CONSTRUCTION JOURNAL

NEWFOUNDLAND AND LABRADOR CONSTRUCTION ASSOCIATION 2023

NLCA
We Build Newfoundland and Labrador

Women in Construction

Prompt Payment in Canada

No Damages for Delay

PM# 40063056

DISTRESSED COMPANIES: RESTRUCTURING OPTIONS

■ BY DARREN D. O'KEEFE

Years of undisciplined hyper competitive underwriting caught up to the industry, culminating in an environment in 2018 where the Canadian insurance industry as a whole paid out $1.03 in claims and expenses for every dollar they had come in, an unsustainable business model with an unacceptable ROI.

Let's face it, the pandemic has been hard on most Canadian businesses, and the construction industry is no exception. As we move towards the "new normal," construction companies are facing a series of challenges, not the least of which is trying to balance their books once government subsidies dry up and their creditors come calling. So, what do you do when the financial pressure is too much? This article outlines a series of restructuring options available to distressed construction companies facing insolvency.

DIFFERENCE BETWEEN BANKRUPTCY AND INSOLVENCY

While the terms are often used interchangeably, there is a marked difference between bankruptcy and insolvency. Bankruptcy is a legal status. Here, a company is no longer in control of its assets, and a bankruptcy trustee steps into the company's shoes, typically with the mandate to liquidate the company's assets to satisfy its creditors. Insolvency, on the other hand, is a financial condition, where the company's liabilities exceed the value of its assets leaving the company with the option to restructure where it is viable to do so.

ACT EARLY, AND ACT DECISIVELY

The first piece of advice we give most clients facing insolvency is to act early, and act decisively. Avoidance and indecision can mean the difference between having a shot at saving your company or not. Early engagement with your creditors, including your major secured lenders and CRA is always a wise decision.

RESTRUCTURING OPTIONS: WHICH DIRECTION DO YOU GO?

In Canada there are two main insolvency statutes that provide options for an insolvent company looking to restructure its debt. The main benefit under both is that the company will get some form of creditor protection.

(a) Bankruptcy and Insolvency Act

The first option is the *Bankruptcy and Insolvency Act*, (BIA). This is a federal statute that allows companies to either liquidate or reorganize their affairs. Under the BIA a company can enter into a "proposal" process whereby a company will file a Notice of Intention to make a proposal with the court and be granted a 30-day creditor relief period to allow it time to develop a restructuring plan acceptable to its creditors. A BIA proposal, normally used for less complicated restructurings, requires a company to put its "best foot forward", as the consequence of a failed proposal will see the company being automatically deemed bankrupt.

(b) Companies Creditor Arrangements Act

The second option is the *Companies Creditors Arrangement Act* (CCAA). In order to qualify for relief under the CCAA you must be (i) a Canadian company, (ii) be insolvent or have committed an "act of insolvency", and (iii) have debt in excess of CDN $5 million. Like a BIA proposal, creditor relief under the CCAA requires a court application and a detailed filing setting out the company's financial affairs at the time of filing, and at a high level, its proposed restructuring plan. The courts have found that if a company proceeds in good faith and can demonstrate a "germ of a plan" then creditor relief will be granted for an initial period of 10 days, subject to further extension by the court if appropriate. Within the CCAA process a supervising "monitor" will be appointed by the court (typically a specialized accountant) and they will oversee the proposed restructuring, deal with

creditors, and report to the court. Generally, in this process — unlike the BIA — the company's management will stay in control of the company and work alongside the monitor to execute on the restructuring plan.

A formal BIA or CCAA process has many benefits as each act provides a number of useful tools that can be used to legally restructure. One of those tools is the use of Debtor in Possession (DIP) Financing which allows the company to raise money to execute on its restructuring plan where otherwise funds would not be available.

(c) Informal Restructuring

A third option available to companies looking to restructure is to carry out their own informal restructuring. This process remains subject to the provisions of various federal and provincial statutes, such as the BIA, CCAA and Personal Property Security Act, and is arguably the most flexible of the three options outlined because it puts the process solely within the control of the company. Where a company wishes to informally restructure, it is imperative that the company have seasoned legal and accounting professionals guide them through the process. Again, as noted above, early engagement with the company's major secured creditors will present the best likelihood of success in an informal restructuring. Options here include (i) selling redundant assets, (ii) discontinuing and reorganizing unprofitable business lines, (iii) renegotiating your secured debt (iv) negotiating payment plans with unsecured creditors, and (v) reorganizing employees. The main downside with an informal restructuring is that there is no creditor protection.

(d) Creditor Driven Action

In the event a restructuring is simply not possible because the company is too far gone, then you will most likely be faced with a creditor driven action such as a petition into bankruptcy, or as is most common, the appointment of a receiver. In this scenario, the company's focus switches from restructuring to protection, notably, of the company's officers and directors. Once a receiver is appointed — either privately or by the court — they typically move quickly to liquidate the company's assets. Often times this will leave company directors exposed for various statutory charges and responsibilities, including certain forms of tax, WHSCC, employment insurance, and employee wages. Company directors would be wise to seek independent legal advice on how to best protect themselves in this scenario.

CONCLUSION

This brief outline is meant to give an overview of the options available to distressed construction companies looking to restructure. Each situation is unique and there are various considerations at play. The most important thing is that once you recognize your financial problems that you contact the right professionals for help. Experience has taught us that the passage of time does not make a distressed debt situation better, it will only make it worse. ■

Darren D. O'Keefe is the founder and principal lawyer at O'Keefe & Company Lawyers, a St. John's based boutique firm practicing in the areas of insolvency and restructuring, business law, and business litigation.

SELF-PERFORMANCE

Our ability to self-perform separates us from other contractors. It is what makes us true builders, and not simply project administrators. Our employees are hands-on in the construction process, they provide invaluable knowledge, creativity, and experience to the management team.

QUALITY

We bring a superior level of quality to each and every project. We believe quality service is the only way of conducting business. Details matter and we believe in doing things right the first time and every time. We build quality buildings, and in the process, build quality relationships.

TECHNOLOGY

We continue to be at the forefront of new technologies and evolving building trends. At Allied, we have big plans for the future. With expansion on the horizon, we will push the boundaries of innovation, finding ways to work faster, safer, and smarter.