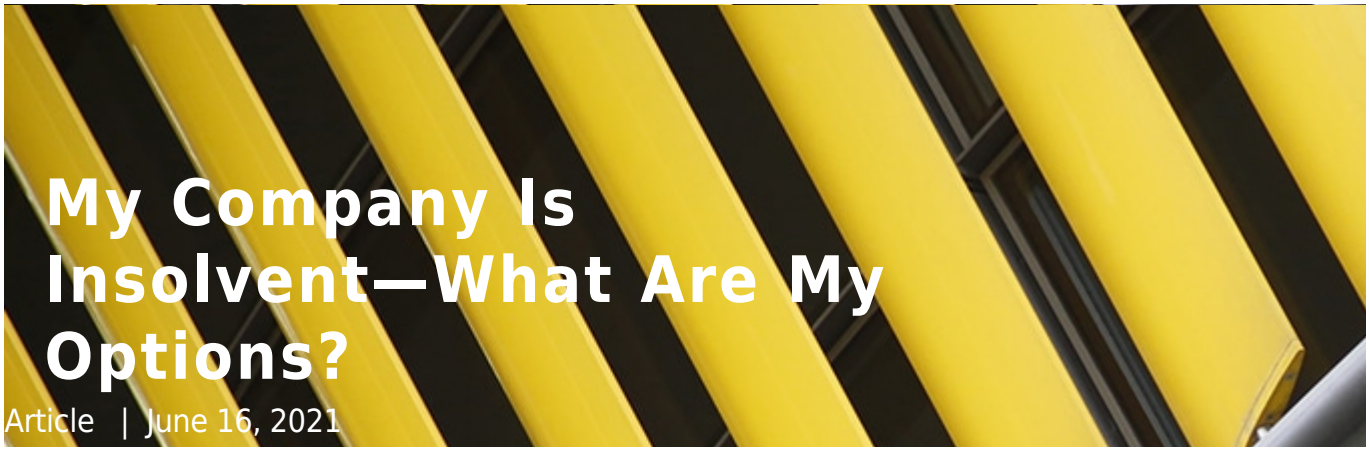

My Company Is Insolvent—What Are My Options?

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After running the numbers, you've determined your company is insolvent. With that in mind, what are your options as a business owner? Although it may seem like a dire situation, there can be positive outcomes if you act quickly and decisively. Paul Denton and Allan Nackan explain your available options.

At this point, you should have already consulted with a licensed insolvency trustee (LIT) to help gain clarity on the situation. If you haven't yet, this should be your very first step. As a business owner, you will be faced with several options and—depending on the severity of the situation—these options may be limited.

AUTHOR

Allan Nackan
Senior Managing Director

However, if your company's financial problems have been confronted early enough, there is a greater chance of stopping its decline and affecting a positive turnaround. Unfortunately, and all too often, business owners will regrettably bury their head in the sand hoping that debts and creditor pressure will subside. This won't happen unless

decisive action is taken—and that begins by accepting that help is required in the first place.
Either way, an experienced LIT will walk you through your options and guide you through the process.

Turnaround options

Taking early advice is key to opening potential turnaround options. A LIT will be able to establish whether your company could benefit from using appropriate restructuring and rescue procedures from the outset. That initial assessment will often look at turnaround or informal restructuring options, the key driver of which is the amount of liquidity and runway (time) you have. New or interim finance is also a common strategy for turning a struggling business around—especially when its problems aren't necessarily chronic, but more down to poor cash flow or liquidity.

Formal restructuring options

However, if the situation is chronic from a cash flow and collateral position, formal insolvency proceedings need to be considered to keep creditors at bay, particularly if you are facing petitions for bankruptcy or judgement creditors looking to enforce their rights.
There are several debtor-in-possession procedures that companies can avail themselves of, including proposals under the *Bankruptcy & Insolvency Act* (BIA) and *Companies' Creditors Arrangement Act* (CCAA) proceedings.

BIA Proposal

When small-to-medium-sized companies face financial challenges, they often turn to what is called a proposal under the BIA to initiate a restructuring, instead of CCAA proceedings which are normally more court driven and complex. In this situation, your company can either file a proposal with your creditors immediately (i.e., the plan is formulated in advance in concert with a restructuring firm and your legal advisors), or file a Notice of Intent to file a proposal (NOI), which provides you an initial 30-day filing period, with the ability to extend the time for filing up to six months, with court approval. Importantly, this does not mean your company is bankrupt; rather it is a debtor in possession and buys you time to formulate a restructuring plan.
While the NOI proceeding is a more streamlined process, with less court involvement and various milestones prescribed by the BIA, it provides many of the same benefits as the CCAA proceeding, including:

- a stay of proceedings
- the ability to obtain DIP funding to finance operations while the restructuring takes place
- the ability to disclaim or assign major contracts
- the ability to conduct a sale and investment solicitation process (SISP) to find an investor or purchaser as part of a restructuring process
- subject to the restructuring path taken, the filing of a plan with creditors

CCAA

When large corporations encounter financial distress, they often turn to the CCAA—a federal act to restructure their financial affairs. Some of Canada's largest companies, such as Nortel Networks, U.S. Steel Canada (aka Stelco), and Sears Canada have filed for protection under CCAA and restructuring firms have played a significant role in each of these cases, on behalf of large stakeholders.

As part of the process, your company will apply to the court for protection under the CCAA and, in return, receive an initial stay period of up to 10 days of protection from creditors, with an extension often granted beyond the initial 10 days via what is called a "Comeback Hearing," to provide time to formulate a potential plan of arrangement (CCAA plan) with your stakeholders.

During this time, the court will appoint an independent third party, referred to as a monitor, to assist with such matters as monitoring your company's ongoing operations and cash flow, communicating with key stakeholders and ultimately potentially filing a CCAA plan with your creditors. CCAA proceedings also allow for the:

- immediate relief from creditors
- a forum for conducting a sales and investment solicitation process (SISP) to identify investors or buyers of the company's business
- debtor in possession (DIP) funding which may be required to continue operations while a CCAA plan is formulated
- the ability to disclaim or assign major contracts if deemed integral to a restructuring or sale of the business
- provisions for a court-approved charge to cover off directors' and officers' liabilities to help retain such individuals through CCAA proceedings

Closure options

When a company is insolvent, attempting to stop its decline and introduce measures to reverse the company's situation is always an insolvency practitioner's primary objective. However, this is not always achievable and closure in some cases is inevitable.

Bankruptcy

When there is no prospect of a company surviving, it may be assigned into bankruptcy as a voluntary process or petitioned into bankruptcy by a creditor. On becoming bankrupt, a firm will be appointed a bankruptcy trustee, with one of the initial responsibilities being to notify the creditors of the First Meeting of Creditors, which is to be held within 21 days of bankruptcy.

Subject to the nature of your business, assets and liabilities, the bankruptcy estate will thereafter be managed by the

bankruptcy trustee pursuant to the directions of the creditors or inspectors appointed on behalf of creditors. The bankruptcy trustee can also seek direction of the court regarding the ongoing management of the bankruptcy estate. Ultimately, the bankruptcy provides the forum for realization of assets, adjudication of claims and payout of claims in order of priority.

Bankruptcy often results in a wind down and liquidation of your company's assets, but not always—sometimes the business assets are sold en-bloc to a new company which may continue all or part of the business as a going concern. The bankruptcy option can also provide benefits as follows:

- an automatic stay over creditors
- reversing certain priority claims which would otherwise impact or eliminate general creditor recoveries
- ability to assign, disclaim contracts
- ability to exercise statutory powers to investigate the company's affairs and examine persons of interest and transactions to potentially enhance recoveries for the estate; (e.g. identify and prosecute acts of fraud, preferences or transfers at less than market value,)
- directors and officers able to resign; minimize D&O liability
- protections from environmental liabilities post-filing under the BIA
- provides finality to corporate entity including cessation of reporting obligations

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As you can see, there are many options on the table. If you recognize there's a problem early enough, engage with an insolvency professional, and devise a plan—there's a likelihood your business can be saved. However, the longer you wait, the more complicated it gets. Once the flood gates open and creditors start knocking on your door, your options become much more limited.

Not sure if your company is insolvent?

Discover the early warning triggers before its too late, Get started.

Our Contributors

Allan Nackan is a Senior Managing Director at B. Riley Farber and co-leads the firm's Restructuring practice. His

practice focuses on corporate insolvency and restructuring, financial advisory services, cross-border restructuring, fraud investigations, and forensic accounting. Allan can be reached at anackan@brileyfin.com or at 437.294.4602

Paul Denton is a Managing Director with the Restructuring practice of B. Riley Farber. His practice focuses on providing restructuring and advisory services to corporations, lenders, and under-performing companies. Paul can be reached at pdenton@brileyfin.com or at 437.294.4645