

Canadian Institute for the Administration of Justice

**Governance of Public Institutions, Professions, Corporations, Tribunals and Courts:
Ethics, Responsibility and Independence**

International Bankruptcies and Restructuring

**Fairmont Le Manoir Richelieu
Thursday, October 14, 2004**

1. NOTES OF CERTAIN ASPECT OF THE PRESENTATION

1.1 INTRODUCTION

1.1.1 Thanks to organizers

1.1.2 Thanks to Rosenhek for subbing for Swidler (substitute/replacement story)

1.1.3 Topic of International Insolvency – will stray from governance (and perhaps from International aspects)

1.1.4 Open discussion – okay to interrupt with questions

2. TECHNICAL DIFFERENCES BETWEEN U.S. AND CANADA

2.1 Canadians and Americans look pretty much the same (English/French/Quebec English/legal terms)

2.2 U.S. more religious society

2.2.1 Relevance to topic – none (Chapter 11 story)

2.3 Americans more litigious than Canadians

2.4 Sue about everything / everything is win or lose

2.5 Canadians tend to be compromisers – try to make business deals (chicken/road)

2.6 Canadian Bankruptcy Court has always been business persons Court

2.7 Evolution of CCAA has expanded judicial involvement and authority (inherent jurisdiction)

2.7.1 Still less involved in business decisions

2.8 One can't understand difference between U.S. and Canadian insolvency law and practice solely by reference to differences in law and precedent

2.9 Completely different dynamics

3. LEGISLATION

3.1 Canada – 2 main statutes – also Winding-Up Act

3.1.1 BIA

3.1.1.1 Full bankruptcy (U.S. Chapter 7 equivalent)

3.1.1.2 Reorganizations on rather inflexible system

3.1.1.2.1 Compromise of debt, renunciation of commercial leases

3.1.1.2.2 Limited opportunity for creative solutions

3.1.2 CCAA

3.1.2.1 Reorganization of corporations or corporate groups involving more than \$5,000,000 in debt

3.1.2.2 Short

3.1.2.3 Flexible

3.1.2.4 Counterpart of U.S. Chapter 11 of Bankruptcy Code

3.2 U.S.

3.2.1 Chapter 11 of U.S. Bankruptcy Code

3.2.2 Highly regulated

3.2.3 Considerable detailed Court involvement

3.2.4 Prolific litigation gives rise to prolific jurisprudence

4. DIFFERENCES ACROSS CANADA AND EXPANSIVENESS OF CANADIAN COURTS

4.1 Inherent jurisdiction

4.1.1 Extreme in Ontario; less out West, even less in Civil Law Quebec

4.1.1.1 Babcock & Wilcox

- 4.1.2 Some Courts recognize virtually no limits (CF/UK Parliament)
- 4.2 “Important Companies Act”
- 4.3 Importance of Monitors
- 4.4 Adequate Protection vs Balance of Prejudice
- 4.5 Sometimes companies should be allowed to die
- 5. GOVERNANCE MATTERS (MM Introduce)**
- 5.1 Board of Directors – to whom responsible
 - 5.1.1 Hard question
 - 5.1.2 Traditionally responsible to shareholders
 - 5.1.3 Evolving concept – as company becomes insolvent or approaching insolvency does responsibility shift?
 - 5.1.3.1 Peoples case before Supreme Court
 - 5.1.4 Insolvency reorganization
 - 5.1.4.1 By definition not enough for creditors; nothing for shareholders
 - 5.1.4.2 Balance of entitlements rather than determination of entitlements
 - 5.1.4.3 Differences in outcome for shareholders between large companies and small companies
 - 5.1.4.4 Corporate shell
- 5.2 Liability issues for directors of large companies
 - 5.2.1 Independent committees and independent counsel
 - 5.2.2 Old statutory liabilities
 - 5.2.3 New statutory liabilities
 - 5.2.4 Tendency to want to abandon
 - 5.2.4.1 Abandonment can lead to criticism
 - 5.2.4.2 Less chance of putting old liability to bed through reorganization
 - 5.2.5 Directors’ charges

5.2.5.1 Pre-filing

5.2.5.2 Post-filing

5.2.5.3 Has effect of changing legal priorities

5.2.6 D&O Insurance

5.2.6.1 Insurers tend to want to cancel or not renew

5.2.6.2 Sometimes they realize it's better to stay the course

6. SENIOR MANAGEMENT AND HIRED CRISIS MANAGEMENT (SR)

6.1 Managers

6.1.1 Involvement of independent outsider brings comfort to stakeholders (CF Air Canada situation)

6.1.2 Retention bonuses and incentives

6.2 CROs

6.2.1 Air Canada example