges, owing to the unique and complex nature of restructuring proceedings as well as the principal objective of restructuring – corporate rescue.

## II. The Role of The Courts in *CCAA* Proceedings

The courts use both statutory and inherent jurisdiction in their decision-making in respect of the *CCAA.* Given that the statute is relatively short in nature, even with the increased codification effective 2009, and given that the restructuring proceedings that are undertaken under the statute are very complex, the court has used both its statutory and its inherent jurisdiction to make both procedural and substantive decisions that assist the parties in completing the negotiation process and that meet the overall objectives of the legislation.[111]

*CCAA* courts generally have a supervisory role. The courts have held that the *CCAA* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the corporation to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. In this respect, its supervision of the *CCAA* proceeding is with a view to ensuring that the statutory objectives are being met and that any statutory rights, remedies or protections are being observed.[112]

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[111] Janis Sarra, *supra* note 10 at p. 119.
[112] *Ibid,* at p. 136.

Appeals of an order or reasons for judgment of the *CCAA* supervising judge lay with the courts of appeal. There have been a number of judicial pronouncements on the role of the appellate courts during a *CCAA* proceeding. The Court of Appeal for British Columbia in *Doman Industries Ltd.*[113] held that where an order is made by the judge who is supervising the *CCAA* proceedings of the insolvent company from the beginning, the court will be very reluctant to grant leave to appeal the order. The appellate court will exercise its power sparingly when asked to intervene with respect to decisions made during the course of a *CCAA* proceeding, as the *CCAA* judge is undertaking a careful and delicate balancing of numerous interests; and appellate proceedings may upset that balance and frustrate the process.[114]

The appellate courts have held that they will be cautious about intervening in *CCAA* proceedings at an early stage, particularly where the order contains a come-back clause that allows parties to bring their concerns regarding a decision to the judge supervising the *CCAA* proceeding.[115] Appellate courts will accord a high degree of deference when asked to interfere with the exercise of the authority of a *CCAA* court. At the same time, discretionary decisions are not immune from review if the appellate court reaches the clear conclusion that there has been a wrongful exercise of authority or there is a fundamental question of the lower court's jurisdiction.[116]

### a. Standard of Review Under The *CCAA*

Some of the cases considered above have explained the high level of discretion given to

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[113] *Re Doman Industries Ltd.,* [2004] B.C.J. No. 1402, 2004 CarswellBC 1545.
[114] *Pacific National Lease Holding Corporation* 1992 CanLII 427 (BC CA).
[115] *Algoma Steel* 2001 CanLII 5433 (ON CA).
[116] *Re New Skeena Forest Products Inc.,* 2005 CarswellBC 705, 9 C.B.R. (5$^{th}$) 278 (B.C.C.A.).

*CCAA* judges and the deference given to decisions of *CCAA* judges. For instance, in *Pacific National Lease Holding Corporation,*[117] the Court noted:[118]

> [30] Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
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> […]
>
> [32] … In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

Further, in *Algoma Steel Inc.*,[119] the Ontario Superior Court of Justice granted an interim financing order in the initial stay order, without notice to the first-ranking secured creditors. The Court's endorsement emphasized that creditors who had not received notice should use the "come-back" clause and that "any interested party may apply to this court to vary or rescind this order". The first mortgage noteholders, who had claims of more than a half-billion dollars, then sought leave to appeal the decision. The Court of Appeal for Ontario dismissed the motion for leave to appeal and held that the fact that the *CCAA* provides that an appeal of an initial order is only available with leave indicates that appeals in *CCAA* proceedings should be limited. An appeal court should be cautious about intervening in the *CCAA* process, especially at an early stage.[120]

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[117] 1992 CanLII 427 (BC CA).
[118] *Ibid,* paras 30-32. [underlined for emphasis].
[119] *Supra,* note 77.
[120] 2001 CanLII 5433 (ON CA) at para 8. [underlined for emphasis].

In *Consumers Packaging Inc. (Re)*,[121] the Court of Appeal for Ontario noted that the authorities are clear that, due to the nature of *CCAA* proceedings, leave to appeal from orders made in the course of such proceedings should be granted sparingly. Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders as a whole, and hence would be contrary to the spirit and objectives of the *CCAA*.[122]

In *Air Canada, Re*,[123] the Court of Appeal for Ontario noted that reliefs which fall squarely within the discretion of the *CCAA* supervising judge are to be afforded substantial deference on appeal. In *Canadian Union of Public Employees v. Royal Crest Lifecare Group Inc*.[124] the Court noted that appellate courts have long recognized the unique difficulties faced by judges in bankruptcy and *CCAA* proceedings. The result is that appellate courts accord considerable deference to judges' decisions in these contexts.[125]

In terms of the standard of review, intervention by appellate courts to decisions of *CCAA* judges is justified only by an error in principle or the unreasonable exercise of discretion. This therefore means that the standards of review are "error in principle" or the "unreasonable exercise of discretion". In *New Skeena Forest Products Inc., Re*,[126] the Court of Appeal for British Columbia noted:[127]

> [20] … The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for

[121] 2001 CanLII 6708 (ON CA).
[122] *Ibid,* at para 5.
[123] 2003 CanLII 36792 (ON CA) at para 25.
[124] 2004 CanLII 19809 (ON CA).
[125] *Ibid,* at para 23.
[126] 2005 BCCA 192 (CanLII).
[127] *Ibid,* at para 20. [underlined for emphasis].

> the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. [at 138]
>
> At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:
> But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138] …

The following year, in *Ivaco Inc., Re,*[128] the Court of Appeal for Ontario held that appellate intervention is justified only for an error in principle or the unreasonable exercise of discretion.[129] These were emphasized in *Crystallex (Re)*:[130]

> Appellate review of a discretionary order under the CCAA is limited. Intervention is justified only for an error in principle or the unreasonable exercise of discretion: *Ivaco Inc. (Re)* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (C.A.), at para. 71. An appellate court should not interfere with an exercise of discretion "where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion": *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 26.

In *Re Stelco Inc,*[131] the Court of Appeal for Ontario granted leave to hear an appeal of a judgment of the supervising judge under a *CCAA* proceeding. It set out the tests for granting leave to appeal:

> [24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": Country Style Food Services Inc. (Re), 2002 CanLII 41751 (ON CA), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,
>
> > (a)whether the point on appeal is of significance to the practice;
> > (b) whether the point is of significance to the action;
> > (c) whether the appeal is prima facie meritorious or frivolous;
> > (d) whether the appeal will unduly hinder the progress of the action.
> > [underlined for emphasis]

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[128] 2006 CanLII 34551 (ON CA).
[129] *Ibid,* at para 71.
[130] 2012 ONCA 404 (CanLII) at para 70.
[131] *Supra,* note 87.

**b. Deference To Decisions of *CCAA* Judges**

As a result of the appellate court's deference to the *CCAA* supervising judge, the judgments in which leave to appeal is denied are more numerous than those cases in which leave was granted.[132] In *De Lage Landen Financial Services Canada Inc. v. Royal Bank,*[133] the Court of Appeal for Alberta denied leave to appeal against a decision of a *CCAA* judge. The Court held that substantial deference is accorded to the weight given by trial, chambers and case-management judges to the factors in legal tests. Here, the judge was in the best position to assess whether a particular directive was fair in the context of the compromises made by everyone involved in the proceedings.[134] The Court concluded that the chances of success on appeal were minimal, and the issue was not important to practice surrounding the *CCAA*.[135]

In *Re SemCanada Crude Co.*[136] the Court refused an application for leave to appeal. It held that the chambers judge was uniquely positioned to understand the import of the issue in the *CCAA* context and its relationship to the claims of other creditors.[137]

In *Re Timminco Ltd.*[138] the Court of Appeal for Ontario denied leave to appeal from the decision of a motion judge who had granted priority for interim financing. The Court of Appeal held that in the *CCAA* context, leave to appeal is to be granted sparingly, and only where there are serious and arguable grounds that are of real and significant interest to the parties. The Court here

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[132] Janis Sarra, *supra,* note 10 at p. 190.
[133] 2010 CarswelllAlta 2428 (Alta. C.A.).
[134] *Ibid,* at para 14.
[135] *Ibid,* at para 15.
[136] (2010), 76 C.B.R. (5th) 1 (Alta. C.A.).
[137] *Ibid,* at paras 24, 42.
[138] 2012 ONSC 948 (CanLII).

found that the proposed appeal lacked sufficient merit to meet the stringent test. The Court saw no basis on which to interfere with the motion judge's decision.

In *Aurora v. Safeguard Real Estate Investment Fund LP,*[139] the Court of Appeal for Alberta held that the test for leave to appeal involves a single criterion that there must be serious and arguable grounds for appeal, assessed based on the four factors outlined in *Stelco.* The Court further noted that the application turned on whether the proposed appeal was *prima facie* meritorious and therefore deserving of leave. O'Ferrall J. found that the standard of review for this highly fact-driven conclusion is overriding and palpable error. The Applicant presented no argument on which the Court of Appeal could find that the conclusions of the *CCAA* judge was unreasonable or resulted in any manifest error. As such, the Court saw no basis on which the appeal could succeed and leave to appeal was denied.

In *Laurentian University of Sudbury (Re),*[140] the Court of Appeal for Ontario noted that a high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings, who are "steeped in the intricacies of the CCAA proceedings they oversee".[141]

In 2022, the Court of Appeal for Ontario in *Urbancorp Toronto Management Inc. (Re),*[142] refused an appeal which would have hindered the progress of the *CCAA* proceedings.[143] The Court justified its findings by noting that supervising judges in *CCAA* proceedings are entitled to "broad discretion" and appellate courts must "exercise particular caution before interfering with orders

[139] 2012 ABCA 58.
[140] 2021 ONCA 199 (CanLII).
[141] *Ibid*, at para 20.
[142] 2022 ONCA 181 (CanLII).
[143] *Ibid*, at para 49.

made in accordance with that discretion as intervention is only appropriate where the judge has erred in principle or exercised their discretion unreasonably.[144]

In an even more recent decision, the Supreme Court of British Columbia in *PaySlate Inc. (Re),*[145] referred to an older case where it was stated that a *CCAA* judge's order reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings, and which forms the basis for the considerable deference their decisions are afforded on review. To find otherwise, would be acting contrary to the instruction of the Supreme Court of Canada in *Callidus* that appellate courts should defer to the exercise of discretion by supervising judges in these kinds of proceedings.[146]

From the *CCAA* cases discussed, appellate courts are reluctant to interfere with decisions of *CCAA* judges owing largely to the expertise of these judges. A juxtaposition of this and the discretionary power of courts under the *CAMA* will now be considered.

### III. The Role of Nigerian Courts under the *CAMA*

The court structure in Nigeria, just like in Canada, is hierarchical in nature. However, the focus here will be on the Federal High Court of Nigeria which is the court with jurisdiction over the *CAMA*. Section 249 of the Constitution[147] establishes the Federal High Court. Section 251 sets out the purview of the Federal High Court's jurisdiction. Section 251(1) provides as follows:

> Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National

[144] *Ibid*, at para 50 where the Court held: "…as the Supreme Court of Canada has recently noted, supervising judges in *CCAA* proceedings are entitled to "broad discretion" and appellate courts must "exercise particular caution before interfering with orders made in accordance with that discretion": *Canada v. Canada North Group Inc.*, 2021 SCC 30, 460 D.L.R. (4th) 309, at para. 22. Intervention is only appropriate where the judge has erred in principle or exercised their discretion unreasonably: *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Laurentian University of Sudbury (Re)*,2021 ONCA 199, 87 C.B.R. (6th) 243, at paras. 19-20; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, 78 C.B.R. (6th) 1, at paras.53-54. We see no error in principle or unreasonable exercise of discretion in the making of the distribution order."

[145] 2023 BCSC 608 (CanLII).

[146] *Ibid* at para 83.

[147] *Constitution of the Federal Republic of Nigeria* (CFRN), 1999 as amended.

> Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-

More specifically, sub-paragraph (e) adds:

> arising from the operation of the Companies and Allied Matters Act or any other enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act…[148]

The import of this is that the Federal High Court has jurisdiction over matters arising from the *CAMA*. In *Eduok & Ors v. Eyaekop & Ors*[149] the Court of Appeal held:

> A careful and meticulous examination of the facts pleaded above vis a vis the reliefs sought by the respondents, same in my view falls squarely within the realm of matters arising from the operation of Companies and Allied Matters Act and not a dispute in respect of land. The provisions of Section 251(1) (e) of the Constitution of the Federal Republic of Nigeria, 1999 as amended vests exclusive jurisdiction in the Federal High Court in civil causes or matters arising from the operation of the Companies and Allied Matters Act or any other enactments replacing the Act or regulating the operation of companies incorporated under the companies and Allied Matters Act.

Also, in *Dasunmu & Anor v. Fanimokun*[150] the Court of Appeal added that the above provision gives exclusive jurisdiction to the Federal High Court in- (a) civil causes and matters arising from the operation of the Companies and Allied Matters Act; or (b) civil causes or matters regulating the operation of companies incorporated under the Companies and Allied Matters Act. To supplement this, section 868 of the *CAMA,* which is the interpretation section of the Act, provides that "Court" or "the Court" used in relation to a company, means the Federal High Court, and to the extent to which application may be made to it as; court includes the Court of Appeal and the Supreme Court of Nigeria. This is because appeals from the Federal High Court, lie with the Court of Appeal.

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[148] Section 251(1)(e) of the CFRN [Underlined for emphasis].
[149] (2021) LPELR-53149(CA). [Underlined for emphasis].
[150] (2021) LPELR-54835(CA).

In *Riikadawa V. Ibada & Ors*[151] the Court of Appeal restated that sections 241 and 242 of the CFRN provide for when an appeal shall lie from the decisions of the Federal High Court or a High Court to the Court of Appeal as of right and when such appeal shall arise by first seeking the leave of the court. It is therefore a settled fact that the Federal High Court has jurisdiction over matters relating to the *CAMA* and this includes the insolvency provisions in the *CAMA*. Consequently, appeals from decisions of the Federal High Court, lie with the Court of Appeal.

**a. Role of the Court Under the Insolvency Related Provisions of the *CAMA***

The Court (Federal High Court) has the authority to approve agreements, compromises, and merger plans. The type of restructuring the corporation is considering will determine how much the court will be involved in the process. The Court will convene a meeting of the company, its creditors, and members of the company for any restructuring proceeding upon the firm's request. After this, the court will direct inquiries into the fairness of a plan and, if satisfied, will approve it.[152]

For instance, in a Company Voluntary Arrangement (CVA), section 438 of the *CAMA* provides that the Court may order the decision of the company meeting to have effect instead of the decision of the creditors' meeting; or make such order as it deems fit. Again, section 440 of the *CAMA* provides that an application may be made to challenge a CVA decision and the court can, where appropriate, either revoke or suspend any decision approving the voluntary arrangement or give a direction to any person for the summoning of further meetings to consider any revised proposal, the person who made the original proposal may make or a further company or creditors' meeting to reconsider the original proposal. The import of these provisions is that the

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[151] (2022) LPELR-58654(CA).

[152] Adebajo Odutola, "Nigeria: Restructuring & Insolvency Comparative Guide" < https://www.mondaq.com/nigeria/insolvencybankruptcyre-structuring/939084/restructuring--insolvency-comparative-guide>.

Court plays a vital role in the outcome of a CVA which is one of the restructuring options under the *CAMA*.

In an Administration, which is also another restructuring option under the *CAMA,* section 443(1)(a) provides that a person may be appointed as Administrator of a company by an administration order of the Court under section 449 of the Act. The *CAMA* also provides that "on hearing an administration application, the Court may— (a) make the administration order sought; (b) dismiss the application; (c) adjourn the hearing conditionally or unconditionally; (d) make an interim order; (e) treat the application as a winding-up petition and make any order which the Court could make under section 574 of this Act; or (f) make any other order which the Court deems appropriate."[153] By virtue of section 511(1), a creditor or member of a company in administration may apply to the Court to challenge the conduct of an Administrator. The Court is also vested with the authority to make an order terminating an Administration where appropriate.[154]

Essentially, just like *CCAA* supervising judges, the Federal High Court plays a supervisory role in a restructuring plan under the *CAMA* to ensure fairness and that the objectives of the restructuring are met. The objective here will be corporate rescue.

**b. Standard of Review and Exercise of Discretion by the Courts – Nigerian Perspective**

In *Popoola v. Nigerian Army*[155] the Supreme Court of Nigeria defined discretion as the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law. It is a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right. In the earlier case of *Odulaja v. WEMA Bank*[156] the

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[153] Section 451(1) *CAMA*.
[154] Sections 513, 517, 518 and 519 of the *CAMA*.
[155] (2022) 6 NWLR (Pt. 1825) 1.
[156] (2015) 9 NWLR (Pt. 1464) 299.

Court of Appeal noted this about judicial discretion "judicial discretion means that courts are to act according to the rules of reason, justice and law, not according to private opinion or humour".

There are also some judicial authorities on how judicial discretion should be exercised. For instance, in *Olatubosun v. Texaco (Nig) Plc & Anor*[157] the Supreme Court held that:

> There is no doubt about it that a judex must exercise his discretion not only judicially but judiciously as well. In so doing, he should be discrete and if need be, apply the sixth sense in a bid to facilitate room for the invocation of substantial justice principle.

Subsequently, in *Azuh v. Union Bank*[158] the Supreme Court rehashed that discretion should not only be exercised judicially, but also judiciously.

Similar to the deference given to decisions of *CCAA* judges by the appellate courts, this author will now consider the perspective of appellate courts in interfering with the exercise of judicial discretion by trial courts. In *Eye v. FRN*[159] the Supreme Court noted as follows:

> It is well settled that if judicial discretion has been exercised bonafide uninfluenced by irrelevant considerations and not arbitrarily or illegally by the lower Court, an appeal Court will not ordinarily interfere. But there are exceptions whereby this Court is entitled to impeach the exercise of judicial discretion by the lower Court. Thus, an appellant Court may interfere with exercise of judicial discretion if it shown that there has been a wrongful exercise of the discretion such as where the trial Court acted under misconception of law or under misapprehension of fact in that it either gave weight to irrelevant or unproved matters or it omitted to take into account matters that are relevant or where it exercised or failed to exercise the discretion on wrong or inadequate materials and in all other cases, where it is in the interest of justice to interfere..

The Court in this case, went further provide some form of caution by noting that "judicial discretion ought to be founded upon the facts and circumstances presented to the Court, from which it must draw a conclusion governed by law. A discretion must be exercised honestly and in the

[157] (2012) LPELR-7805(SC).
[158] (2014) LPELR-22913(SC).
[159] (2018) LPELR-43599(SC).

spirit of the law". In a more recent decision of the Court of Appeal, this case was relied on, and the Court held:

> It is settled that in an appeal against the exercise of discretion by a lower Court, an appellate Court will not interfere with the decision simply because if faced with a similar application it would have exercised the discretion differently. It is the duty of an appellant who appeals against the exercise of discretion by a lower Court to satisfy the appellate Court that the lower Court did not exercise its discretion judicially and judiciously. It is not for the appellant to repeat the same argument before the appellate Court in the hope that it would exercise its discretion differently.[160]

Reliance has been on the general principles governing judicial discretion by Nigerian courts because there are no cases specific to this under *CAMA*'s insolvency regime. There is however a case which is worthy of note. The Nigerian Federal High Court only recently had an opportunity to review a live case and make relevant judicial pronouncement, and directions regarding CVA application in Nigeria. This was in the case of *FHC/L/CS/1250/2021- Re: Seyi Akinwunmi & Okorie Kalu* where the Nominees appointed by the Tourist Company of Nigeria (TCN) filed ex-parte originating application praying the Court for an order sanctioning their appointment as Nominees of a proposed CVA for a leading hospitality company. The Joint Nominees made a detailed analysis and presentation to the Court on their report recommending the commencement of the CVA process. A prayer was accordingly made to the Court for an order summoning separate meetings of creditors of the company on the one hand and the meeting of the company on the other hand for the consideration of the company's proposal on the restructuring and liquidation of certain outstanding obligations. The Court sanctioned the appointment of the Nominees of Tourist Company of Nigeria ("the Company") in respect of the proposed CVA and further ordered a meeting of creditors of the company on the one hand, and

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[160] *Larabee Enterprises Ltd & Anor v. Nexim Bank &* Anor (2022) LPELR-57007(CA).

company's meeting on the other hand for the purpose of considering the company's proposal for a voluntary arrangement.

In granting the application, the Court remarked, "*it must be appreciated that the lawmakers have introduced these novel steps for the purpose of fostering seamless and less cumbersome mechanisms in insolvency with the primary purpose of rescuing businesses through the instrumentality of the company voluntary arrangement, which has become expedient considering the present global economic meltdown and recession occasioned by the covid-19 pandemic. The present application reveals that there is a need for the TCN i.e. Tourist Company of Nigeria to restructure its obligations to enable it keep afloat as a going concern.*"[161]

The Court further charged the company and its Nominees to duly comply with the other requirements outlined in *CAMA* with respect to the conducts of the meetings and notifications especially having regards to the fact that the instant CVA is the precedent setting CVA in Nigeria and a template for other CVAs in the country.[162]

It is hoped that Nigerian courts will have more opportunities to deal with the restructuring provisions of the *CAMA* so that the precedents can serve as a guide to the courts just like the *CCAA* cases which have set out the precedent for *CCAA* decisions.

## IV. Brief Commentary on Judicial Discretion and Deference in Restructuring

In the case of decisions of *CCAA* supervising judges, interference is by an appellate court and this requires leave to appeal. Where leave is granted, the implication is that the appellate court is not according the *CCAA* supervising judges' decision, deference and intends to interfere/

[161] Punuka Attorneys & Solicitors, "Court Delivers Ruling on Pioneer Company Voluntary Arrangement (CVA) in Nigeria" < https://punuka.com/court-delivers-ruling-on-pioneer-company-voluntary-arrangement-cva-in-nigeria/>.
[162] *Ibid.*

overrule same. Given that the grant of leave to appeal *CCAA* decisions is tantamount to the inapplicability of deference, the test set out by the court in granting leave to appeal can in my opinion, be used as a measure to determine whether the *CCAA* supervising judges' decision amounts to an error in principle or is unreasonable. The factors to be considered are:[163]

1. Whether the point of appeal is significant to practice.

2. Whether the point of appeal is significant to the action.

3. Whether the case is prima facie meritorious or frivolous.

4. Whether the appeal will unduly hinder the progress of the restructuring proceedings under the CCAA. The *CCAA* supports the high level of deference given to *CCAA* supervising judges.

The *CCAA* has been described as a "skeletal" statute which provides only a framework but does not contemplate every possible scenario that can arise in *CCAA* proceedings. In the same vein, it gives wide discretionary powers to the *CCAA* supervising judges and so it would be counter-productive if deference is not given to these decisions. As has been pointed out earlier, courts have held that the basis for deference of decisions of *CCAA* supervising judges is that these decisions are intricate, fact-specific, real-time and these *CCAA* supervising judges are steeped in the intricacies of the *CCAA*. The *CCAA* supervising judges are skilled and have expertise in dealing with the *CCAA* which is an advantage they have over the appellate courts owing largely to their first-hand knowledge of the facts and what is at stake. Given that the *CCAA* involves dynamic and time-sensitive proceedings, *CCAA* supervising judges are forced to make quick decisions which would further the goals and objective of the *CCAA*. While this may not always be accepted by all

[163] *Re Stelco* 2005 CanLII 8671 at para. 24.

the stakeholders, the objectives of the *CCAA* plays a fundamental role in the decisions of *CCAA* supervising judges.

The objective of the *CCAA* as has been discussed earlier, is to enable the insolvent company restructure and carryon business to avoid the social/ economic costs of liquidation while preserving the company's going concern value. The reality is that allowing for ease of appellate interference will greatly impact the restructuring process. It would likely frustrate the *CCAA* proceedings which counters the essence of the *CCAA* in the first place. The *CCAA* is a remedial statute and so dealings under it cannot be the same as dealings under other statutes such as regulatory statutes. Courts have even noted that the fact that leave is required to pursue an appeal under the *CCAA* shows that it is not the intention of the legislature that this option be exercised frequently but only in exceptional circumstances.

I would say that the attitude of Nigerian courts when it has to deal with interfering with the decision of a trial court where discretion was exercised, is similar to that of *CCAA* cases. As stated in the cases considered, appellate courts in Nigeria will not be willing to interfere with a discretionary decision except where it shown that there has been a wrongful exercise of the discretion such as where the trial court acted under misconception of law or under misapprehension of fact in that it either gave weight to irrelevant or unproved matters or it omitted to take into account matters that are relevant or where it exercised or failed to exercise the discretion on wrong or inadequate materials and in all other cases, where it is in the interest of justice to interfere.[164]

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[164] *Supra,* note 159.

## V. CONCLUSION

Given the unique nature of the *CCAA* in terms of its objectives as a remedial statute, the high level of deference accorded to decisions of *CCAA* supervising judges is reasonable, as to do otherwise would frustrate the objectives of the *CCAA*. Likewise, given the objectives of the restructuring provisions in the *CAMA,* the level of deference accorded to decisions of *CCAA* supervising judges should be adopted. A possible challenge here will be in determining when deference should be given to decisions of the Federal High Court to general decisions on the *CAMA* or when deference should only be given to the insolvency related sections of the Act. This will be left for the court to decide.

Insolvent companies undergoing restructuring under the *CCAA* or *CAMA* are in a financial/ economic crisis which is a very delicate situation. If appellate courts fail to strike the correct balance in giving discretion to the supervising judges in restructuring proceedings, then restructurings will become more difficult or impossible due to the uncertainty hanging over them vis-a-vis the potential for appeals. In light of this, deference in this regard, is justified and recommended.

# CHAPTER FOUR

# COURT SUPERVISED LIQUIDATION UNDER THE *COMPANIES CREDITORS ARRANGEMENT ACT (CCAA)* AND THE *COMPANIES AND ALLIED MATTERS ACT (CAMA)*: DOES THIS OPTION SUPPORT THE GOALS OF RESTRUCTURING?

## I. Introduction

At the heart of the *CCAA* and the *CAMA* is the concept of "corporate rescue". Conventionally, this would involve some form of reorganization or restructuring of the distressed company through the execution of an approved plan, carefully curated considering the company's circumstances and which has the potential to exponentially improve the company's financial outlook, making it viable again. However, in recent times, there has been a rise in asset sales (liquidation) of distressed companies as a form of restructuring. These sales have been carried out using the *CCAA* in Canada. Liquidation has also been provided for as an option under *CAMA* for when a company is unable to pay its debts. This Chapter considers the concepts of liquidation under the *CAMA* and the *CCAA* and addresses the question of whether they support the goals of restructuring.

The starting point will be a brief consideration of the general policy objectives of restructuring laws (not specific to any statute or jurisdiction). Subsequently, this Chapter will delve into asset sales in the *CCAA* and *CAMA,* by considering their evolution and the rise in this trend as it relates to asset sales as a restructuring tool. Finally, the outcomes of asset sales will be juxtaposed with the policy objectives of restructuring, the *CCAA* and the *CAMA* to consider their effectiveness in achieving the primary objectives of the insolvency restructuring regimes under each statute.

This paper will conclude by suggesting that although asset sales are sometimes the most viable option to maximize the value of an insolvent enterprise, the use of restructuring laws to effect quick sales is also riddled with public policy concerns and may be contrary to the goals of insolvency law in some cases and should therefore be approved with caution, particularly under the *CCAA*. With regard to the *CAMA,* it will suggest that the option for liquidation be expressly made subject to the availability of a viable restructuring alternative – CVA or Administration.

## II. Policy Objectives of Restructuring

According to the United Nations Commission on International Trade Law (UNCITRAL)'s *Legislative Guide on Insolvency Law*, there is broad agreement that effective and efficient insolvency regimes should aim to achieve certain specific key objectives in a balanced manner.[165] The World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes also sets out key principles for evaluating insolvency regimes.[166]

The World Bank and UNCITRAL, in consultation with the International Monetary Fund, designed the Insolvency and Creditor Rights Standard (the "ICR Standard") to establish the international consensus on best practices for evaluating and strengthening national insolvency and creditor rights systems.[167] The ICR Standard does this by combining the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Legislative Guide on Insolvency Law. The Financial Stability Board[168] has recognized and designated the ICR Standard as one of the key standards for sound financial systems and deserving of priority implementation depending on each country's circumstances.

[165] *Supra,* note 1.
[166] *Supra,* note 2.
[167] *Supra,* note 3.
[168] *Supra,* note 4.

A common feature of the UNCITRAL Legislative Guide, World Bank Principles and the ICR Standard, is the goal of maximizing the insolvent company's value while ensuring the fair treatment of creditors. Chapter 1 has discussed how these guiding principles have been incorporated into the *CCAA* and the *CAMA*.

As detailed in Chapter one above, the policy objectives of the *CCAA* can be summarized as 1) the maximization of returns to creditors; (2) the protection of wider stakeholder interests and (3) debtor rehabilitation.[169] Likewise, as also detailed in Chapter one, the policy objective of the *CAMA* is corporate rescue: to keep the insolvent company as a going concern.[170] With this in mind, the subsequent sections will consider how court-supervised liquidation can be justified and can fit into the restructuring objectives.

## III. Liquidation (Asset Sale) under the *CCAA*

Asset sales that extend beyond a sale in the ordinary course of business, or a sale of redundant assets as part of a downsizing of operations,[171] require court approval. These types of sales are sometimes referred to as "pre-plan sales"[172] or as "liquidating CCAAs".[173] Section 36(1) of the *CCAA* provides as follows:

> A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

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[169] *Supra*, note 5 at 507.

[170] Section 444(2) of *CAMA* provides that notwithstanding the other objectives of Administration, the rescue of the company is the primary objective of the Administrator in the performance of his functions, except where he is of the opinion that it is not reasonably practicable, or a better result can be achieved for the company's creditors by pursuing some other course in order of priority as specified in that subsection. Thus, the objectives of Administration are listed in order of priority under the Act.

[171] Shelley C Fitzpatrick, "Liquidating CCAAs – Are We Praying to False Gods" Ann Rev Insol Law 2008 2.

[172] A pre-packaged sale or "pre-pack" refers to a practice whereby the sale of all or part of a distressed company's business or assets is agreed with a purchaser before the formal insolvency proceeding commences.

[173] *Supra,* note 5 at 593.

Prior to the addition of Section 36 to the *CCAA* in 2009*,* there were instances where requests for the approval of asset sales were made before a plan was proposed under the *CCAA*. Consequently, the courts had to consider in these cases whether the use of the *CCAA* to effect asset sales where a formal restructuring plan had not been prepared was an appropriate use of the *CCAA*. Before 2009, the courts considered what is generally referred to as the "Soundair test"[174] which was set out in *Royal Bank of Canada v. Soundair Corp*[175](a case that dealt with a receivership sale), when deciding whether to approve asset sales under the *CCAA*.[176]

In *Re Consumers Packaging Inc.*,[177] a creditor sought leave to appeal the approval of an asset sale under the *CCAA*. The Court of Appeal for Ontario dismissed the appeal and noted that although it did not want to delve into the merits of the appeal, the sale approval was consistent with previous decisions in Ontario and elsewhere that emphasized the broad remedial purpose and flexibility of the *CCAA* in approving asset sales prior to a formal plan being tendered.[178]

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[174] The factors to be considered by the courts under section 36 of the *CCAA* largely replicate the factors in this test. See, *Supra,* note 13.

[175] 1991 CanLII 2727 (ON CA); for context, this was not a *CCAA* proceeding but a proceeding bordering on the sale of assets by a receiver in a restructuring proceeding. Regardless, it is still very instructional in understanding how assets sales in restructuring evolved in Canada and the *CCAA*.

[176] The factors which a court must consider under the *Soundair* test are as follows: whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process.

[177] 2001 CanLII 6708 (ON CA).

[178] *Ibid,* at para 9. Similarly, in *Re PSINET* 2001 CanLII 28266 (ON SC), the Ontario Superior Court of Justice approved a going concern sale in a *CCAA* proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted in para 3. as follows: "[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees". See also *Re Stelco*, 2004 CanLII 33019 (ON SC).

In 2009, Parliament introduced Section 36 of the *CCAA* to provide courts with "substantive direction" on factors to consider when deciding whether to approve asset sales.[179] Similar to the *Soundair* test, Section 36(3) of the *CCAA* sets out six non-exhaustive[180] factors that must be considered in approving a sale by a *CCAA* debtor of assets outside the ordinary course of business. They are: (a) whether the process leading to the proposed sale was reasonable in the circumstances; (b) whether the Monitor[181] approved the process leading to the proposed sale; (c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to creditors than a sale or disposition under a bankruptcy; (d) the extent to which the creditors were consulted; (e)the effects of the proposed sale on creditors and other interested parties; and (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[182]

In *Re Canwest Global Communications Corp,*[183] the Ontario Superior Court of Justice considered and applied Section 36 for the first time. The Court held that when determining whether a proposed sale was in the "ordinary course of business" within the meaning of Section 36, it must

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[179] Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003, Chair: Richard H. Kroft) ("Senate Report"), at p. 146.
[180] The Section provides that the court is to consider these among other factors.
[181] The Monitor's role is codified in Section 11.7(1) of the *CCAA* which provides that when an initial application is made under the *CCAA,* the court shall appoint a person to monitor the business and financial affairs of the company. The term "Monitor" was first coined by the British Columbia Supreme Court in 1988 in *Re Northland Properties Ltd* (1988) CarswellBC 531 where the Court in para. 44 held that it had the jurisdiction to "appoint an interim receiver and spell out the responsibilities of that office such that his true role would be that of a monitor or watchdog during this interim period". The Supreme Court of Canada in describing the responsibility of the Monitor, held in *Re Stokes Building Supplies Ltd* 1992 CarswellNfld 20 at para 15 (SC): "the Monitor is an agent of the court with the responsibility of helping the court discharge its obligations under the Act. The court on an ex parte hearing does not have the opportunity to realistically determine the scope of the Monitor's mandate. The Court must also determine whether the proposed Monitor has the necessary expertise to discharge its obligations".
[182] Following the amendment of the *CCAA* in 2009 to include section 36, the Court in *Re AbitibiBowater, Inc.* 2010 QCCS 1742 at paras 70-72, suggested that a court should give due consideration to two further factors: a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and b) the weight to be given to the recommendation of the monitor.
[183] 2010 ONSC 2870 (CanLII).

conduct a fact-specific inquiry of the subject transaction within the context of the business carried on by the debtor. Pepall J. (as she then was) found that the proposed disposition of assets met the section 36 *CCAA* criteria and those set forth in the *Soundair* test. The Court also pointed out that to a large degree, the criteria in section 36 of the *CCAA* and the Soundair test, overlap.

Subsequently, in *White Birch*,[184] the Superior Court of Quebec stated:

> [48] The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.
>
> [49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.[185]

More recently, Re *Sanjel Corporation,*[186] the Sanjel debtors sought orders approving certain sales of assets generated through a Sale and Investment Solicitation Process (SISP)[187] that was conducted prior to the debtors' filing under the *CCAA*. The proceeds of the sales would have been insufficient to fully satisfy the claims of the secured creditor, and would have generated no return to unsecured creditors, including the holders of unsecured bonds. The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating *CCAA* in this situation. He alleged that the use of the *CCAA* to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the *CCAA*. He also alleged that bad faith and collusion tainted the integrity of the

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[184] *Re White Birch Paper Holding Company (Arrangement relatif à)* 2010 QCCS 4915 (CanLII).
[185] *Ibid,* at para 48-49. See also Alfonso Nocilla, "Asset Sales under the *Companies' Creditors Arrangement Act* and the Failure of Section 36" (2012), 52 *Can. Bus. L.J.* 226 at p. 242.
[186] 2016 ABQB 257 (CanLII).
[187] A SISP is a court-supervised process under the *CCAA* whereby the assets of an insolvent company are marketed to prospective purchasers or an investment of equity/debt by way of refinancing/restructuring is sought.

SISP. The Trustee submitted that the *CCAA* can only be used to liquidate the assets of a debtor company and distribute the proceeds where such use is uncontested or where there is clear evidence that the *CCAA* provides scope for greater recoveries than would be available in a bankruptcy. The Court dismissed the application of the Trustee and approved the sale. The summary of the Court's findings is as follows:[188]

> I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:
>
> (a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence…
>
> (b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process…
>
> (c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.
>
> (d) Creditors, other than trade creditors, were consulted and involved in the process.
>
> (e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.
>
> (f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

It appears from the three cases discussed above, that the courts are very likely to approve a sale under the *CCAA* (pre-packs inclusive), provided the *Soundair* test and requirements under Section 36 of the *CCAA* are met. They also underscore the fact that the *CCAA* courts enjoy significant discretion in the exercise of their duties.

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[188] *Supra,* note 186 at para 112.

As has been illustrated above, asset sales/liquidating *CCAA*s generally have become the trend and it appears that they are here to stay. While it is a welcome idea to embrace the broad scope of the *CCAA,* caution should be employed particularly as it relates to asset sales in the *CCAA*. Farley J. in *Re Stelco*[189] noted this about the *CCAA*: "…the *CCAA* may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part". This statement suggests that asset sales under the *CCAA* should only be considered where restructuring is not feasible. However, with the rapid increase in the number of liquidating *CCAA* cases, it may be that asset sales under the *CCAA* are being used even when restructuring is a viable option.

While liquidating *CCAA*s appear to be inconsistent with the traditional corporate rescue purpose of the Act, courts that favour them have justified them in two ways. Firstly, they have pointed to the broad discretion of the *CCAA* court to grant a wide range of orders, and to the remedial nature of the Act that requires a large and liberal interpretation of its provisions. Secondly, they have suggested that sales in the absence of plans are appropriate where the underlying business of the debtor is preserved, or where the sale of the debtor's assets will maximize returns for the creditors.[190] At a minimum, the absence of data to support the claim that sales generally yield better returns than reorganizations should encourage closer scrutiny of a process that the *CCAA* does not expressly authorize, i.e., the sale of substantially all of the debtor's assets in the absence of a plan.[191]

## IV. Liquidation (Asset Sale) under the *CAMA*

[189] 2004 CanLII 33019 (ON SC) at para 1. [underlined for emphasis].
[190] Alfonso Nocilla, "Is Corporate Rescue Working in Canada" (2012) 53:3 Can Bus LJ 382 at p. 394.
[191] *Ibid.*

It is important to point out here that the Court of Appeal of Nigeria in *Musa v. Ehidiamhen*[192] noted that the terms "liquidation or winding up" which are interchangeable terms and thus used indiscriminately cover a process whereby the life of a company is ended, and its property administered for the benefit of its creditors and members. Thus, reference to winding up provisions in the *CAMA* will be the same as liquidation provisions in the *CAMA*.

*CAMA* provides that there are 3 modes in which the winding up of a company may be effected: (1) Winding up by the Court; (2) Voluntarily winding up and (3) Winding up subject to the supervision of the Court. Section 570(1) of *CAMA* vests the Federal High Court "within whose area of jurisdiction the registered office or head office of the company is situate", with the jurisdiction to wind up a company.

**a. Winding up by the Court:**

Section 571 of *CAMA* provides for the instances in which a company can be wound up by the Court and that is if any of these occur:

1. The company has by special resolution resolved that the company be wound up by the Court.
2. Default is made in delivering the statutory report to the Commission or in holding the statutory meeting.
3. The number of members is reduced below two in the case of companies with more than one shareholder.
4. The company is unable to pay its debts.[193]

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[192] (1994) 3 NWLR (Pt. 334) 544.

[193] Section 572(a) of *CAMA* provides that "A company is deemed to be unable to pay its debts if—
(a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N200,000, then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; (b) execution or other process issued on a judgment, act

5. The condition precedent to the operation of the company has ceased to exist.
6. The Court is of opinion that it is just and equitable that the company should be wound up.

Section 573(1) provides for the list of persons who can make an application to the Court for a winding up order.[194] Worthy of note is section 574 which provides for the powers of the Court in hearing a winding up petition. On hearing a winding up petition, the Court may dismiss it, adjourn the hearing conditionally or unconditionally or make any interim order, or any other order that it deems fit.[195]

One thing I find commendable in this section, is the discretionary power given to the Court in section 574(2):

> Unless it appears to the Court that some other remedies are available and that the petitioners are acting unreasonably in seeking a winding-up order instead of pursuing those remedies, the Court, on hearing a petition by contributory members of a company for relief by winding-up on the ground that it would be just and equitable so to do, shall make the order as prayed if it is of the opinion that the petitioners are entitled to the relief sought.

Given that the *CAMA* provides for the CVA and Administration proceedings which are an alternative to winding up a company which is unable to pay its debts, the inclusion of this provision was necessary to avert the mind of the Court to these other remedies and make winding up, a last resort. Otherwise, the inclusion of CVA and Administration provisions would have been

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or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or (c) the Court, after taking into account any contingent or prospective liability of the company, is satisfied that the company is unable to pay its debts.

[194] An application to the court for the winding-up of a company shall be by petition presented subject to the provisions of this section, by — (a) the company or a director; (b) a creditor, including a contingent or prospective creditor of the company; (c) the official receiver; (d) a contributory; (e) a trustee in bankruptcy to, or a personal representative of, a creditor or contributory; (f) the Commission under section 366 of this Act ; (g) a receiver, if authorised by the instrument under which he was appointed; or (h) by all or any of those parties, together or separately.

[195] Section 574 (1) *CAMA*.

counterproductive. It is also worthy of note that when a company is being wound up, a liquidator is appointed, and the liquidator takes charge of the assets of the company.[196]

**b. Voluntary Winding up**

Section 620(1) of the *CAMA* provides that a company can be wound up voluntarily:

1. When the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on occurrence of which the articles provided that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;
2. If the company resolves by special resolution that the company be wound up.

This mode of winding up is straightforward and would not require the intervention or supervision of the Court because it is voluntary. There are however cases where a voluntary winding up proceeding can be made subject to the supervision of the Court as will be discussed below.

**c. Winding up subject to the supervision of the Court**

Section 649 of *CAMA* provides that if a company passes a resolution for voluntary winding up, the Court may on petition order that the voluntary winding up shall continue but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally on such terms and conditions, as the Court deems fit. This is very similar to the first mode considered – winding up by the Court. Section 651 of *CAMA* also adds that a winding up subject to the supervision of the Court shall, for the purposes of sections 576 and

[196] Section 588 of *CAMA* provides a detailed list of the powers of a liquidator. Relevant examples are the power to sell the assets and the power to pay off creditors in full.

577 of the Act, be deemed to be a winding up by the Court. Also, some powers of the appointed liquidator in this mode, are restricted and can only be exercised by the sanction of the Court.[197]

Clearly, the concept of liquidation under the *CAMA* is not the same as liquidating *CCAA*'s. In the *CAMA*, liquidation essentially marks the dissolution of the company (not an attempt to restructure) but in liquidating *CCAA*'s, it is seen as a restructuring option even though courts sometimes approve liquidating *CCAA*'s without a restructuring plan being in place as has been discussed above. Regardless, a company incorporated under the *CAMA* can be wound up for being unable to pay its debts and this is why the scope of liquidation under the *CAMA* must be addressed as well.

## V. DOES ASSET SALE SUPPORT THE GOAL OF RESTRUCTURING?

There is no doubt that asset sales could be in some circumstances, more beneficial than a traditional restructuring thereby resulting in more value which can be distributed among the creditors. Nevertheless, the drastic surge in asset sales where no plan has been proposed is quite alarming and may undermine the remedial purpose of the restructuring laws. Resorting to asset sales at the onset of insolvency not only kills any hope of reviving the company as such but also, more importantly, could jeopardize the interests of many stakeholders who will not be privileged to have a say in the pre-pack sale negotiation. The World Bank,[198] while highlighting the objectives of restructuring goals, noted:

> Where an enterprise is not viable, the main thrust of the law should be swift and efficient liquidation to maximize recoveries for the benefit of creditors. Liquidations can include the preservation and sale of the business, as distinct from the legal entity. On the other hand, where an enterprise is viable, meaning that it can be rehabilitated, its assets are often more valuable if retained in a rehabilitated business than if sold in a liquidation.

[197] Section 653 *CAMA.*
[198] *Supra,* note 3.

The Supreme Court of Canada[199] also reiterated that "the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the BIA regime".[200]

It is clear that the general objectives of restructuring law, as well as the objectives of the *CCAA* and *CAMA*, are corporate rescue and protection of creditor interests. Given the issues raised above, asset sales do not necessarily facilitate these objectives in all cases. It can therefore be said that in some cases, liquidation may interfere with the goals of the *CCAA* and the *CAMA*. In terms of statistics, the justification of pre-packs[201]—namely, that they are faster, more cost-effective and more likely to yield higher returns than traditional reorganization procedures —were not supported by the data gathered in either Canada or the United Kingdom (U.K.). This conclusion is particularly interesting given that the average sizes of debtor companies differed significantly between Canada and the U.K. In general, pre-packs in the U.K. are a Small and Medium Scale Enterprises (SME) phenomenon, while most *CCAA* proceedings involve large corporations.[202]

## VI. CONCLUSION

The approach of liquidating *CCAA'*s is more of a restructuring option for a number of reasons, some of which are that it is regulated under the *CCAA,* and courts have held in the cases discussed above, that the asset sale was the best option which would maximize value for the

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[199] *Supra,* notes 176 and 177.
[200] Underlined for emphasis.
[201] This would include various forms of asset sales/ liquidation.
[202] Alfonso Nocilla, "Reorganizations, Sales, and the Changing Face of Restructuring in Canada: Quantitative Outcomes of 2012 and 2013 CCAA Proceedings, 2019" 42-2 *Dalhousie Law Journal* 371, 2019 CanLIIDocs 4261, <https://canlii.ca/t/sw9g> at p. 389.

stakeholders. The issue here is the potential for liquidating *CCAA*'s to be preferred even when a viable and more effective restructuring option exists. The solution in this author's opinion, will be for the courts to closely scrutinize applications made to approve liquidating *CCAA's* and be cautious in exercising their wide discretionary powers under the *CCAA*. If approval of liquidating *CCAA's* can be limited to unique circumstances where it is fair to all creditors and viable, it will certainly help facilitate the goals of the *CCAA*.

On the other hand, *CAMA's* provisions on liquidation were not to serve as a restructuring or business rescue option. It even poses some form of conflict because as discussed above, a company can be wound up or liquidated for failure to pay its debts and the same *CAMA* also provides for the CVA and Administration as restructuring options for insolvent companies. Although the Act gives the Court discretion to decide when other options will prevail over liquidation, there is no framework or guide to help the Court in deciding this. Without a guide, there will likely be conflicts between winding up a company or pursuing the CVA or Administration options. This author's recommendation here will be two-fold:

1. The provision under the *CAMA* which allows for a company to be liquidated for its inability to pay its debts should be amended and expressly made subject to available and viable restructuring options.
2. The liquidation option for insolvent companies should have a framework such that it aligns with the restructuring goal of value maximization which means that this should only be pursued where it will be in the best interest of the stakeholders. An example can be drawn from the parameters set out for liquidating *CCAA's* under the *CCAA* which have been discussed above.

Given that inability to pay its debts is not the only ground for winding up a company under the *CAMA,* these recommendations are only suited to where the company's insolvency is the ground for the proceeding as this will better align the *CAMA* with its corporate rescue goal.

# CHAPTER FIVE

## ARRANGEMENTS UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*[203] (*CBCA*) AND ARRANGEMENTS UNDER CHAPTER 27 OF THE *COMPANIES AND ALLIED MATTERS ACT (CAMA)*

## I. INTRODUCTION

Section 192 of the *CBCA* permits corporations to apply for judicial approval of an "arrangement", a broad term that includes a variety of changes such as amendments to a corporation's articles of incorporation, the amalgamation of two or more corporations, and exchanges of a corporation's securities for property, money, or other securities.[204] Section 192 is often used to carry out reorganizations where it is not practicable to carry out the reorganization by other means, and it has become an important vehicle for complex corporate reorganizations in Canada.[205] One of the statutory requirements for a corporation seeking court approval of an

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[203] (R.S.C., 1985, c. C-44).

[204] Section 192(1) of the *CBCA* provides a non-exhaustive list of changes that constitute an arrangement within the meaning of Section 192. The opportunities for creative and effective transaction design made available by the plan of arrangement provisions in the *CBCA* and other Canadian corporate statutes have been long recognized, see Christopher Nicholls, *Mergers, Acquisitions, and other Changes of Corporate Control,* 2nd ed (Toronto: Irwin Law Inc. 2012) at 96. The Director under the *CBCA* endorses the view that the arrangement provisions of the Act are intended to be facilitative and notes that the arrangement provisions of the Act have been utilized by corporations to effect a wide range of different types of transactions, such as "spin-offs" of business enterprises, combinations of business enterprises, continuances of corporations to or from other jurisdictions and so-called "going-private" transactions, see: Government of Canada, Innovation, Science and Economic Development Canada, *Policy on arrangements – Canada Business Corporations Act, section 192*, April 20, 2022 at para 2.01, online: <https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/policy-arrangements-canada-business-corporations-act-section-192#notice>. These changes include the following: an amendment to a corporation's articles of incorporation; an amalgamation of two or more corporations; an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act; a division of the business carried on by a corporation; a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate; an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate; a going-private transaction or a squeeze-out transaction in relation to a corporation; a liquidation and dissolution of a corporation; and any combination of the foregoing.

[205] Section 192 is typically used to carry out complex transactions. Section 192(3) provides that "where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation". This underscores the fact that Section 192 is primarily intended to be used for complicated

arrangement under Section 192 is that the corporation must be solvent.[206] Despite the clear language of the Act, however, an examination of the jurisprudence on Section 192 reveals varying and inconsistent interpretations of the solvency requirement.[207]

Likewise, chapter 27 of the *CAMA* has similar provisions which allow for arrangements to be made which could not be made under any other provision in the *CAMA.* Given that the *CAMA* does not expressly prohibit the use of chapter 27 to restructure insolvent companies, it could be seen as a complimentary provision to the restructuring regimes – CVA and Administration under the *CAMA*. This raises the question of whether these provisions in both statutes, could rightly be used to facilitate the restructuring of insolvent companies. The purpose of this chapter is to address this question.

This chapter will begin by discussing the origins of Section 192 of the *CBCA* and the requirements for court approval of an arrangement. This discussion begins with the landmark case of *BCE Inc v 1976 Debentureholders*[208] (*BCE*) which explains that Parliament enacted Section 192 of the *CBCA* to permit corporations to make fundamental changes while still protecting their shareholders' rights.[209] It will then consider the judicial interpretation and expansion of the scope

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transactions that cannot be dealt with under other provisions of the Act, see *Amoco Acquisition Company Ltd* (1988), 87 AR 321, 59 Alta LR (2d) 260 [*Amoco*] at para 5.

[206] Section 192(3) codifies this requirement of solvency and Section192(2) provides that for the purposes of this section, a corporation is insolvent where it is unable to pay its liabilities as they become due, or where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes.

[207] *Re Computel Systems Ltd.* (30 April 1982), unreported (Ont SC) unreported [*Computel Systems*]; *Savage v Amoco Acquisition Company Ltd* (1988), 87 AR 321, [*Amoco*]; *Re 9171665 Canada Ltd* [1994] 10 W.W.R. 127, paras. 3 and 17 (Alta. Q.B.); *12178711 Canada Inc v Wilks Brothers, LLC* 2020 CarswellAlta 2300. As explained in *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560 [*BCE*], Parliament enacted Section 192 to permit corporations to make changes to their share structures while still protecting the rights of their shareholders.

[208] [2008] 3 SCR 560 [*BCE*].

[209] *Ibid*, at para 123, citing Consumer and Corporate Affairs Canada, *Detailed background paper for an Act to amend the Canada Business Corporations Act* (1977), p. 5 ["Detailed Background Paper"].

of Section 192 of the *CBCA* over time, particularly with respect to the solvency requirement and the problems associated with the continued expansion of Section 192's scope by the courts.

Subsequent parts will cover the provisions of chapter 27 of the *CAMA* in terms of scope and application and then distinguish it from section 192 of the *CBCA* despite their similarities. It will argue that Section 192 of the *CBCA* and the Director's Policy[210] should be amended to expressly prohibit the use of Section 192 by insolvent corporations, even where those corporations are part of a corporate group that includes solvent entities as these amendments would clarify the purposes of Section 192 of the *CBCA* and distinguish it from the insolvency reorganization regimes under the *Bankruptcy and Insolvency Act*[211] (*BIA*) and the *Companies Creditors Arrangement Act*[212] (*CCAA*). In the alternative, assuming that Parliament is of the opinion that the solvency requirement is no longer relevant, Section 192 of the *CBCA* should be amended to remove the requirement. Either way, an amendment is necessary as well as a clear statement by Parliament to ensure consistency between the language of the Act and the jurisprudence as well as to guide the courts in the future. On the flipside, it will be argued that the existence of chapter 27 of the *CAMA* does not contradict but rather compliments the "developing" insolvency regimes which the *CAMA* has introduced.

## II. STRUCTURE, ORIGINS AND PURPOSES OF SECTION 192 OF THE *CBCA*

### a. Requirements for Approval of an Arrangement

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[210] Government of Canada, Innovation, Science and Economic Development Canada, *Policy on arrangements – Canada Business Corporations Act, section 192*, April 20, 2022, online: <https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/policy-arrangements-canada-business-corporations-act-section-192#notice>
[211] *Supra,* note 23.
[212] *Supra,* note 8.

There are two stages to the approval process under Section 192. First, the applicant corporation or corporate group must apply for an interim order[213] permitting it to propose an arrangement. The applicant(s) must meet four main statutory requirements when applying for the interim order, as follows: (i) notice must be given to the CBCA Director; (ii) the proposed arrangement must constitute an "arrangement" under Section 192 of the CBCA; (iii) it is not practicable to effect the proposed arrangement under any other provision of the CBCA; and (iv) the applicant is not "insolvent". Second, if the foregoing requirements are met and an interim order is granted, the applicant(s) must then finalize the terms of the arrangement and ultimately apply for a final order approving the arrangement so that it can be implemented.[214] Each of these stages is described below in greater detail.

*(i) Application for an Interim Order (Statutory Requirements)*

1. *Notice must be given to the Director under the CBCA*[215]

Pursuant to Section 192(5) of the Act, the Director[216] must be notified of the application. Section 192(5) also grants the Director the right to appear and be heard in person or through a legal representative. This notice must be given both with respect to the interim and final application for court approval. In these regards, the Director's Policy sets out the position of the Director as to the permissible use of, and appropriate procedural safeguards and substantive requirements

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[213] Christopher Nicholls, *Mergers, Acquisitions, and other Changes of Corporate Control,* 2nd ed (Toronto: Irwin Law Inc. 2012) at 96.
[214] *Ibid,* at 98.
[215] Section 192 (5); *8440522 Canada Inc. (Re)*, 2013 ONSC 2509 at para 49.
[216] Section 2 of the *CBCA* defines the Director as "the Director appointed under section 260" and Section 260 provides that "The Minister may appoint a Director and one or more Deputy Directors to carry out the duties and exercise the powers of the Director under this Act". The Minister is also defined under Section 2 of the *CBCA* as "such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this Act".

applicable to arrangements under Section 192. [217] A more in-depth review of the Director's Policy will be considered later, as it raises key issues relevant to the solvency requirement.

2. *The proposed arrangement must constitute an "arrangement" within the meaning of Section 192*[218]

As noted earlier, Section 192(1) provides a list of the various forms that an arrangement might take. Notably, the definition of "arrangement" in Section 192(1) uses the word "includes", suggesting that the list is non-exhaustive, and the jurisprudence has confirmed that the term "arrangement" is to be interpreted broadly and flexibly.[219] It is also to be used where it is not practicable to effect the proposed arrangement under any other provision of the *CBCA*.[220] On the impracticability requirement, the Director's Policy states the following:

> The Director endorses the view that the impracticability requirement means something less than "impossible" and, generally, that the test would be satisfied by demonstrating that it would be inconvenient or less advantageous to the corporation to proceed under other provisions of the Act. The Director endorses this view subject to a concern that the arrangement provisions of the Act not be utilized to subvert the procedural or substantive safeguards applicable to other sorts of transactions possible under the Act.[221]

As such, in its initial application, the applicant must satisfy the court that even if the proposed transactions could be carried out by some other means, it would be more advantageous for the corporation to carry out the transactions pursuant to an arrangement under Section 192.[222]

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[217] *Supra,* note 210.
[218] Section 192(1); Section 192 (5); *8440522 Canada Inc. (Re)*, 2013 ONSC 2509 at para 49.
[219] *BCE*, *supra* note 208 at para 125; For instance, in *Amoco* at para 5, the court in determining the scope of transactions capable of arrangement under the *CBCA,* held that "to give the words of the section the narrow interpretations suggested would defeat that purpose. Accordingly, we say that "exchange" in s. 185.1 includes a compromise, and that the section generally deals with proposals that are much more than a simple offer to acquire the shares of another. So long as a proposal is not a sham, that section is available"; *Supra,* note 210.
[220] Section 192(3); *8440522 Canada Inc. (Re)*, 2013 ONSC 2509 at para 49.
[221] *Supra,* note 210 para 2.06.
[222]*Supra,* note 213 at 100.

3. *The Applicant is not "insolvent"*[223]

The wording of Section 192(3) expressly excludes insolvent corporations from undertaking arrangements under Section 192. It uses the phrase "not insolvent". The term "insolvent" is defined in Section 192(2) to mean either of the following: (a) the corporation is unable to pay its liabilities as they become due; or (b) the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes.[224] As will be discussed later, it is clear from this language and the structure of Section 192 that the Section was never intended to be used to restructure insolvent corporations.

*(ii) Application for a Final Order approving the Arrangement*

Once the arrangement has been finalized, the applicant(s) must ask the court for a final order approving the arrangement before it can be implemented. In approving the arrangement, the court must be satisfied that: (a) the statutory procedures have been met; (b) the application has been put forward in good faith; and (c) the arrangement is fair and reasonable.[225] In *12178711 Canada Inc v Wilks Brothers, LLC*,[226] the Alberta Court of Appeal in considering the good faith requirement, held as follows:

> The second consideration is whether the application was put forward in good faith; whether the applicants are proceeding with the arrangement for a valid business purpose. The chambers judge concluded:
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> . . . the Arrangement serves a valid business purpose because it will significantly reduce the outstanding indebtedness in annual cash interest payments of Calfrac Entities.... It will also provide new liquidity, reduce financial risk, and strengthen working capital.[227]

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[223] *Ibid*.
[224] Section 192(2); *supra* note 210 at para 2.03.
[225] *Supra,* note 208 at para 137.
[226] 2020 CarswellAlta 2300 *[Wilks Brothers]*.
[227] *Ibid,* at para 21.

The import of the above-referenced quote is that the good faith requirement is assessed based on whether the arrangement has a valid business purpose. In addressing the requirements to establish the existence of a valid business purpose, the Court went further to hold:

> The first prong, whether there is a valid business purpose, asks whether there is a positive value to the corporation to offset the fact that rights are being altered. The court must be satisfied that "the burden imposed by the arrangement on security holders is justified by the interests of the corporation": BCE at para 145. If the arrangement is necessary for the corporation's continued existence, the court will more willingly approve it despite its prejudicial effect on some security holders.[228]

For the second requirement, the court in *BCE* set out the fair and reasonable test as follows:

> In reviewing the directors' decision on the proposed arrangement to determine if it is fair and reasonable under s. 192, Courts must be satisfied in determining whether the proposed arrangement is fair and reasonable by applying a two-prong test, namely, that (1) the arrangement has a valid business purpose, and (2) the objections of those security holders whose legal rights are affected are being resolved in a fair and balanced way.[229]

The Director's Policy further elaborates on the fairness requirement as follows:

> The Director believes that in addition to demonstrating compliance with jurisdictional requirements (discussed above in Section 2) and statutory and court-ordered procedural requirements (including those designed to ensure procedural fairness), there rests with the applicant proposing an arrangement an onus to demonstrate that the proposed arrangement is fair from the perspective of the security holder constituencies whose rights are affected by the arrangement".[230]

It appears that the good faith and fair and reasonable test are intertwined. The Court in *BCE* did not spell out the good faith test and an attempt by the Court in *Wilks Brothers* to do so implies that the existence of a valid business purpose is the yardstick for determining good faith. Going by the quoted excerpt from the Court in *BCE,* valid business purpose is also one of the determinants of the fair and reasonable test. This is somewhat confusing as the good faith test may be seen as a prerequisite to the fair and reasonable test. The Courts in *BCE* and *Wilks Brothers* did not set out

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[228] *Supra,* note 226 at para 15.
[229] *Supra,* note 208 at para 138.
[230] *Supra,* note 210 at para 4.01.

the good faith test because this was never a contested issue in these cases. Nevertheless, the Courts found that in approving the arrangement, the court must be satisfied that: (a) the statutory procedures have been met; (b) the application has been put forward in good faith; and (c) the arrangement is fair and reasonable. These fundamental requirements have been subject to interpretation by the courts over the years. Another important factor to note here is that although there is no explicit requirement for the applicant corporation to hold a vote of its security holders, in practice, such a vote is typically an important step before applying for judicial approval of the arrangement.[231]

### b. Origins and Purposes of Section 192 of the *CBCA*

As the Supreme Court of Canada explained in *BCE*, Parliament's intention when it enacted Section 192 of the *CBCA* was to permit corporations to carry out complicated transactions that altered the rights of their shareholders while still protecting those shareholders' rights:

> The s. 192 approval process has its genesis in 1923 legislation designed to permit corporations to modify their share capital: Companies Act Amending Act, 1923, S.C. 1923, c. 39, s. 4. The legislation's concern was to permit changes to shareholders' rights, while offering shareholders protection. In 1974, plans of arrangements were omitted from the *CBCA* because Parliament considered them superfluous and feared that they could be used to squeeze out minority shareholders. Upon realizing that arrangements were a practical and flexible way to effect complicated transactions, an arrangement provision was reintroduced in the *CBCA* in 1978: Consumer and Corporate Affairs Canada, Detailed background paper for an Act to amend the Canada Business Corporations Act (1977), p. 5 ("Detailed Background Paper").[232]

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[231] *Supra,* note 208 at 127 where the court held: "Fundamentally, the s. 192 procedure rests on the proposition that where a corporate transaction will alter the rights of security holders, this impact takes the decision out of the scope of management of the corporation's affairs, which is the responsibility of the directors. Section 192 overcomes this impediment through two mechanisms. First, proposed arrangements generally can be submitted to security holders for approval. Although there is no explicit requirement for a security holder vote in s. 192, as will be discussed below, these votes are an important feature of the process for approval of plans of arrangement. Second, the plan of arrangement must receive court approval after a hearing in which parties whose rights are being affected may partake" [emphasis added]; *Supra,* note 16 at 97.

[232] *Supra*, note 208 at para 123.

In its 1977 report recommending the enactment of Section 185.1 (which later became Section 192), the Department of Consumer and Corporate Affairs stated that the new Section had the dual purpose of giving "management and majority shareholders substantial flexibility to govern a corporation's internal affairs" while also "protecting the interests of minority shareholders". Whenever it became impractical for a corporation to effect a fundamental change in any other way, Section 185.1 would permit corporations to do so through an arrangement supervised by the courts.[233]

The Supreme Court of Canada in *BCE* went further by analyzing the "philosophy that underlies Section 192 approval".[234] In doing so, the Supreme Court held as follows:

> "The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose rights may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests. In discussing the objective of the arrangement provision introduced into the *CBCA* in 1978, the Minister of Consumer and Corporate Affairs stated: ... the Bill seeks to achieve a fair balance between flexible management and equitable treatment of minority shareholders in a manner that is consonant with the other fundamental change institutions set out in Part XIV.[235]

*BCE* continues to be the leading decision on the test for court approval of arrangements under Section 192. However, as will be discussed subsequently, lower courts have gradually expanded the scope of Section 192 to the extent that its application in practice is, at times, inconsistent with the plain language of the statute itself. Although a plain reading of Section 192(3) suggests that only solvent corporations can carry out arrangements under Section 192, in practice,

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[233] *Supra*, note 208 citing Consumer and Corporate Affairs Canada, Detailed background paper for an Act to amend the Canada Business Corporations Act (1977), p. 5 ["Detailed Background Paper"].

[234] *Supra*, note 208 at para 123.

[235] *Supra*, note 208 at para 128 [emphasis added]; Detailed Background Paper, *supra* note 209 at p.6.

courts have allowed insolvent corporations to do so, as well. In effect, Section 192 of the *CBCA* is now seen as an additional restructuring tool for insolvent corporations that, for a variety of reasons, do not want to file for protection under either the *BIA* or the *CCAA*.[236]

## III. THE SECTION 192 JURISPRUDENCE: REINTERPRETING THE SOLVENCY REQUIREMENT

Historically, Section 192's solvency requirement was initially uncontroversial, as all corporations seeking to carry out arrangements under Section 192 were solvent. As such, in each case, the court simply needed to mention that the corporation was solvent, before turning its focus to the disputed issues in the arrangement.[237] Therefore, in the early 1980s, courts applied a strict and literal construction of Section 192's solvency requirement, thereby prohibiting the use of Section 192 by insolvent corporations.[238] For example, in *Bell,* the Quebec Superior Court stated that:

> According to the jurisprudence with respect to legislative provisions of the same nature, it is the duty of the court on such a petition to assure itself that all prerequisites have been entirely satisfied in accordance with the law, particularly that the documentation sent to shareholders is sufficient to permit them to appropriately appreciate the question, and that the proposed arrangement is just and reasonable to the shareholders, in particular, for minority shareholders…. In addition, in accordance with s. 185.1 the court must assure itself that it is in fact an arrangement in accordance with s. 185.1, <u>that the corporation is not insolvent within the meaning of s. 185.1(2)</u> and that it is not practicable for the corporation to effect a fundamental change in the nature of an arrangement under any other provision of the Canada Business Corporations Act, s. 185.1(3)".[239]

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[236] Sean Zweig and Preet K Bell, "The Expanded Use of the CBCA in Debt Restructurings" (2018) Ann Rev Insol Law 27 at p 1.

[237] See, for example, *Bell Canada Inc v Canada (Director, Business Corporations Act)* 1982 CarswellQue 359, 69 C.P.R. (2d) 188 [Bell]: "in accordance with s. 185.1 the court must assure itself that it is in fact an arrangement in accordance with s. 185.1, that the corporation is not insolvent within the meaning of s. 185.1(2) and that it is not practicable for the corporation to effect a fundamental change in the nature of an arrangement under any other provision of the Canada Business Corporations Act, s. 185.1(3)". Section 185 later became Section 192.

[238] *Ibid.*

[239] *Ibid,* at para 12 [emphasis added]; Section, 185.1 later became Section 192.

The shift away from a strict interpretation of Section 192 and the attempt at expanding the scope of the solvency requirement was seen first in the cases of *Re Computel Systems Ltd*[240] *(Computel)* and *Savage v Amoco Acquisition Company Ltd*[241] *(Amoco)*. These two cases highlight two distinct scenarios in which courts have interpreted the solvency requirement beyond its original scope as set out in *Bell*.[242]

In *Computel*, the applicant corporation, while insolvent at the interim hearing date, would become solvent by the date of the final order approving the arrangement. In the opinion of the Court, the solvency requirement was satisfied as long as the corporation would be solvent at the time of the grant of the final approval of the arrangement. The key consideration of the Court in interpreting the solvency requirement was the "time of solvency". Interestingly, however, the solvency requirement as prescribed in Section 192(3) draws no distinction between solvency at the time of making the interim order of arrangement and at the time of final approval. The Court in *Computel* did not address this issue.

*Amoco* established a second exception to the solvency requirement, which is that where a corporate group seeks to carry out an arrangement under Section 192, and the group includes both solvent and insolvent entities, only the applicant corporation needs to be solvent in order to meet the solvency requirement.[243] In *Amoco,* the applicant, Amoco Limited, proposed to restructure several billion dollars in secured debts and trade debts as well as all the outstanding shares in Dome Limited (Dome), which would result in Dome becoming a wholly owned subsidiary of Amoco

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[240] (30 April 1982), unreported (Ont SC) unreported [*Computel Systems*].
[241] (1988), 87 AR 321, 59 Alta LR (2d) 260 [*Amoco*].
[242] *Supra,* note 210 at para 2.03.
[243] *Supra,* note 210 at para 2.03.

Limited. As part of the proposal, each shareholder in Dome would exchange their shares for debentures. An interim application was brought pursuant to Section 185.1(4)(c) – now Section 192(4)(c) – and the resulting order held that the proposal fell within the scope of the Section. However, two common shareholders and one preferred shareholder appealed, arguing, among other things that: (i) the proposed arrangement was a mere takeover bid and therefore should not be carried out under Section 192, but was governed by Part XVI of the Act; (ii) in the alternative, that the arrangement was a mere amalgamation, and should be governed by Section 176; (iii) that the proposal involved a compromise of debts and securities, and was therefore beyond the scope of Section 192[244]; and (iv) that the real applicant was Dome, which was insolvent and was therefore prohibited from bringing the application. The Alberta Court of Appeal dismissed the appeal, holding that it would "not interpret subs. (3) of the section to limit the section to cases where none of the corporations involved is insolvent, which is the effect of the submission of the appellants. Dome may, indeed, be insolvent; but the applicant and others involved are not".[245] Unlike in *Computel*, where the Court's focus was on the "time of solvency" (whether at the point of an interim or final order of arrangement), the focus of the Court in *Amoco* was whether the applicant corporation itself was solvent. The Court concluded that the applicant corporation was solvent, and therefore satisfied the solvency requirement in what is now Section 192(3).

More recently, in *Re 9171665 Canada Ltd*[246] *(Connacher)*, the Alberta Court of Queen's Bench addressed the question of whether the Court had "the jurisdiction to issue a final order under the *CBCA* where the entity emerging from the arrangement will or might be insolvent".[247] The

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[244] Although the basis for this argument is unknown, it could have been premised on the origin and purpose of Section 192 which was to permit alterations to shareholder rights as discussed above, not the compromise of debts.
[245] *Supra,* note 241 at para 5.
[246] (2015), 260 ACWS (3d) 273 (Alta QB) [*Connacher*].
[247] *Ibid,* at paras 20-27.

applicants, 9171665 Canada Ltd. and Connacher Oil and Gas Limited, made an application before the court for an interim order and, subsequently, a final order pursuant to Section 192 approving an arrangement which would, among other things, allow United States holders of second secured lien notes to exchange them for common shares of Connacher pursuant to an exemption from registration requirements of the United States Securities Act of 1933. The Court granted the interim order but held that in order to obtain a final order under Section 192, the emerging entity must not be insolvent. In particular, the Court held that where corporations fail to meet the Section 192 solvency requirement, the compromise of their debtholders' claims is best dealt with under insolvency law, not under the *CBCA*.[248] In summary, the Court was not satisfied with the evidence before it that Connacher would emerge as a solvent entity following the arrangement, and was also not satisfied that the arrangement was, under the circumstances, fair and reasonable. Accordingly, the application for a final order pursuant to Section 192 was dismissed.

In *12178711 Canada Inc. v. Wilks Brothers, LLC*,[249] the applicant proposed a recapitalization transaction designed to reduce its outstanding indebtedness and annual cash interest payments and improve its liquidity in order to provide the sustainable capital structure required to continue business operations. The Alberta Court of Queen's Bench approved the plan of arrangement, but a creditor who was also a shareholder and competitor of the applicant appealed this decision on the ground that, among other things, the solvency requirement had not been met. The appellant submitted that the solvency test requires that the applicant's cash flow be demonstrated to be positive for a reasonable period of time after implementation of the arrangement, however (it was argued) the applicant was likely to become insolvent within less

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[248] *Ibid* at para 27 (2).
[249] *Supra,* note 226.

than a year following the plan implementation date.[250] The final order was granted in October 2020,[251] and the appellant argued that the debtor would not be solvent past August 2021, but the Court dismissed this argument. On appeal, the Alberta Court of Appeal upheld the lower Court's determination that the solvency test was met. In particular, the Court of Appeal agreed with the lower Court that, based on the evidence, the applicant would remain solvent following the implementation of the arrangement and for a reasonable period of time thereafter. Based on the decision in *Wilks Brothers*, it appears that the solvency requirement has been further expanded such that even if the entity that emerges post-arrangement may become insolvent in the future, the solvency requirement will be met as long as the entity remains solvent for a reasonable period of time post-arrangement. This raises the question of what will be regarded as a reasonable period of time post-arrangement in future cases.

## IV. ARRANGEMENTS UNDER CHAPTER 27 OF THE *CAMA*

Chapter 27 of the *CAMA* is tagged "Arrangements and Compromise" and provides for the range of activities or transactions within a company, which will fall under this category. Similar to section 192 of the *CBCA*, section 710 of the *CAMA* provides that "the word "arrangement" means any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of this Act or by the unanimous agreement of all parties affected." Examples of transactions that are usually implemented using schemes of arrangement include mergers and a scheme of arrangement could also be used in the context of a share acquisition to ensure that the

[250] *Ibid.*
[251] *Ibid,* at para 49.

shares sought to be acquired by an investor are acquired from all shareholders on a uniform basis.[252]

Where under a scheme proposed for a compromise, arrangement or reconstruction between two or more companies or the merger of any two or more companies, the whole or any part of the undertaking or the property of any company concerned in the scheme is to be transferred to another company, the Court[253] may, on the application in summary of any of the companies to be affected, order separate meetings of the companies to be summoned in such manner as the Court may direct.[254] These kind of transactions require the sanction of the Court and when sanctioned by the Court, it becomes binding on the companies.[255]

Another example is the transfer of shares. It provides for where a scheme or contract, not being a take-over bid under the Investment and Securities Act[256] involves the transfer of shares or any class of shares in a company to another company.[257]

Again, a company can enter into an arrangement as a prequel to a voluntary winding up procedure. The Act provides that with a view to effecting any arrangement, a company may by special resolution resolve that the company be put into members' voluntary winding up and that the liquidator be authorised to sell the whole or part of its undertaking or assets to another body corporate, whether a company within the meaning of this Act or not in consideration or part

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[252] Mondaq, Udo-Udoma & Belo-Osagie, *Nigeria: The Companies and Allied Matters Act 2020 – What You Need to Know - Part 9 – Schemes of Arrangement* < https://www.mondaq.com/nigeria/shareholders/1023882/the-companies-and-allied-matters-act-2020--what-you-need-to-know---part-9--schemes-of-arrangement#:~:text=Section%20710%20of%20CAMA%202020,the%20unanimous%20agreement%20of%20all>
[253] Federal High Court.
[254] Section 711(1) of *CAMA*.
[255] Section 711(3) of *CAMA*.
[256] Section 117 of the Investments and Securities Act provides that a "take over" means the acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company; and a "take-over bid" means a bid made for the purpose of a take-over as provided in section 132 of this Act.
[257] Section 712(1).

consideration of fully paid shares, and to distribute the same in specie among the members of the company in accordance with their rights in the liquidation.[258]

Very interestingly, this chapter also provides for a company's power to compromise with its creditors and members. Where a compromise or arrangement is proposed between a company and its creditors or any class of them, the Court may, on the application, in a summary way, of the company or any of its creditors or members or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company, or class of members, as the case may be, to be summoned in such a manner as the Court directs.[259] If the Court is satisfied as to the fairness of the compromise or arrangement, it shall sanction the same and the compromise or arrangement shall be binding on all the creditors or the class of creditors or on the members or the class of members as the case may be, and also the company or in the case of a company in the course of being wound up, on the liquidator and contributories of the company.[260]

The most unique feature of this chapter in the *CAMA* is the moratorium. It provides that no winding up petition or enforcement action by a creditor (secured or unsecured) shall be entertained against any company or its assets that has commenced a process of arrangement and compromise with its creditors for six months from the time that the company by way of affidavit provides the following documents to the Court—

a. A document setting out the terms intended to be proposed to the creditors in an arrangement or compromise;

[258] Section 714 of *CAMA*.
[259] Section 715(1) of *CAMA*.
[260] Section 715(3) of *CAMA*.

b. A statement of the company's affairs containing the particulars of the company's creditors and its debts and other liabilities and of its assets;
c. Such other information as the Court may require; and
d. A statement that the company desires a protection from a winding-up process pending the completion of the arrangement or compromise.

Regardless of this provision, it is still possible for a secured creditor to apply for the moratorium to be discharged.[261] Section 868 defines a secured creditor as "a creditor who has been granted a security interest in any property, asset or assets for the purpose of securing the performance of a debt or guarantee obligation".

It is clear that although the scope of section 192 of the *CBCA* and Chapter 27 of the *CAMA* are similar, they are quite different in terms of their application. In my opinion, section 192 of the *CBCA* was not to serve as an alternative to restructuring as it clearly excludes insolvent companies despite the judicial trend. On the flip side, chapter 27 of the *CAMA,* is drafted in such a way that it complements the other restructuring options – CVA and Administration and can be employed by insolvent companies because the *CAMA* did not expressly limit its scope of application. Given that the Nigerian insolvency regime is not as developed as that of Canada, chapter 27 of the *CAMA* could be a viable complimentary restructuring option for insolvent companies. On the other hand, given the express prohibition of the use of the *CBCA* to restructure insolvent companies as well as the developed insolvency regimes under the *CCAA* and *BIA*, *CBCA* arrangements tend to override the purpose of the *CCAA* and *BIA* as well as the protection and advantages that come with them.

[261] Section 717(2) of *CAMA*.

In light of the above, the question then becomes: "is Section 192 of the *CBCA* being properly interpreted and applied by the courts"? Although the court in *Banro* similarly held that the solvency requirement will be met so long as a solvent entity emerges after the proposed arrangement is implemented, the Court cautioned against the use of Section 192 for restructuring insolvent entities instead of the *CCAA*. Particularly, the Court held:

> I am very dubious as to the appropriateness of the order sought in paras. 10 & 11 of the draft. The aim is to prevent third parties from enforcing rights based on events of default cured by the arrangement. But this is not a CCAA proceeding. The arrangement is not a comprehensive compromise among creditors intended to facilitate a restructuring of a debtor's finances to avoid the devastation of bankruptcy. A CBCA plan is intended to assist corporations implement fundamental changes that they cannot conveniently do on their own under corporate law. While CBCA arrangements allow debt reorganization at times, there are too few safeguards for creditors and other interested parties to treat a CBCA arrangement as equivalent to a CCAA plan. If a debtor needs to cure a prevailing or threatened insolvency by compromising debt and curing defaults comprehensively, a CCAA plan with service on all parties affected by the compromise and curing provisions is required.[262]

The excerpt above supports the conclusion of this chapter, which is that section 192 ought not to be used as a tool for restructuring of insolvent corporations owing to the robust provisions in the *CCAA* and *BIA* which are specifically designed for restructuring of insolvent corporations.

The reasoning of the Court in *Connacher* is helpful, where the Court considered the prospect of an arrangement in terms of its ability to keep the applicant solvent for a reasonable time post-arrangement. While it may seem that the Court was too strict in its interpretation of the solvency requirement, when the policy objectives of section 192 are considered alongside the fact that it was not meant to constitute part of Canada's insolvency regime, the Court was justified in

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[262] 2017 CarswellOnt 5100, 2017 ONSC 2176 *[Banro]* at para 2.

arriving at its conclusion that where the solvency requirement is not met, such debt claims are best dealt with under insolvency law.

Aside from the express exclusion of insolvent corporations in the language of the statute, section 192 arrangements are not ideal for restructuring insolvent corporations for several reasons. First, the *CCAA* and *BIA* contain various mechanisms and protections for creditors that do not exist in the *CBCA*.[263] Thus, restructuring under the *CCAA* is more appropriate for an insolvent corporation.[264] Second, the *CCAA*[265] makes provision for debtor-in-possession financing, as financially distressed corporations undergoing restructuring will need financing to continue operating, but section 192 does not make provision for this. Third, in a section 192 arrangement, there is no "neutral" person such as a Monitor in *CCAA* proceedings who is involved in the restructuring and acts in the best interests of stakeholders. This could lead to decisions that will not be favourable to all stakeholders. Fourth, section 192 arrangements do not include a stay of proceedings on claims against the applicant (as the *CCAA* does), and the effect of this is that where the court does not exercise its discretion to order a stay of proceedings, the applicant corporation will not be protected from actions by its creditors, further increasing uncertainty and costs in Section 192 arrangements.

## V. CONCLUSION

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[263] For instance, the priority scheme of distribution in Section 136 of the *BIA*, sets out a ranking of creditors that is subject to the rights of secured creditors", see Stephanie Ben-Ishai & Thomas GW Telfer, eds, Bankruptcy and Insolvency Law in Canada: Cases, Materials, and Problems (Toronto: Irwin Law, 2019) at 146. On the other hand, Section 11.2 of the CCAA gives the court the express power to grant security for interim financing in priority to existing charges or secured claims, see Stephanie Ben-Ishai & Thomas GW Telfer, eds, Bankruptcy and Insolvency Law in Canada: Cases, Materials, and Problems (Toronto: Irwin Law, 2019) at 586.

[264] The court in *Connacher* held that where the solvency requirement is not met, such debt claims are best dealt with under insolvency law; *Supra,* note 246.

[265] Section 11.2.

While it is desirable that corporations have various avenues to restructure their business in a way that makes them more profitable and avoids insolvency, section 192 of the *CBCA* is not the appropriate mechanism to achieve this goal for insolvent entities because the *CBCA* does not contain the comprehensive protections for creditors that are found in the *BIA* and *CCAA*. I would argue that the express exclusion of insolvent corporations from Section 192 properly reflects the distinction between the *CBCA* and the insolvency regimes in the *BIA* and the *CCAA*.

Given the inconsistency between the language of Section 192(2) solvency requirement and the jurisprudence, there is a need to amend Section 192 and the Director's Policy. An example could be an express statement that the solvency test will only be met where the applicant corporation is solvent at the time of making the application for interim order up until the time the application for a final order will be made, and for a reasonable time thereafter (what qualifies as a reasonable time will also have to be stated). This will clarify and distinguish the purposes of Section 192 of the *CBCA* from the purposes of the restructuring regimes contained in the *BIA* and *CCAA* and reaffirm the distinction between corporate reorganization proceedings and insolvency reorganization. In the alternative, assuming Parliament is of the opinion that the solvency requirement is no longer relevant, Section 192 of the *CBCA* should be amended to remove this requirement. Either way, an amendment is necessary as well as a clear statement by Parliament to support the continued inclusion or exclusion of the solvency requirement. This will guide the courts in subsequent interpretations and application of Section 192.

Regarding *CAMA*'s chapter 27, given that Nigeria's insolvency regime is generally still developing, any complimentary legislative provision such as chapter 27 which provides alternatives for insolvent companies should be welcomed and not rejected. The current insolvency regime is Nigeria is not as developed as the *CCAA* or *BIA*, does not provide for some of the benefits

of the *CCAA* like interim financing for instance, and so there is a lot more to be done. It would be premature to advocate for the amendment or removal of these provisions, especially as they do not contradict the CVA and Administration provisions. Hopefully in the near future, there will be judicial decisions which can provide more guidance on this and reveal whether or not, chapter 27 contradicts *CAMA*'s corporate rescue goal and should therefore be amended.

# CHAPTER SIX

# CONCLUSION AND RECOMMENDATIONS

This paper has discussed some fundamental issues and highlighted some recommendations based on the comparative analysis. The summary of each chapter as well as its recommendations will be highlighted seriatim as follows:

**Chapter One:**

Chapter one has considered the policy objectives of the *CCAA* and *CAMA* as well as proceedings under the *CCAA* and Administration under the *CAMA*. It has shown that the policy objectives of both statutes are similar, but the models adopted are different. Arguments have been canvassed for and against the debtor-in-possession and management-displacement models and this has been done with the aim of addressing this chapter's research questions. This chapter contends that the *CCAA*'s approach is the most attractive because it includes key elements of both the management-displacement and the debtor-in-possession model. While the *CCAA* gives the directors of the insolvent debtor a "second chance", it also makes provision for the impartial monitoring of their activities, on behalf of creditors, through the role of the Monitor.

This chapter's key recommendation is for the adoption of the debtor-in-possession model in the *CAMA*, owing to the various advantages which have earlier been addressed.

**Chapter Two:**

Chapter two has considered in detail, the need for interim financing. While the *CCAA* provides for this, the *CAMA* does not. There is a justifiable need for interim financing and this need is not peculiar to Canada but to restructuring regimes generally. The concept of insolvency

is premised on the absence of sufficient cash flow and while restructuring arrangements are put in place, without a source of cash flow, restructuring efforts will likely be futile.

This chapter's key recommendation is for the *CAMA* to codify interim financing in addition to the restructuring regimes and model it after the *CCAA*. Without this, failing businesses in Nigeria would struggle to raise funds which will likely not yield any result because they will have no incentive to offer in return.

**Chapter Three:**

Chapter three has considered the high level of discretion and deference given to *CCAA* judges as well as the general principles of judicial discretion in Nigeria. Unlike the *CCAA,* there are no practical cases in Nigeria from which the discretionary power of the courts in restructuring proceedings can be gauged. Regardless, Given the unique nature of the *CCAA* in terms of its objectives as a remedial statute, the high level of deference accorded to decisions of *CCAA* supervising judges is reasonable, as to do otherwise would frustrate the objectives of the *CCAA.*

This chapter's key recommendation is that the level of deference accorded to decisions of *CCAA* supervising judges should be adopted in the *CAMA*. Insolvent companies undergoing restructuring under the *CCAA* or *CAMA* are in a financial/ economic crisis which is a very delicate situation and so judicial intervention should only be when necessary.

**Chapter Four:**

Chapter four has considered the provisions on liquidation in the *CCAA* and *CAMA* and whether it is proper to use liquidation as a restructuring option. It highlighted that this has become the reality especially in the *CCAA* and has noted the disadvantages of continuing in this pattern.

This chapter's key recommendations are as follows: that approval of liquidating *CCAA'*s should be limited to unique circumstances where it is fair and the most viable option; the provision under the *CAMA* which allows for a company to be liquidated for its inability to pay its debts should be amended and expressly made subject to available and viable restructuring options; and the liquidation option for insolvent companies should have a framework such that it aligns with the restructuring goal of value maximization which means that this should only be pursued where it will be in the best interest of the stakeholders. An example can be drawn from the parameters set out for liquidating *CCAA*'s under the *CCAA* which have been discussed earlier.

**Chapter Five:**

Chapter five has considered the use of the *CBCA* arrangement provisions to effect restructuring for insolvent companies despite the express prohibition in the *CBCA.* It has also considered the similar provisions for arrangement under the *CAMA* although without express prohibition for use by insolvent companies. While it is desirable that corporations have various avenues to restructure their business in a way that makes them more profitable and avoids insolvency, section 192 of the *CBCA* is not the appropriate mechanism to achieve this goal for insolvent entities because the *CBCA* does not contain the comprehensive protections for creditors that are found in the *BIA* and *CCAA*.

This chapter's recommendations are as follows: given the inconsistency between the language of Section 192(2) of the *CBCA* solvency requirement and the jurisprudence, there is a need to amend Section 192 and the Director's Policy; and regarding *CAMA'*s chapter 27, given that Nigeria's insolvency regime is generally still developing, any complimentary legislative provision such as chapter 27 which provides alternatives for insolvent companies should be welcomed and not rejected. The current insolvency regime is Nigeria is not as developed as the

*CCAA* or *BIA*, does not provide for some of the benefits of the *CCAA* like interim financing for instance, and so there is a lot more to be done. It would be premature to advocate for the amendment or removal of these provisions, especially because they do not contradict the CVA and Administration provisions.

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