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5-Year Retrospective: Insolvency & Restructuring

Over the past five years, Canadian insolvency law underwent a period of doctrinal consolidation unlike anything since the 2009 statutory reforms. The Supreme Court of Canada delivered a series of landmark decisions that recalibrated court-ordered charge priorities, disciplined set-off practice, reconciled arbitration with the single-proceeding model, modernized corporate attribution, and delineated the boundaries of non-dischargeable debts. At the same time, Ontario's Commercial List and courts across Canada expanded the restructuring toolbox. Reverse vesting orders became more normalized across CCAA, BIA proposal, and receivership proceedings. Third-party stays under section 11 of the *Companies' Creditors Arrangement Act* moved from contested to confident footing. Cross-border recognition practice became more nuanced and sector-specific pressures — from real estate development to retail lease portfolios — tested the limits of flexible relief. This article surveys these developments and offers practical guidance for practitioners, in-house counsel, and business clients. Three themes recur:

- Evidence matters more than ever, with courts expecting a focused record on necessity and proportionality.
- Flexible remedies remain available, but with clearer guardrails around stakeholder impact.
- Outcomes are increasingly shaped before filing, by financial disclosure, corporate structure, and stakeholder management.

Key Supreme Court & Appellate Developments

Priming Charges vs. Crown Deemed Trusts *After Canada North*

In *Canada v Canada North Group Inc*, the Court addressed whether court-ordered super-priority charges under the CCAA can rank ahead of Crown deemed trusts arising under the *Income Tax Act*, the *Canada Pension Plan*, and the *Employment Insurance Act*. The majority anchored priming charge authority in the broad discretion conferred by section 11 of the CCAA, permitting such charges to outrank deemed trusts where the evidence demonstrates necessity to achieve the statute's remedial purposes.

No single factor is dispositive: courts must weigh the availability of alternative financing, the remedial link between the proposed charge and the restructuring objectives, and the protections afforded to Crown claims under section 6(3) of the CCAA. *Canada North* underscores the need for a focused evidentiary record on necessity and proportionality.

Pre-Post Set-Off Reined in *Montréal (City) v Deloitte*

In *Montréal (City) v Deloitte Restructuring Inc*, the Court resolved a long-simmering tension about set-off across the filing date. Sections 11 and 11.02 of the CCAA empower initial orders to stay pre-post set-off — the netting of a pre-filing debt owed to the debtor against a post-filing obligation owed by the debtor. Section 21 preserves only pre-pre set-off, with rare exceptions governed by a triad of considerations: appropriateness, diligence, and good faith. The decision reinforced, and *Poonian* later echoed, that exceptions to the discharge regime are interpreted restrictively. Applicants should ensure initial order stay language expressly addresses pre-post set-off and watch for counterparties attempting unauthorized deductions.

Arbitration Meets the Single-Proceeding Model: *Peace River v Petrowest*

In *Peace River Hydro Partners v Petrowest Corp*, the Court confronted the tension between party autonomy in arbitration and the single-proceeding imperative in insolvency administration. Justice Côté, writing for the majority, held that arbitration agreements remain presumptively enforceable in insolvency, but may be found “inoperative” where enforcement would compromise the orderly conduct of a court-supervised proceeding.

The Court articulated a multi-factor inquiry that considers urgency, cost, complexity, the number of overlapping references, and prejudice to the estate and its stakeholders. On the facts, the Court declined to refer the matter to arbitration, vindicating the single-control model while preserving room for arbitration where it would not fracture estate administration.

Attribution, Set-Off, & Non-Dischargeable Claims: *Aquino*, *Golden Oaks*, and *Poonian*

The October 2024 companion decisions in *Aquino v Bondfield Construction Co* and *Scott v Golden Oaks Enterprises Inc* modernized corporate attribution for insolvency purposes.

In *Aquino*, Justice Jamal held, for a unanimous Court, that the fraudulent intent of a directing mind can be attributed to the corporation under section 96(1)(b)(ii)(B) of the BIA, even where the directing mind acted in fraud of the company. The “fraud”

and “no benefit” exceptions to attribution were incompatible with section 96’s policy of protecting creditors by reversing improvident transactions.

In *Golden Oaks*, however, the Court declined to attribute the knowledge of a sole controlling mind in a one-person Ponzi scheme where doing so would defeat the policy objectives of the relevant limitation period.

Together, the decisions confirm that attribution in insolvency is purposive, contextual, and pragmatic.

In *Poonian v British Columbia (Securities Commission)*, the Court held that administrative penalties imposed by a securities commission are not “imposed by a court” under section 178(1)(a) of the BIA and do not survive discharge. However, section 178(1)(e) captures disgorgement orders representing value extracted through fraud.

Reverse Vesting Orders

Reverse vesting orders have moved from novelty to mainstream. Since the early precedents in *Plasco Energy (2015)* and *Stornoway Diamond (2019)*, Canadian courts have approved RVOs in CCAA proceedings, BIA proposals, and receiverships to preserve non-transferable licenses, avoid property transfer taxes, and maintain contractual relationships that would otherwise be lost in a conventional asset sale.

The leading framework is the four-part test from *Re Harte Gold Corp*, where Justice Penny held that the debtor, purchaser, and monitor must address:

- Why the RVO is necessary
- Whether it produces an economic result at least as favorable as any viable alternative
- Whether any stakeholder is worse off than under any viable alternative
- Whether the consideration reflects the value of the licenses or intangible assets being preserved

Courts overlay these considerations with the section 36(3) CCAA factors and, where third-party interests are extinguished, the *Third Eye* test from *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*.

In *Re PaySlate Inc*, Justice Gomery catalogued the jurisprudence and confirmed the Court should grant RVOs only in “extraordinary circumstances.” The Court requires evidence that the transaction could not be reasonably accomplished through a conventional vesting order and that stakeholder interests are adequately protected.

In *British Columbia v Peakhill Capital Inc*, the BC Court of Appeal upheld jurisdiction to grant RVOs in receiverships under sections 183(1) and 243(1)(c) of the BIA, treating the RVO as a flexible remedial tool appropriate not only to preserve a going-concern business but also to maximize creditor recoveries.

Section 11 & Third-Party Stays

From Caution to Confidence

Third-party stays moved from cautious, often consensual use to a clearer section 11 framework. Before 2023, CCAA courts routinely extended stays to partnerships, subsidiaries, and directors, but they did so using varying jurisdictional anchors, creating uncertainty about whether the limitations in sections 11.03 and 11.04 applied.

In early 2023, Chief Justice Morawetz granted consensual third-party stays to operating partnerships and parent guarantors in *Re BBB Canada Ltd* (2023 ONSC 1014), and *Nordstrom Canada Retail Inc*, while cautioning that the issue remained "not free of doubt."

The turning point came in January 2024 with *Re Balboa Inc*, where Justice Kimmel endorsed the narrow interpretation of section 11.04 and confirmed that section 11 operates as a standalone source of authority for third-party stays, independent of section 11.02.

Chief Justice Morawetz put his earlier doubt to rest in *Pride Group Holdings Inc*, affirming, without his prior "non-opposition" proviso, the Court's broad inherent jurisdiction under section 11 to grant stays in favour of third-party guarantors, including director and personal guarantors, notwithstanding sections 11.04 and 11.03(2), where necessary to prevent frustration of the CCAA proceedings' intent and purpose.

Justice Black applied this framework in a contested motion in *2675970 Ontario Inc*, confirming that the *Balboa/Pride* line had displaced any lingering uncertainty from *Nordstrom* and *BBB*.

Expanding the Circle: Insurers, Co-Tenancies, & Performance Bonds

Subsequent decisions pushed the boundaries further.

In *Re Earth Boring Co Ltd*, Justice Steele stayed calls on performance bonds in the construction industry, reasoning that premature calls would trigger cascading obligations on the surety and jeopardize the debtor's ability to complete ongoing projects.

The co-tenancy stay, first deployed in *Re Target Canada* and revived in *Nordstrom* and initially in *Re Hudson's Bay Company* , can prevent landlords from exercising co-tenancy termination

rights that could trigger a portfolio-wide run. But *Re Hudson's Bay Company* also shows this relief remains temporary and evidence-driven: the co-tenancy stay granted at the initial hearing was not extended at the comeback hearing.

These developments confirm the Court now recognizes third-party stays as a pragmatic, proactive tool rather than exceptional relief, though they remain temporary and subject to ongoing justification at comeback hearings.

Cross-Border Recognition

Canadian courts have traditionally played an ancillary role in cross-border restructurings under Part IV of the CCAA, recognizing foreign proceedings and granting complementary domestic relief such as administration charges, DIP charges, vesting orders, and information officer appointments.

That ancillary role has limits. In *Re Payless Holdings LLC*, the Court declined to recognize a DIP order that would have granted roll-up liens over Canadian assets where the Canadian debtor had not been a borrower under the pre-petition facility. In *Paladin Labs Canadian Holding Inc*, Chief Justice Morawetz refused to appoint representative counsel for Canadian creditors, holding that the applicants could have sought the relief in the Chapter 11 cases.

At the same time, courts grant autonomous relief where Canadian interests require it. In *Paladin Labs Canadian Holding Inc*, Chief Justice Morawetz included a bar order in the Canadian recognition order under section 49(1), even though no bar order had been included in the US confirmation order. In *Hornblower Cruises and Events Canada Ltd* (2024 ONSC 2615), he approved a standalone sale of a Canadian vessel without corresponding US court approval, satisfied that the disposition relieved ongoing costs and caused no prejudice.

Autonomous relief must be consistent with what would be available in a plenary CCAA case and must not encroach on the foreign court's jurisdiction. Part IV should not be used to circumvent domestic statutory constraints, but Canadian courts should not reflexively defer when Canadian stakeholder interests require protection.

Sector-Specific Developments: Developers & Retail Portfolios

Real Estate Development After Port Capital

The BC Court of Appeal's decision in *Port Capital Development (EV) Inc v 1296371 BC Ltd* modernized the *Cliffs Over Maple Bay* framework for CCAA access by real estate developers. Rejecting a categorical bar, the Court held that the question is

not whether the debtor intends to file a plan of compromise at the outset, but whether CCAA relief will “avoid the disastrous consequences of insolvency” and align with the statute’s remedial objectives.

Post-*Port Capital* outcomes still turn on the record. In *Re Alderbridge Way GP Ltd*, the project’s scale and a coordinated SISP justified CCAA relief by offering broader stakeholder value. In *Re Ashcroft Urban Developments Inc*, by contrast, the Court terminated proceedings at the comeback hearing when the applicants could not show a credible restructuring path and secured creditors holding 84% of the debt opposed continuation. The lesson is not that developers now enjoy easier CCAA access, but that the evidence must show a real restructuring purpose.

Retail Lease Portfolios on the Commercial List

The retail insolvencies of *Nordstrom Canada*, *BBB Canada*, and *Hudson’s Bay Company* demonstrated the critical role of co-tenancy stays and disciplined lease assignment processes.

In *Re Hudson’s Bay Company*, the Court weighed competing landlord objections against evidence of the proposed assignee’s business viability. Justice Osborne emphasized that section 11.3 is an “extraordinary power” that permits the Court to require counterparties to accept future performance from a party they never agreed to deal with. The evidentiary record must support a reasonable finding that the proposed assignee can perform the lease obligations.

On the facts, the Court declined to approve the contested lease assignments, finding the applicants and the proposed purchaser fell “well short of any reasonableness standard” on the question of the assignee’s ability to perform. Essential to this determination, however, was the unique fact that the monitor refused to approve the proposed assignment and the assignment was opposed by the debtor’s first-ranking secured creditor.

Practical Takeaways

For practitioners, the recurring lesson is to build the evidentiary record early. Applications for priming charges, third-party stays, RVOs, and cross-border relief now turn less on novelty than on necessity, proportionality, and stakeholder impact. Counterparties should scrutinize initial order stay language — particularly on pre-post set-off and co-tenancy rights — and be ready to challenge or support it at comeback hearings.

For business clients and in-house teams, the practical work starts before filing. Preserve liquidity information, identify regulatory and contractual constraints, and map which entities,

licenses, guarantees, and counterparties matter most to the restructuring strategy. Restructuring outcomes are often determined before filing — by the quality of financial disclosure, corporate structure, and stakeholder management. Courts remain willing to deploy creative relief, but expect a concrete purpose, a solid record, and a fair explanation of who benefits and who bears the cost.

Conclusion

The 2020–2026 period has consolidated Canadian insolvency practice around a coherent, pragmatic core. The Court affirmed section 11 of the CCAA as a powerful, supervised engine for protective relief, capable of grounding priming charges, third-party stays, and innovative interim orders. The Supreme Court has disciplined priority doctrine, constrained pre-post set-off, and harmonized arbitration with the single-proceeding model. Attribution is now purposive and contextual. RVOs and third-party stays have become routine but carefully policed tools, subject to evidentiary scrutiny and ongoing justification. Cross-border recognition tolerates autonomous relief when truly necessary but remains anchored in comity.

Across these developments, courts have emphasized evidence and statutory purpose. Courts grant expansive or creative relief only where necessity is shown and safeguards are in place. One near-term issue to watch is Bill C-228, the *Pension Protection Act*, which received Royal Assent on April 27, 2023. Its amendments to the BIA and CCAA take full effect on April 27, 2027, granting super-priority status to special payments required to liquidate unfunded liabilities of defined benefit pension plans. Practitioners should be alive to these changes now: lenders are already updating covenants and reporting triggers, and employers should assess de-risking options before the transition period expires.

Read our Commercial List Year in Review: 5-Year Retrospective for more.