

Model Orders: Filling a Need

By A. John Page, CA•CIRP

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In the recent past, receivership and *Companies' Creditors Arrangement Act* ("CCAA") orders were often created by adding any special clauses required for the file at hand to a recently used order. The problem with that approach was that orders were getting progressively longer and harder to understand. Portions of the orders were unnecessary and perhaps related to some particular problem or unrelated industry-specific issue from an earlier file. Some orders had contradictory language. In addition, every law firm seemed to have a different precedent. The judges were presented with a somewhat incomprehensible epic that needed to be reviewed and approved "immediately." A recipe for disaster? Maybe. A recipe for confusion, certainly.

The creation of a subcommittee to look at model orders

In 2003, the Ontario Superior Court Commercial List Users Committee ("CLUC"), under the leadership of Justice James Farley, set up a subcommittee to look into the creation of model orders to help alleviate this problem. The vast majority of an order is "standard." So why not just use the same wording every time for the non-contentious part of the order? That would enable the judge to focus on the parts of the order that are unique to the case at hand. Counsel could present draft orders blacklined to the model and then explain and justify the additions to, or the deletions from, the model that they were proposing.

The purpose of the subcommittee was not to create new law but merely to identify provisions, concepts and approaches that had already been adopted by the court and to establish a common starting point. Since everyone would start from the same model, the prospect of ever-expanding orders would be removed.

Paul Casey and I, then the President and Secretary, respectively, of the Ontario Association of Insolvency and Restructuring Professionals, asked if we could assist the subcommittee, which consisted solely of insolvency lawyers at the time. We were welcomed aboard to bring a different and more practical perspective to the deliberations.

We first worked on a model receivership order. Input was canvassed from interested parties, which included the Ontario Bar Association and various Ontario government departments. The results of our endeavours were finally "blessed" by CLUC in September 2004. At the same time, we released Explanatory Notes to aid users in understanding the thinking behind the inclusion or exclusion of certain clauses in the order.

After developing the receivership order, we worked on a model CCAA Order. In fact, we ended up producing two CCAA orders. The first, the Short Form or First Day CCAA order, is limited in scope and anticipates a "come back" hearing on notice to affected parties before more extensive powers are granted. The

second, the Long Form CCAA order, is more comprehensive and includes the actual power to restructure. Both orders allow for the creation of a Debtor In Possession ("DIP") Lender's Charge.

The subcommittee then produced an Approval and Vesting Order, which approves a proposed sale of assets by a court-appointed receiver of a debtor and then provides for the vesting of those assets in the proposed purchaser free and clear of claims.

At the same time, the subcommittee produced a Receiver's Discharge Order, which approves the activities of the Receiver together with its fees and expenses. It designates to whom remaining funds should be distributed and discharges the Receiver. Finally there is wording for a form of release that the court might wish to give to the Receiver.

Model orders, Ontario and beyond

Copies of all the Ontario model orders and explanatory notes can be found at <http://www.ontariocourts.on.ca/scj/en/commercialist/>

This model order trend is not just an Ontario phenomenon. In British Columbia, Alberta and Saskatchewan, model receivership orders were developed based on the Ontario template, with only a few changes where local practice or legislation diverged from that in Ontario. Copies of these model orders can be downloaded from: <http://www.courts.gov.bc.ca/sc/practice%20directions%20and%20notices/Civil/> (British Columbia), <http://www.cba-alberta.org/DesktopDefault.aspx?Ta>

bId=140&SectionId=83 (Alberta) and <http://www.cba.org/saskatchewan/main/news/> (Saskatchewan).

Quebec was the first jurisdiction to publish a model CCAA order (being a model Initial Order) in January 2005. It can be found through the publications link at <http://www.barreaudemontreal.qc.ca/Ang/Home.htm> The Quebec form of order is quite different from the forms of orders being used or developed in the common-law jurisdictions. According to Louis Gouin, President of the Montreal Bar Association Liaison Committee with the Superior Court Commercial Division from 2004 to 2007, the order, although developed in Montréal, is being used across the province of Quebec and is working very well. A separate DIP financing template was drafted because, at that time, DIP financing was less common.

In British Columbia a single form of order has been developed. According to Shelley Fitzpatrick, the chair of the British Columbia Model Insolvency Order Committee, their CCAA model order is modelled on the Ontario Short Form order but does not include a DIP financing section. She said that they saw DIP financing as an extraordinary remedy that should be considered carefully by the court every time it was requested. They did, however, put a form of wording for a DIP financing charge in their explanatory notes. A copy of the order can be downloaded from <http://www.courts.gov.bc.ca/sc/practice%20directions%20and%20notices/Civil/>

In Saskatchewan, a template CCAA order has been drafted. According to Randall Rooke, who heads the Saskatchewan model order drafting committee, the template is currently being considered by the bankruptcy and insolvency panel of the Court of Queen's Bench in Saskatchewan. The template is based on the Ontario Long Form CCAA. As well as being 'Saskatchewanized,' it provides more instruction on service requirements. Although still in draft, it formed the basis of a recently granted CCAA order.

In Alberta, a model CCAA Initial Order is also being finalized. The

issuance of these orders may be delayed, however, by the changes to the *Bankruptcy and Insolvency Act* ("BIA") and the CCAA.

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Quebec has also drafted a Claims and Meeting Procedure Order that can be located through the publications link at <http://www.barreaudemontreal.qc.ca/Ang/Home.htm>

Did we think that, once these orders were drafted, we could return to our offices, sit back and perhaps restart our careers as insolvency professionals and lawyers? Not at all. First, it was never anticipated that the model orders would be "static." We are therefore reviewing, on a regular basis, comments from users and the judiciary to see what improvements are required. In Ontario the subcommittee is now working on a model Claims Bar Order. In addition, we are involved in a major review of the existing model orders to identify changes necessary to incorporate the amendments to the BIA and the CCAA. We have been in contact with other provincial model-order drafting committees to see if we can coordinate these revisions.

It seems that there is an almost unlimited appetite for model orders and the like. Recently, model Anton

Pillar and Mareva Injunction Orders have been developed. Other CLUC subcommittees are working on a model BIA Proposal and a model Plan of Arrangement.

What do the judges in Ontario think of the model orders? Madam Justice Pepall, current CLUC team leader, says: "I find the model orders to be very helpful. They provide for consistency, and are also efficient. As such, they save costs for the stakeholders. The explanatory notes provide some background. The language of the orders is not mandatory, and changes may be made to fit the circumstances. In my mind, they achieve a good balance between predictability and flexibility."

CAIRP members have been represented on the model order committees in Ontario and British Columbia. What have CAIRP members been able to add to the process of creating model orders? In the words of Tony Reyes, Co-chair of the Ontario Model Order Subcommittee (along with Scott Bomhof): "The input of the CAIRP members of the subcommittee has been invaluable. They often offer a somewhat different, and necessary, perspective with respect to the legal and conceptual issues that arise in these orders, and also provide practical suggestions and insight based on their experience in administering insolvency files; and first-hand experience that the lawyers don't have."

I believe that, working together, we have been able to help advance the effectiveness of the insolvency process through the development of these model orders. ▀

Ontario CAIRP members of the model order sub committee from 2004 to 2008 have been/are John Page, A. John Page & Associates Inc., Paul Casey, Deloitte & Touche Inc., Murray McDonald, Ernst & Young Inc. and Allan Nackan, A. Farber & Partners Inc.

The British Columbia CAIRP member of the model order committee was/is Craig Bushell, PricewaterhouseCoopers Inc.

Les modèles types d'ordonnances comblent un besoin

Au cours des dernières années, il est souvent arrivé que l'on rédige les demandes de mise sous séquestre ou les demandes en vertu de la *Loi sur les arrangements avec les créanciers des compagnies (LACC)* en reprenant le texte d'une ordonnance récemment rendue, et en y rajoutant les éléments particuliers aux faits de l'affaire traitée. Comme l'explique le syndic torontois A. John Page dans cet article, cette façon de procéder avait l'inconvénient de rendre les demandes de plus en plus longues et difficiles à comprendre. Les juges se retrouvaient devant une saga interminable dont ils devaient prendre connaissance, et sur laquelle ils devaient se prononcer, « sur le champ ».

En 2003, le Comité des utilisateurs du rôle commercial de la Cour supérieure de justice de l'Ontario (le CURC), sous la direction du juge James Farley, mettait sur pied un sous-comité chargé d'examiner l'opportunité de rédiger des modèles types pour régler ce problème. Le sous-comité devait identifier des formulations, des concepts et des approches qui avaient déjà été retenus par la Cour, et s'entendre sur le point de départ.

De concert avec un collègue professionnel de l'insolvabilité de Toronto Paul Casey, M. Page s'adressa au sous-comité, alors entièrement constitué d'avocats en pratique de l'insolvabilité, pour savoir s'ils pourraient les appuyer dans leur travail. Ils allaient d'abord travailler sur un projet de demande de mise sous séquestre qui reçut la « bénédiction »

du CURC en septembre 2004. Ils s'attelèrent ensuite à l'élaboration d'une demande d'ordonnance en vertu de la *LACC* et produisirent deux versions. La première, la demande abrégée ou demande d'ordonnance initiale en vertu de la *LACC*, a une portée limitée et prévoit la tenue d'une seconde audience sur avis aux parties intéressées avant que des pouvoirs plus étendus ne soient accordés. La seconde, la version longue de la demande d'ordonnance initiale en vertu de la *LACC*, est plus complète, et elle comprend les pouvoirs nécessaires pour procéder à la réorganisation de l'entreprise.

Il semble y avoir une grande demande pour des modèles types d'ordonnances. On rapporte l'élaboration de plusieurs modèles de ce genre à travers le pays. Les membres de l'ACPIR ont apporté une importante contribution à leur élaboration, et Tony Reyes, coprésident du sous-comité sur les ordonnances types de l'Ontario (en compagnie de Scott Bomhof) l'a soulignée de la façon suivante : « La contribution des membres de l'ACPIR est inestimable. Ils offrent souvent une perspective différente et nécessaire sur les problèmes de fond et de droit soulevés par ces ordonnances, et ils font des suggestions fondées sur leur expérience pratique du règlement des dossiers de faillite. Qui plus est, ils ont une expérience de première main que les avocats n'ont pas. »

La collaboration dans l'élaboration de ces modèles types d'ordonnances a certainement contribué à l'amélioration du fonctionnement de notre régime de l'insolvabilité.

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