



Manitoba Bar Association

Basics of Insolvency



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Rick is recognized for his considerable experience and knowledge in bankruptcy and insolvency matters and commercial litigation. He is listed in Best Lawyers, the oldest and most highly respected peer review guide, for his work in insolvency and financial restructuring matters.



Ross A. McFadyen

Ross practices in the area of civil litigation, with an emphasis on insolvency and restructuring, and commercial disputes. He has extensive experience in providing advice to clients with respect to proposal proceedings under *The Bankruptcy and Insolvency Act* and in receivership matters, including acting as counsel for Court – appointed Receivers.



John R. Fritz

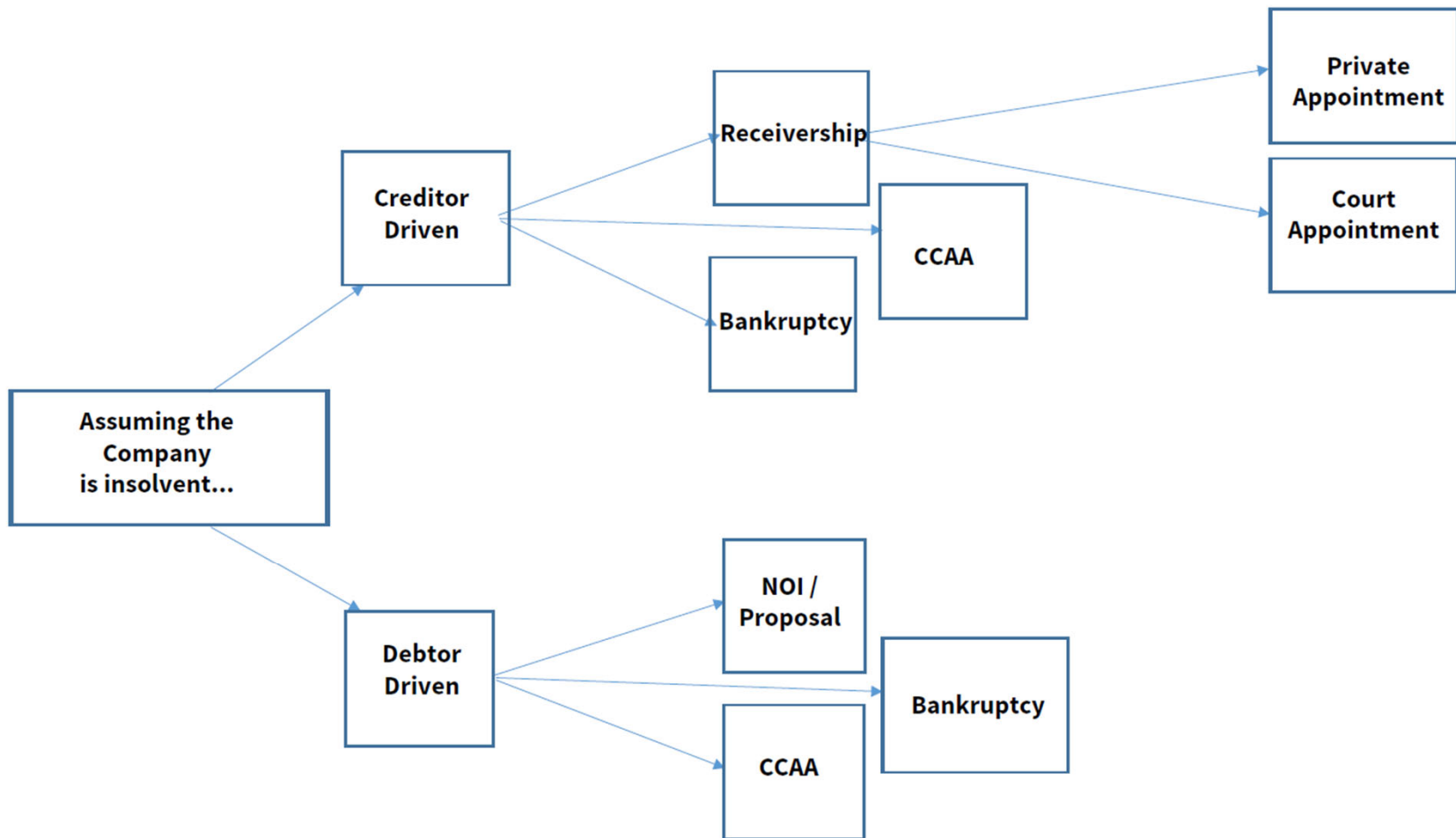
John is a Licensed Insolvency Trustee at Deloitte Restructuring Inc. and specializes in the restructuring and insolvency of financially troubled companies. John has experience with formal and informal restructuring engagements across a variety of industries including construction, aerospace, mining, consumer goods, manufacturing, agriculture, energy, oilfield services, and real estate.



Basics of Insolvency

- Number of separate areas under the “Insolvency” umbrella
 - Receiverships (can be pursuant to the *Bankruptcy and Insolvency Act* – the “BIA”, but not necessarily)
 - Proceedings under the *Companies’ Creditors Arrangement Act* (“CCAA”)
 - Proposals (under the BIA)
 - Bankruptcy (under the BIA)





Receivership

- Receiver is a person who is appointed to take possession and control of a debtor's property
- Receiver can typically be appointed by a secured creditor with a general security interest following default by debtor, service of appropriate notices (note s. 244 of the BIA)
- Private appointment is possible, if security instrument allows it
- Court can also appoint Receiver under a number of provisions
 - s. 243 of the BIA, s. 55 of *The Court of Queen's Bench Act*



Receivership

Court-appointed Receiver begins with initial Order; almost always based on model Order developed in Ontario in 1990's, now adopted in Manitoba

- Order provides for appointment of Receiver over all of the assets, both real and personal, undertakings and properties of debtor business (defined as "Property")
- Receiver empowered and authorized to "act at once" in respect of the Property; general power provided, followed by extensive list of specific examples



Receivership

- Initial Receivership Order also:
 - imposes duty to provide access and cooperation to Receiver
 - provides full stay of proceedings against debtor business, Property
 - mandates continuation of supply of goods / services
 - provides priority charge on Property in favour of fees of Receiver and its legal counsel



Receivership

- Sale of bulk debtor's assets usually key event in receivership
- If sale of assets exceeds threshold approval amount in Receivership Order, asset purchase agreement conditional on Receiver obtaining court approval
- Great deference typically shown by Court to business judgment, opinions and recommendations of Receiver
- Test looks at whether reasonable efforts made to get best price, whether overall process was fair
- Receiver not held to standard of perfection



Companies' Creditors Arrangement Act

- CCAA is Canada's equivalent to what is known as Chapter 11 bankruptcy proceedings in United States
- Purpose is to allows distressed business with ability to devise plan of compromise or arrangement with creditors, with view to becoming viable in future
- Debtor remains in possession and control of business, obtains protection from its creditors (secured and unsecured)
- CCAA only applies to debtor company if claim of creditors total at least \$5,000,000



Companies' Creditors Arrangement Act

- On application of debtor company, Court may make “any order that it considers appropriate in the circumstances” (s. 11)
- Primary relief granted under initial Order is stay of creditor claims; typically stay applies to claims against directors too
- Interim (or “DIP”) financing can also be made available
- CCAA also requires appointment of “Monitor” by Court on initial Order
- Initial Order also establishes a number of charges in priority to existing secured claims and charges



Companies' Creditors Arrangement Act

- While originally intended to allow debtor company to restructure operations, compromise claims and continue on in the future, frequently used now as a Court-supervised process in which to liquidate all assets and pay of claims of creditors to extent possible
- Courts have determined it is permissible to use CCAA in this manner; reality is that use of CCAA for this does not prejudice creditors worse than receivership



Proposals Under the *Bankruptcy and Insolvency Act*

- Proposals available under Part III of BIA; Division I is general scheme for proposals, applicable to business entities
- Usually process commenced by filing of Notice of Intention to make a proposal
- Filing of Notice of Intention, or actual proposal, results in automatic stay of rights of creditors (except secured creditors that have served s. 244 BIA notice and 10 day time period has passed)



Proposals Under the *Bankruptcy and Insolvency Act*

- Amendments to BIA made in mid 2010's provide Court with same type of powers to facilitate a restructuring process as found under the CCAA – ex. DIP financing, priority charges for insolvency professionals
- Proposal, if accepted by creditors (majority in number, having at least 2/3 of value of claims) and approved by Court, becomes binding
- If proposal rejected, or if debtor defaults in proposal with timely remedy, result is automatic bankruptcy



Bankruptcy

- Generally, results from a voluntary “assignment” by a person
- Can also result from application by creditor to Court for “bankruptcy order”
- Bankruptcy order can be obtained if Court satisfied from evidence debtor committed “act of bankruptcy”, as defined under s. 42 of BIA



Bankruptcy

- Result of bankruptcy – all of bankrupt's "property" vests with the trustee in bankruptcy (s. 67 of BIA)
- This means virtually everything; only limited exceptions
- Idea is that Trustee gathers all property of bankrupt, realizes on it, then distributes property amongst unsecured creditors of bankrupt in accordance with scheme set out in BIA
- Important to note: secured creditors not impacted by bankruptcy; on other hand, unsecured creditors are stayed (s. 69 of BIA)



Bankruptcy

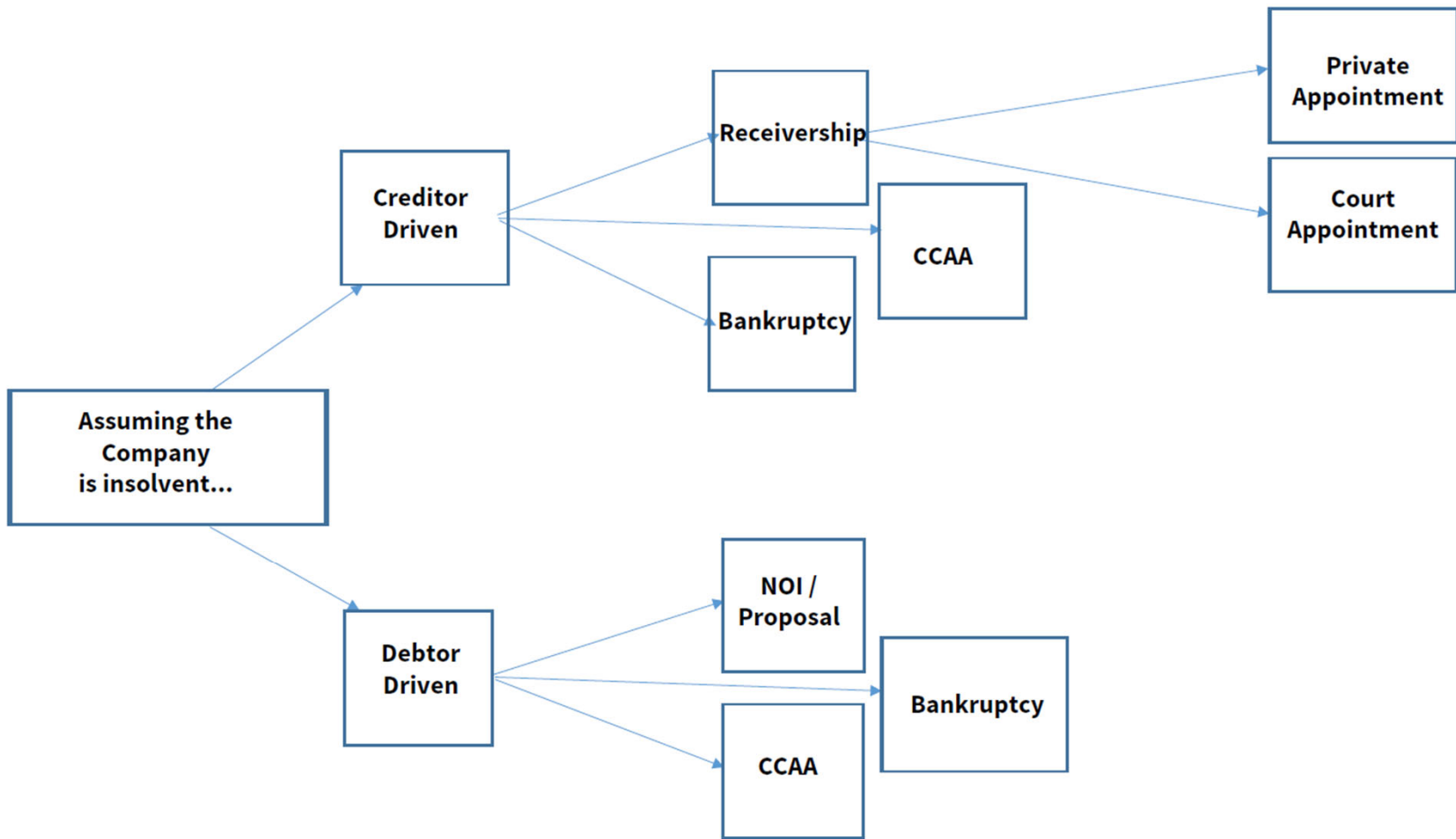
- ▶ Proofs of Claim, required from creditors
- ▶ Trustee determines claims, subject to Court review
- ▶ After property realized upon and claims assessed, funds are paid out in accordance with scheme under s. 136 of BIA
- ▶ Scheme gives priority to administration costs, preferred claims; remaining non-preferred unsecured creditors share pro-rata



Bankruptcy

- After bankruptcy order or assignment, person has “bankrupt” status until discharged; in the case of bankrupt business entities, discharge from bankruptcy is not possible unless all the creditors with proven claims are paid out in full
- As result, it is exceedingly rare for business entities to emerge from bankruptcy; filing of assignment in bankruptcy is effectively end of the corporation
- Bankruptcy filing can be useful for crystallizing priorities amongst creditors and, in fact, eliminating certain priorities that might otherwise exist in favour of government taxation authorities; as a result, bankruptcy frequently follows a receivership or a proposal proceeding





Other Insolvency Considerations

- Challenges for Small to Medium Enterprises (“SMEs”)
- Directors’ Considerations
- Insolvency Professionals’ Costs



Challenges for SMEs

- Can be operationally focused with limited emphasis on finance function
- Ability to generate timely and reliable financial reporting and forecasting
- Management of lender relationships – Preventing surprises
- Retention of key staff and insolvency professionals



Director(s) Considerations

- Liabilities (employee claims, GST/PST, environmental claims, etc.)
- Personal guarantees
- Indemnity charges in restructuring proceedings
- Independent Directors' counsel



Insolvency Professionals' Costs

- Third-party fee guarantees and deposits
- Administrative charges
- Professionals involved





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