



INSOLVENCY AND RESTRUCTURING LAW IN CANADA

*Understanding the general principles of the
Canadian landscape*

September 2009 Edition

Fasken Martineau DuMoulin LLP
Insolvency and Restructuring Group

Aubrey Kauffman
416 868 3538
akauffman@fasken.com

TABLE OF CONTENTS

	Page
1. INTRODUCTION.....	1
2. RESTRUCTURING STATUTES	1
3. THE CCAA.....	2
(i) Overview	2
(ii) Commencement of the Restructuring Process	3
(iii) Stay of Proceedings.....	3
(iv) Duration of Stay	4
(v) Disclaimer of Contracts.....	4
(vi) Assignment of Contracts	4
(vii) The Monitor	5
(viii) Creditors' Committees	5
(ix) DIP Financing	6
(x) Professional Fees.....	6
(xi) Critical Suppliers.....	6
(xii) Sale of Assets	6
(xiii) Directors	7
(xiv) Classification of Creditors and Approval by Creditors.....	7
(xv) The Plan	8
(xvi) Court Approval	8
(xvii) Cross-Border	9
4. BIA PROPOSALS	9
(i) Overview	9
(ii) Commencement of the Proposal Process	10
(iii) The Stay	10
(iv) The Proposal Trustee.....	10
(v) Duration of the Stay	11
(vi) Disclaimer of Contracts.....	11
(vii) Assignment of Contracts	11
(viii) DIP Financing	11
(ix) Sale of Assets	11
(x) Classification of Creditors and Approval by Creditors.....	12
(xi) The Proposal	12
(xii) Court Approval	13
(xiii) Conclusion	13
5. LIQUIDATIONS – BANKRUPTCY	13
(i) Meaning of “bankruptcy”	13
(ii) Commencement of the Process	14
(iii) The Bankruptcy Trustee.....	15

TABLE OF CONTENTS
(continued)

		Page
	(iv) Property of the Bankrupt.....	15
	(v) Stay of Proceedings.....	15
	(vi) The First Meeting of Creditors.....	16
	(vii) The First Meeting of Inspectors and Subsequent Meetings of Inspectors	16
	(viii) Realization	16
	(ix) Improper Transactions	17
	(x) Security for Unpaid Wages	18
	(xi) Security for Unpaid Pension Contributions	18
	(xii) Distribution of Proceeds.....	18
	(xiii) Assignment of Contracts.....	18
	(xiv) Rights of Unpaid Suppliers	19
6.	LIQUIDATION – RECEIVERSHIP	19
	(a) Meaning of receivership	19
	(b) Private Receivers	19
	(i) Appointment.....	19
	(ii) Duties and Powers of the Private Receiver	20
	(iii) Status of the Privately Appointed Receiver	20
	(iv) Realization	21
	(c) Court-Appointed Receivers – CJA	21
	(i) Appointment.....	21
	(ii) Provisions of the Appointing Order	22
	(iii) Marketing of the Assets	23
	(iv) Sale Approval Motions	23
	(v) Distribution Motions	24
	(vi) Priority for Arrears of Wages and Pension Contributions and Rights of Unpaid Suppliers	24
	(vii) Discharge of Receiver.....	24
	(d) Interim Receiverships/National Receiver	25
7.	CONCLUSION	26

INSOLVENCY AND RESTRUCTURING LAW IN CANADA

Understanding the general principles of the Canadian landscape

1. INTRODUCTION

Canada and the United States are each other's largest trading partners. The rate of investment by Canadian companies in the United States and American companies in Canada continues to grow. With economies that are joined at the hip, financial downturns in one jurisdiction impact stakeholders in both.

The current economic crisis has amplified this dynamic. Cross-border filings in the manufacturing, forestry, energy and retail sectors are mushrooming. Virtually every significant recent restructuring filing has a cross-border element.

While there are many similarities between the Canadian and American systems, there are some material differences in approach and process that must be appreciated in order to understand the Canadian insolvency and restructuring landscape. In certain cases, the same words (for example, debtor in possession (DIP) financing) have quite different meanings or nuances. This paper is intended as a primer to assist American readers in understanding the general principles of Canadian insolvency and restructuring laws.¹

As in the United States, insolvency laws in Canada deal with both restructurings and liquidations. In Canada, there are two statutes governing restructurings: the *Companies' Creditors Arrangement Act* (CCAA) and Part III of the *Bankruptcy and Insolvency Act* (BIA Proposals). On the liquidation side, there are two processes which may be applicable: bankruptcy and receivership.²

Over the past several years Canada has undertaken an insolvency law revision process. After extensive delay, wide-ranging amendments were proclaimed in force effective September 18, 2009. This paper incorporates the new amendments.

2. RESTRUCTURING STATUTES

Generally, the CCAA is used for restructuring more complex companies (Air Canada, Stelco, Calpine, Nortel) while BIA Proposals are used for smaller or less complicated filings. Both regimes provide for debtor in possession restructuring under the supervision of the Court. The amendments to the BIA Proposal provisions now provide a wider scope to BIA Proposals and

¹ This paper will restrict itself to Canadian federal laws as applied in the Province of Ontario.

² This paper will not include a discussion of the *Winding Up and Restructuring Act* – used for the liquidation or restructuring of certain financial institutions and insurance companies.

increase their utility in more complex situations – however, the CCAA will undoubtedly remain the process of choice in more complex filings.

3. THE CCAA

(i) Overview

A restructuring under the CCAA is a uniquely Canadian process. The CCAA was passed during the Great Depression and was used to restructure large companies with complex financial structures.³

Until the recent amendments the entire statute consisted of only 22 sections. In essence, the CCAA provides a general framework for restructuring that includes a stay of proceedings to permit the debtor to file a plan of compromise or arrangement (Plan) with its creditors. Beyond the general framework, the CCAA has very few statutory rules compared to the US Bankruptcy Code and leaves a tremendous amount of discretion in the hands of the Court.

The CCAA was dormant for several decades until it was resurrected in the 1980's by innovative counsel who realized that the CCAA provided a flexible tool to restructure companies. Until that time, it was virtually impossible to restructure companies in Canada as the restructuring provisions in the BIA did not contain a stay of proceedings as against secured creditors.

Our American clients tend to find the CCAA process particularly disconcerting. The United States Bankruptcy Code provides a rule-based regime where virtually every aspect of a restructuring is regulated. Results are (theoretically) predictable. In CCAA restructurings, there is a great deal of flexibility left to the discretion of the judge shepherding the case. This can be bad in terms of predictability, but can be good in terms of flexibility and innovative solutions. The Canadian approach also seems to encourage more negotiated resolutions to issues as opposed to resolutions through the litigation process. For this reason, restructurings under the CCAA are usually completed much more rapidly than American restructurings.

The amendments to the CCAA have expanded the provisions of the act from 22 sections to 63. Many practices under the act previously grounded in judicial discretion and inherent jurisdiction, such as the granting of DIP charges and administration charges, are now codified by the amendments. There is concern that codification of these practices will reduce the flexibility that is the hallmark of a CCAA restructuring. Time will tell whether this occurs.

³ As its name implies, the CCAA applies to “companies”. The amendments expand the definition of a company to include an income trust which trades on a prescribed stock exchange.

(ii) Commencement of the Restructuring Process

A CCAA proceeding is usually commenced by a debtor seeking an Initial Order⁴. The Initial Order declares that the debtor qualifies for relief under the CCAA. The Initial Order will authorize the debtor to develop and file a plan of arrangement or compromise with its creditors. The application for an Initial Order must be accompanied by a statement indicating the projected cash flow of the debtor and copies of its most recent financial statement. To qualify for an Initial Order, the debtor must be insolvent, have debts exceeding 5 million dollars and be a Canadian company or a company carrying on business in Canada.

On an application for an Initial Order, the applicant must satisfy the court that circumstances exist that make the order appropriate. The Court must consider whether the relief is warranted. Initial Orders are generally granted, though in some cases an order may not be made where the prospect of restructuring is hopeless.

Historically, the application for the Initial Order was brought on limited notice to key stakeholders. For this reason, the Initial Order generally contains a “comeback” provision which allows creditors who did not receive notice of the original application to come back to court and argue against the Initial Order, or parts thereof, as if the Initial Order had not been made.

The amendments codify existing-practice with respect to granting various judicial charges such as for DIP financing or administration expenses. However, the amendments now contain express requirements to give notice if secured creditors are to be affected. In urgent cases, Canadian practice may evolve into a more U.S. style of granting interim orders and then final orders for these charges. This will require a change to existing practice and much more widespread service.

(iii) Stay of Proceedings

One of the most important aspects of the Initial Order is the stay of proceedings. The CCAA stay is extremely broad. It commonly stays all legal proceedings as against the debtor and the enforcement of private remedies. A stay under the CCAA cannot, however, restrain a person from calling on a letter of credit that is held by a third party in relation to the debtor⁵ nor does it apply to “eligible financial contracts” (e.g. swaps).

In addition, the stay provides for, in essence, a mandatory injunction requiring suppliers to continue to provide goods and services in the ordinary course. No party may terminate an agreement with the debtor simply by reason of the commencement of proceedings under the CCAA or that the debtor is insolvent, provided that there is no obligation on any party to provide goods or services on credit.

⁴ Theoretically, the application can be initiated by “any person interested in the matter”. This can include a creditor. From a practical standpoint, generally, the applications are initiated by the debtor.

⁵ CCAA Section 11.2

(iv) Duration of Stay

The term of the stay in the Initial Order is 30 days. The stay provisions of the Initial Order can thereafter be extended for any duration from time to time, on application of the debtor. The CCAA does not impose limits on the number of extensions that may be granted or on the total duration of the process. On each request for an extension, however, the debtor must establish that it is progressing in its efforts to formulate a Plan and that it is acting in good faith. It is safe to say that most CCAA proceedings do not exceed one year. The Air Canada filing, which was one of the most complex Canadian restructurings, took 17 months from the Initial Order to the final approval of the Plan. The Canadian process can be substantially faster than the US experience.

During the period after the granting of the Initial Order, the debtor negotiates with its various stakeholders with a view to achieving a consensus with respect to a Plan. During this process, the court will make orders providing for a claims process (including a claims bar date) and for the calling of a meeting of creditors.

(v) Disclaimer of Contracts

Before the recent amendments, the ability to disclaim (reject) contracts arose from provisions in the Initial Order permitting such disclaimers. The jurisdiction for making such orders flowed out of the general stay provisions in the CCAA.

The amended CCAA now provides for an express statutory right to disclaim contracts. The new provisions set out a notice process, with access to the court if the disclaimed counterparty objects to the disclaimer (unlike US practice, there is no need to get an order permitting the disclaimer of each contract).

Claims arising from the disclaimer will be dealt with in the Plan. Special protection is provided to executory intellectual property or license agreements. The disclaimer of such contracts will not affect the rights of a counterparty, provided such counterparty is prepared to comply with its obligations.

Previous uncertainty with respect to whether collective agreements can be repudiated is resolved by the amendments. Unlike the US process, a collective agreement cannot be repudiated or amended without the consent of the union. It is anticipated that this clarification will make restructurings within a union environment more challenging in Canada and may drive strategic decisions to file in the US.

(vi) Assignment of Contracts

Historically, there was no ability under the CCAA to force the assignment of an executory contract (either with respect to real property or personal property) without the consent of the

counterparty – where such consent was required contractually.⁶ The amended CCAA now provides a statutory right to assign contracts if a statutory test is met. The test requires evidence that the proposed assignee can perform the contract, that it is appropriate to assign the contract and that all monetary defaults will be remedied. The assignment provisions do not apply to eligible financial contracts, collective agreements or contracts which are not assignable by their nature.

(vii) The Monitor

Three notably areas where Canadian restructuring practice varies significantly from U.S. practice are: (1) the role of the “monitor”; (2) the absence of mandatory unsecured creditors’ committees; and, (3) the role of the U.S. Trustee.

As part of the Initial Order, the court must appoint a monitor⁷ for the purpose of monitoring the debtor’s business and financial affairs during the restructuring. The monitor is usually an insolvency practitioner from an accounting firm. The monitor must be a trustee, licensed under the BIA, and cannot have been the debtor’s auditor within the previous 2 years (without court dispensation).⁸

The monitor is a court officer owing a duty to act fairly to all stakeholders. This mandate has somewhat of a built-in conflict in that the monitor is required to report to the court and creditors and, at the same time, to assist the debtor in the development of its Plan. Substantial deference is afforded to the monitor by the court with respect to the monitor’s recommendations on various issues. The monitor’s fees, and those of its counsel, are paid from the estate and are subject to a charge, (the “Administration Charge”) ranking generally in priority to all creditors, including secured creditors and DIP financiers.⁹

(viii) Creditors’ Committees

There is no requirement or provision under Canadian law for an unsecured creditors’ committee funded by the debtor. Recently, ad hoc creditors’ committees have been organized in larger cases. These committees are generally informal and self-funding. In some cases, however, the debtor has been directed by the court to fund these committees where, for example, the committee represents the interests of former employees or retirees. The amendments dealing with the Administration Charge permit a charge for the fees of any financial, legal or other expert engaged by an interested party, if the court is satisfied that the charge is necessary for their effective participation in the proceedings. This may be the thin edge of the wedge for the more frequent establishment of creditors’ committees in Canada.

⁶ There has been some case law to the contrary; however; the correctness of such case law is not universally accepted.

⁷ CCAA Section 11.7

⁸ CCAA Section 11.7(2)

⁹ This is sometimes subject to negotiation where a secured creditor has security over a fixed asset, in particular real estate.

(ix) DIP Financing

The Initial Order (or a subsequent order) may also provide for DIP financing. This is one area where Canadian and American lawyers use the same word to describe a similar but somewhat different concept.

Prior to the recent amendments, the CCAA did not expressly provide for DIP financing. The jurisdiction to make such an order emanated from the court's inherent jurisdiction. This practice has now been codified. Section 11.2(1) of the CCAA now expressly provides for a DIP charge and specifies the test to be applied by the court. In Canada, the DIP lender is usually the pre-filing senior secured creditor and is granted a super priority for the DIP loan ahead of all existing secured creditors. There is no concept of "adequate protection" in Canada. Having said that, the court will be reluctant to grant priming DIP financing in the face of strong objections by secured creditors whose security value will be eroded. As well, the DIP charge cannot secure an obligation in existence prior to the DIP order.¹⁰

Canadian courts have become sensitive to allowing cross-border DIP facilities to drain value from Canadian assets for the benefit of U.S. creditors. Unless there is a benefit to Canadian entities the courts have been reluctant to allow Canadian entities to pledge their assets to support a U.S. DIP facility.

(x) Professional Fees

The fees of the debtor's advisers, the monitor and its legal counsel (and in certain limited cases, the fees of counsel and financial advisers to creditors' committees) are generally payable by the debtor and benefit from a judicial charge, often ranking in priority to secured creditors. Again, depending on the circumstances, these fees may be subject to limitations or caps. As with the DIP Charge, this practice has been codified by the amendments.

(xi) Critical Suppliers

The amendments introduce the concept of a "critical supplier" into Canadian restructurings. A supplier designated by the court as a critical supplier must continue to supply on existing terms, or terms set out by the court. Post-filing amounts owed to critical suppliers will be secured by a court ordered charge.¹¹ The change does not cover pre-filing debts. The ranking of this charge is not specified, but will probably be high ranking, like a PMSI.¹²

(xii) Sale of Assets

Many CCAA proceedings do not result in a traditional restructuring of the debtor. It is now common for businesses to be sold, in whole or in part, during the CCAA process with the Plan

¹⁰ CCAA Section 11.2(1)

¹¹ CCAA Section 11.4

¹² Purchase money security interest.

constituting a distribution of proceeds (if there is a Plan at all). There is a perception that more value can be obtained for an enterprise through a sale during a restructuring process than through a sale in a receivership process. There are also technical reasons why a sale in a CCAA process is preferable. The amendments now codify this existing practice.¹³ The interim sale of assets is similar in concept to a sale of assets under Section 363 of the Bankruptcy Code, although the elaborate stalking horse process used in such sales is generally not used in Canada. Recent cross-border cases such as Nortel and Eddie Bauer demonstrate how seamlessly such sales of Canadian and U.S. assets can be coordinated.

(xiii) Directors

The existing practice of granting protection to directors under the stay of proceedings is codified in the amendments.¹⁴ In addition, the amendments now give the court the power, on application of any interested party, to make an order removing a director from office if the court is satisfied that the director is unreasonably impairing the possibility of a viable plan or is likely to act inappropriately. In order to encourage directors to remain in their office during a restructuring, the existing practice of granting directors a judicial charge to secure their corporate indemnity is also codified in the amendments.¹⁵ This charge cannot be granted if the debtor is able to purchase adequate director and officer insurance at a reasonable cost.¹⁶ Lastly, claims against directors can be compromised or released in the Plan except for claims based upon misrepresentation, wrongful or oppressive conduct or pursuant to contractual rights as against the directors.

(xiv) Classification of Creditors and Approval by Creditors

Classification of creditors is particularly important in Canada as there is no concept of “cram-down” of any class. In order to achieve a cram-down of a particular interest group, the debtor will attempt to place a hostile group of creditors into a larger class and “swamp” those creditors in the vote within that class. The court determines classes based upon a commonality of interest test. The preference of the court is to establish as few classes as possible. The amendments now provide that the classification proposed by the debtor must be approved by the court.¹⁷ This will give creditors who do not agree with their classification an easier platform for objection. The amendments create an equity class of creditors. These are creditors whose claims arise with respect to the payment of dividends, return of capital, redemption or retraction obligations or monetary loss arising from ownership of equity. This class cannot vote on the proposal without court permission.¹⁸

¹³ CCAA Section 36(1)

¹⁴ CCAA Section 11.03

¹⁵ CCAA Section 11.(51)(1)

¹⁶ CCAA Section 11.51

¹⁷ CCAA Section 22(1)

¹⁸ CCAA Section 54.1

The Plan must be approved by a majority in number, representing 2/3 in value, of the claims of each class. In Canada, there is an actual meeting of creditors present in person or by proxy to vote on the proposed Plan. If the Plan is voted down by any class, the Plan fails. It is possible to provide, in the Plan, that if a particular class votes the Plan down, that class will be treated as unaffected creditors (i.e., their claims will not be compromised and the stay will cease to apply to them). If the Plan is rejected by the creditors, it does not result in the automatic bankruptcy of the debtor, although, realistically, in most cases, that will be the ultimate result.

(xv) The Plan

Generally, the CCAA does not set out guidelines or rules for what can be in the Plan. While it does require the inclusion of some provisions with respect to payment of certain wage arrears and pension contribution arrears in order to obtain court approval, the structure of the Plan is left to the ingenuity of the drafter.

The Plan sets out the classes of creditors and the proposed treatment of each class. Typically, a Plan may propose:

- a cash payment of a percentage of the debt;
- a basket of cash or assets divisible amongst a class of creditors;
- a partial cash payment up front and a payment in the future on some basis; and/or
- a conversion or partial conversion of debt to equity.

The Plan may contain releases (including releases of directors and non debtor third parties) and injunction/exculpation provision to support the releases.

The Plan can be conditional upon certain events occurring such as obtaining the exit financing.

(xvi) Court Approval

If the Plan is passed by the creditors, it must be sanctioned (approved) by the court. Although the court places great weight on the decision of the creditors, the approval process is not a rubber stamp. The court must be satisfied that the Plan is “fair and reasonable”. It is at this stage that creditors that have been “swamped” can take the position that the Plan is not fair and reasonable. The amendments enumerate certain conditions that must be satisfied if the court is to approve the Plan – such as payment of certain wage arrears and pension obligations.¹⁹

¹⁹ CCAA Section 6

The monitor must file a report with the court setting out its recommendations with respect to the Plan. That report contains a liquidation analysis in order to demonstrate that the provisions of the Plan are superior to a liquidation.

Once the Plan has been approved by the creditors and the court, all affected claims prior to the effective date of the Plan are subject to the terms of the Plan and prior contractual defaults can no longer be the basis of termination or acceleration of contracts.

(xvii) Cross-Border

The existing provisions dealing with cross-border restructurings have been substantially amended. Section 18.6 of the CCAA has been replaced by Part IV – Cross-Border Insolvencies. Part IV is based on the UNCITRAL Model Law and is very similar to Chapter 15 of the US Bankruptcy Code.

There is a nuanced difference between Part IV and Chapter 15. Under Part IV the Canadian court must be satisfied that the proceeding to be recognized is a “foreign proceeding”. Once this determination is made, the court decides whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding”. Thus in Canada, unlike the *Bear Stearns* scenario, no foreign proceeding will be refused recognition in Canada. As part of this distinction, there is no requirement for the foreign representative to prove an “establishment” in the foreign jurisdiction. A foreign non-main proceeding is simply a foreign proceeding that is not a main proceeding.

Although not expressly provided for in the CCAA, the practice has developed to appoint an “information officer” to periodically report to the Canadian court and creditors on developments in the foreign proceeding. This practice will probably be continued under the new regime.

4. BIA PROPOSALS

(i) Overview

Part III of the BIA deals with “proposals”. Proposals are similar to CCAA Plans. A proposal allows a debtor-in-possession to restructure its financial affairs with the approval of its creditors and the court.

Historically, a proposal restructuring has been the “poor sister” to a CCAA restructuring. The proposal provisions contain many more rules than the CCAA and, thus, were less flexible. In addition, there were no provisions dealing with administration charges, directors’ charges, DIP charges or interim sale of all or a part of the debtor’s business. The amendments now permit all of these practices.

It is anticipated that, given the breath of the amendments to the proposal provisions, BIA Proposals will be accessed on a more frequent basis and will deal with more complex restructurings.

(ii) Commencement of the Proposal Process

Generally, the proposal process is commenced by the debtor filing a short document called a “Notice of Intention to File a Proposal” (NOI). A debtor may also start the process by lodging a proposal with its creditors, but few debtors are able to negotiate a restructuring agreement with their creditors without first obtaining a stay of proceedings. The debtor must be insolvent, but there is no minimum debt requirement as there is in the CCAA. The NOI must set out the names of the debtor’s creditors and identify a trustee (the “proposal trustee”) selected by the debtor. Within 10 days after filing the NOI, the debtor must file a cash flow statement confirmed by the proposal trustee as reasonable.

(iii) The Stay

The effect of filing the NOI or a proposal is to create, automatically, a statutory stay of proceedings as against the debtor²⁰ for a period of thirty days. The stay is quite broad, though not as broad as a CCAA stay.

The filing of the NOI also results in a prohibition against termination or acceleration of contracts by reason only of the filing of the NOI or the insolvency of the debtor²¹. No counterparty, however, is prohibited from requiring immediate payment for new goods or services, and there is no obligation to advance further monies or grant credit²². (Unlike the CCAA there is no concept of “critical supplier” under the proposal provisions).

(iv) The Proposal Trustee

The proposal trustee is selected from the same accounting firms that act as CCAA monitors. Like monitors, they are court officers. The duties of proposal trustees are set out in section 50 of the BIA. The proposal trustee is to investigate the affairs of the debtor in order to estimate the financial situation of the debtor and report the results thereof to the meeting of creditors. The proposal trustee monitors the proceeding and files reports to the court and creditors from time to time. The fees of the proposal trustee and its advisers can be protected by an administration charge similar to that in a CCAA. This charge grants a priority charge to the proposal trustee, its counsel and financial advisers. The charge can also be extended to counsel and advisers retained by the debtor and, in certain cases, counsel and advisers to necessary parties.²³

²⁰ BIA Section 69(1)

²¹ BIA Section 65.1(1)

²² BIA Section 65.1(4)

²³ BIA Section 64.2(1)

(v) Duration of the Stay

During the initial 30-day stay period, a creditor can move to lift the stay as against that creditor²⁴ or can move to terminate the entire restructuring proceeding²⁵. Before the end of the 30-day period, the debtor must either submit a proposal to its creditors or bring a motion to extend the stay period. To obtain an extension, the debtor must demonstrate that it is acting in good faith and that there is likelihood that a viable proposal will be filed. The extensions are granted in tranches of 45 days but cannot exceed six months in total. This is an example of the diminished flexibility under the proposal provisions compared to the CCAA provisions. If the debtor does not submit a proposal to its creditors or obtain an extension before the expiry of the stay period, the debtor automatically becomes bankrupt.

(vi) Disclaimer of Contracts

During the period of the stay, the BIA provides for the disclaimer of contracts in the same manner as in CCAA proceedings, with special protections for license agreements and collective agreements. As well, there are particular provisions dealing with the disclaimer of real property leases, where it can be demonstrated that such disclaimer is necessary for the restructuring. In the case of the disclaimer of such real property leases, the BIA contains a formula to calculate the claim that the landlord may file.

(vii) Assignment of Contracts

Historically, there was no mechanism in the BIA authorizing a debtor company to assign a valuable executory contract where such assignment required the consent of a counterparty. The amended BIA now provides, similar to the amended CCAA, that a contract may be assigned by order of the court if, *inter alia*, the assignee is an appropriate party, it is appropriate that the assignment be made and all monetary defaults are cured.²⁶

(viii) DIP Financing

There was also no provision for DIP financing in a proposal.²⁷ The amendments now provide for DIP financing on the same terms as provided for under a CCAA restructuring.

(ix) Sale of Assets

Like the CCAA, the amended BIA now permits an interim sale of all or some of the debtor's assets during the proposal process.²⁸

²⁴ Based upon an unfair prejudice test.

²⁵ On the basis that it is an abuse or absolutely doomed to failure.

²⁶ BIA Section 84.1

²⁷ In some cases, DIP financing was effectively obtained by layering a receivership over the proposal process and permitting borrowing within the receivership (See, for example, *Re Charon Systems Inc.* (2001), 30 C.B.R. (4th) 201 (Ont. S.C.J.)).

(x) Classification of Creditors and Approval by Creditors

The BIA contains provisions with respect to the filing of proofs of claim by creditors and mandates the calling of a creditors' meeting for voting on the proposal within a specified time frame. However, the division of creditors into classes takes place in the proposal and, therefore, is established by the debtor (creditors can bring a motion to object to their classification).

As in the case of the CCAA, the relevant test for classification is a "commonality of interests" and there is no concept of a "cram-down" of any class. The BIA permits secured creditors who share a commonality of interests to be placed in the same class having regard to, primarily, the nature of the debt, the nature and priority of the security and the remedies available to the secured creditors in the absence of the proposal²⁹. The amendments to the CCAA require a court order to establish classes. This is not the case in a BIA Proposal.

At the meeting of creditors, the proposal trustee must file a report with respect to the proposal which must include the trustee's opinion comparing the realization for creditors under the proposal to the realization in a bankruptcy scenario.

Each class of creditors must vote separately on the proposal. As in the CCAA, a majority in number and 2/3 in value of each class must approve the proposal. If any unsecured class fails to support the proposal, there is an automatic bankruptcy. If a class of secured creditors votes against the proposal, the members of that class will not be bound by the terms of the proposal.

The amendments now create an equity class of creditors. These are creditors whose claims arise with respect to the payment of dividends, return of capital, redemption or retraction obligations or monetary loss arising from ownership of equity. This class cannot vote on the proposal without court permission.³⁰

(xi) The Proposal

Similar to a Plan under the CCAA, the terms of a Proposal are limited only by the ingenuity of the drafter and the need to find terms acceptable to the majority of the creditors.

The Proposal must contain provisions for the payment of certain wage and pension claims and certain government claims.

Unlike a Plan under the CCAA, if the Proposal is not approved by unsecured creditors there is an automatic bankruptcy.

²⁸ BIA Section 65.13

²⁹ BIA Section 50(1.4)

³⁰ BIA Section 54.1

(xii) Court Approval

After acceptance of the proposal by creditors, the court must approve of the proposal. The court determines whether the terms of the proposal are reasonable and are calculated to benefit the general body of creditors. Unlike a Plan under the CCAA, if the court does not approve the proposal there is an automatic bankruptcy.

There are significant amendments with respect to proposals made by employers. Such proposals cannot be approved by the court unless the proposal provides for payment to employees of at least what they would receive in a bankruptcy, i.e. the amount secured by the employee wage security.³¹ This amount must be payable under the proposal immediately after court approval. In addition, the proposal must provide for the payment of arrears of certain pension plan contributions. No time period for such payment is specified but the court must be satisfied that the employer can and will make the payments. The requirement to pay arrears of pension contributions can be waived by the relevant parties to the pension plan.

Once accepted and approved by the court, the proposal is binding upon all unsecured creditors as at the time of the filing of the commencement of the proceeding. If made to secured creditors, the proposal is binding on all classes of secured creditors who approved the proposal. If, however, the proposal is not made to secured creditors, or a class of secured creditors does not approve a proposal, such secured creditors are not bound by the proposal.

If there is a subsequent failure to comply with the terms of the proposal, a motion can be brought by the proposal trustee or, more commonly, by a creditor to annul the proposal and bankrupt the debtor.

(xiii) Conclusion

The proposal provisions have been substantially conformed to the powers previously present only in a CCAA restructuring. There are nuanced differences remaining in the two regimes. Only time will tell what impact this will have upon the restructuring of companies in Canada.

5. LIQUIDATIONS – BANKRUPTCY

(i) Meaning of “bankruptcy”

“Bankruptcy” is a statutory regime which provides for:

- (A) the capture of the assets of the bankrupt (both the assets at the time of the bankruptcy and assets improperly paid or conveyed within

³¹ See pg. 18. Employees now have a priority secured interest in current assets of an employer for arrears of wages of up to \$2,000.

certain time periods prior to the bankruptcy) and the vesting of those assets in a trustee;

- (B) a liquidation of those assets;
- (C) a distribution of the proceeds of the liquidation in accordance with a statutory priority ranking; and
- (D) in the case of an individual, the rehabilitation of the bankrupt³².

In the U.S. “bankruptcy” includes Chapter 11 restructuring-type proceedings. That is not the case in Canada. Bankruptcy in Canada means a liquidation of the assets.

(ii) Commencement of the Process

There are three ways that a debtor can become a bankrupt. Debtors can jump, slide or be pushed into bankruptcy³³.

- Jumping into Bankruptcy

An insolvent debtor can file an assignment in bankruptcy and, thereby, become bankrupt voluntarily. No court process is involved. The assignment document attests to the insolvency of the debtor and sets out a statement of affairs (financial statements) and a list of creditors. The assignment document names a trustee in bankruptcy selected by the debtor.

- Sliding into Bankruptcy

As set out above, an insolvent debtor can file an NOI or file a proposal. If the proposal is not successful, at any stage (e.g. failure to obtain an extension of the stay, failure to obtain the requisite vote at the meeting of creditors, or failure to obtain the sanctioning (approval) of the court) the debtor is deemed to be bankrupt.

- Being Pushed into Bankruptcy

Where a debtor commits an act of bankruptcy³⁴ within the six months immediately preceding the filing of an application for a bankruptcy order, a creditor owed more than \$1,000.00 can apply for a bankruptcy order which adjudges the debtor to be bankrupt. If the debtor does not contest the application, the debtor becomes bankrupt after the

³² This paper will deal with non-personal bankruptcies. Rehabilitation of a corporate bankrupt is not relevant as the BIA requires payment in full of all debts before a corporate bankrupt can obtain a discharge from bankruptcy.

³³ Credit must be given to Max Mendelsohn for this graphic description.

³⁴ See Section 42(1) for the list of acts of bankruptcy. The act of bankruptcy generally relied upon is “ceasing to meet liabilities generally as they become due”.

expiration of a ten-day period. If the debtor contests the application, a summary hearing takes place to determine whether the pre-requisites for a bankruptcy order have been made out. If so, the debtor is adjudged to be bankrupt.

(iii) The Bankruptcy Trustee

Whichever route results in the bankruptcy, the BIA requires the appointment of a trustee. The powers of the trustee are specified in the BIA³⁵. Like monitors and proposal trustees, trustees are, generally, insolvency practitioners from accounting firms. The trustee is an officer of the court and is required to deal fairly with all stakeholders.

In the case of an assignment in bankruptcy, the debtor initially selects the trustee. Similarly, in the case of a failed proposal, the debtor effectively selects the trustee as the debtor's proposal trustee automatically becomes the trustee. In the case of an application for a bankruptcy order, however, the applicant creditor initially selects the trustee.

At the first meeting of creditors, the appointment of a particular trustee must be affirmed by the creditors and there is an opportunity for the body of creditors to substitute a different trustee³⁶.

(iv) Property of the Bankrupt

Upon bankruptcy, the bankrupt ceases to have any capacity to dispose of or otherwise deal with its property. Subject to the rights of secured creditors and trusts, all property of the bankrupt vests in the trustee³⁷. Most statutory trusts, liens and charges cease to apply on bankruptcy, except for those securing certain employee-related tax withholding liabilities, which continue to have a "super priority" in bankruptcy.

(v) Stay of Proceedings

Upon bankruptcy, no unsecured creditor has any remedy against the debtor or its property or can commence or continue any action or other proceeding for the recovery of a claim provable in bankruptcy until the trustee has been discharged. The stay of proceedings in bankruptcy does not apply to secured creditors. Creditors adversely affected by a stay can apply to have the stay lifted in certain circumstances. Typically, a stay will be lifted in order to allow a trial to proceed where the bankrupt is one of several defendants and a judgment against the bankrupt is required in order to determine the liability of others. The purpose of the stay is to provide the trustee with an opportunity to realize upon the assets of the bankrupt in an orderly manner.

³⁵ BIA Section 30

³⁶ BIA Section 14

³⁷ BIA Section 71(2)

(vi) The First Meeting of Creditors

After the initial selection of the trustee, the trustee mails a notice of a meeting of creditors to all creditors to be held within 21 days following the trustee's appointment. The mailing includes a proof of claim and a statement of affairs³⁸.

Prior to the first meeting of creditors, the trustee may take such emergency steps as it deems appropriate for the recovery or protection of the property of the bankrupt.³⁹ In addition, a trustee may, at any time, apply for directions from the court as concerns protective measures and other steps in a proceeding.⁴⁰

At the first meeting of creditors, the trustee reports on the status of the bankruptcy estate and the trustee's investigations into the affairs of the bankrupt. Creditors have an opportunity to question an officer of the bankrupt with respect to the affairs of the bankrupt. The trustee is then affirmed (or replaced). Lastly, inspectors are appointed in order to instruct the trustee. Generally, inspectors are selected from representative constituencies of creditors. The BIA permits the appointment of up to five inspectors.

(vii) The First Meeting of Inspectors and Subsequent Meetings of Inspectors

The inspectors act as a board of directors in the estate. They approve of the recommendation of the trustee with respect to the method of realization of the assets of the bankrupt and they provide instructions to the trustee with respect to actions to pursue transfers at undervalue or preferential conveyances. The bankruptcy process does not affect the rights of secured creditors. Consequently, it is common that there are limited unencumbered assets available to the trustee. The trustee has no obligation to take steps (other than certain administrative steps) or pursue actions if there are no funds in the estate available to satisfy the fees of the trustee and its counsel.

(viii) Realization

The trustee has a broad range of powers with respect to the realization. In appropriate circumstances, the trustee can operate the business with a view to selling it as a going concern. If this is not feasible, the assets can be liquidated by private sale or auction. Typically, a liquidator is engaged by the trustee.

³⁸ BIA Section 102

³⁹ BIA Section 19

⁴⁰ BIA Sections 34

(ix) Improper Transactions⁴¹

- *Fraudulent Preferences*

Generally, payments⁴² made to creditors within 3 months of the bankruptcy are presumed to be fraudulent preferences subject to claw back by the trustee (the use of the word “fraudulent” is unfortunate as there is no requirement to establish a fraudulent intent⁴³). The presumption can be rebutted by the payee in certain limited situations. The prohibition is not limited to the payment of money but can extend to, amongst other things, providing security. The claw back period is extended to 12 months in the case of related parties.

- *Transfers at Undervalue*

Prior to the recent amendments, the BIA contained provisions dealing with recovery of “settlements” (basically gifts) and “reviewable transactions” (essentially transfers at an undervalue). These concepts are abandoned in the amendments and replaced with an omnibus provision dealing with transfers at undervalue.⁴⁴

Under the new amendments any disposition of property or provision of service for no consideration or for a consideration that is conspicuously less than fair market value can, in certain circumstances, be voided or require payment of fair market value. In the case of an arm’s length counterparty, the transaction can be attacked if it occurred within one year, rendered the debtor insolvent and was intended by the debtor to defeat creditors. The same test applies in the case of non-arm’s length counterparties however, within the first year period there is no requirement to establish intent. In addition, if intent is established with respect to a non-arm’s length counterparty, the claw back period can extend back 5 years.

- *Declaration of Dividend*

If, within one year before bankruptcy, a corporation, while insolvent, issues a dividend, judgment can be obtained against the shareholders or the directors for reimbursement of the dividend.⁴⁵

⁴¹ This paper does not deal with various provincial statutes that may be invoked to attack a transaction such as the Ontario *Fraudulent Conveyances Act* and the Ontario *Assignment and Preferences Act*.

⁴² Either in cash or by way of provision of services.

⁴³ BIA Section 95

⁴⁴ BIA Section 96

⁴⁵ BIA Section 101

(x) Security for Unpaid Wages

One of the most significant amendments to the bankruptcy provisions of the BIA deals with a new super priority security created to protect employees with respect to arrears of wages and arrears of pension plan contributions.

The amended BIA now provides for a super priority security in favour of employees for arrears of wages of up to 6 months to a maximum of \$2,000.⁴⁶ This super priority security is over all current assets of the debtor and ranks in priority to secured creditors, in particular, the debtor's operating banker. This amendment will undoubtedly change lending practices as reserves will have to be established for this potential exposure. This wage security is coupled with a program sponsored by the federal government as set out in the new Wage Earner Protection Program Act, which protects employee arrears of wages up to \$3,000 (with the ability of federal government to be subrogated into the \$2,000 BIA wage super priority security).

(xi) Security for Unpaid Pension Contributions

Another super priority charge has been created to secure payment of arrears of certain employer pension plan contributions. This security is over all of the assets of the debtor and is not capped. It trumps a general security interest of a lender. Again, this new security will change lending practices and, perhaps, require lenders to monitor their borrower's pension plan contributions.

(xii) Distribution of Proceeds

After satisfaction of secured creditors and certain statutory super priorities for tax remittances, the balance of the proceeds of realization are distributed by the trustee in accordance with a scheme of distribution set out in section 136 of the BIA. This section establishes a hierarchy of preferred claims (trustee's fees, certain payments to employees, certain payments to landlords) with the balance being distributed on a pro rata basis to ordinary, unsecured creditors.

(xiii) Assignment of Contracts

The BIA defers to provincial legislation as concerns a trustee's power to assign a lease of real property. In most provinces a trustee has the power to assign real property leases, on certain conditions, despite language in the lease which prohibits such assignment. The assignee must be a fit and proper assignee who agrees to abide by the terms of the lease. Arrears of rent must be paid. There is only a limited right to change usage of the premises, particularly in a shopping centre environment where the court will take "tenant mix" into consideration.

As concerns other contracts, the amended BIA now extends the stay to prevent a counterparty from terminating or accelerating an agreement by reason only of the bankruptcy or insolvency.⁴⁷ However the counterparty is not required to supply goods or services on credit. Coupled with this

⁴⁶ BIA Section 81.3

⁴⁷ BIA Section 84.2

prohibition against termination is a new right permitting a trustee to assign executory contracts to third party assignees over the objection of the counterparty. As in the case under the CCAA or proposal provisions, this assignment can be ordered by the court where the assignee would be able to perform the obligations and it is appropriate to assign the contract. Monetary defaults under the assigned contract must be cured.⁴⁸

(xiv) Rights of Unpaid Suppliers

An unpaid supplier who provides a written demand for possession to a trustee within 15 days of the bankruptcy can, on certain conditions, repossess such goods. The right extends to goods supplied 30 days before the bankruptcy. Generally the right is somewhat illusory as suppliers often cannot react quickly enough and the right is lost if the goods cease being identifiable. Some of the mechanics for asserting this right have been changed by the amendments – so care must be had in relying on old information with respect to the asserting this right.

6. LIQUIDATION – RECEIVERSHIP

(a) Meaning of receivership

Receivership is a remedy which is not well known in the United States. A secured creditor in Canada can, in its security documentation, provide for the appointment of a receiver to seize and sell collateral. The security, typically, gives the receiver the right to operate the debtor's business as part of the realization.

In recent years the practice has grown to have the receiver appointed by the court in order to insulate the secured creditor and the receiver from potential liability.

The following is a description of both private receiverships and court-appointed receiverships.

(b) Private Receivers

(i) Appointment

A private receiver is a creature of contract. The security documentation between the lender and the debtor (a contract) defines the right to appoint a receiver, the collateral over which that right extends and the powers of the receiver.

Given the contractual nature of the relationship, the appointing creditor (and the receiver) must ensure that all contractual and legal pre-conditions for appointment have been satisfied; in particular, notice periods and cure periods required by statute and common law must be allowed for.

⁴⁸ BIA Section 84.1

A private receiver has no right to breach the peace in order to take possession of assets. Thus, if the debtor refuses to allow the private receiver to take possession, the private receiver cannot force its way into the premises.

(ii) Duties and Powers of the Private Receiver

As a creature of contract, the private receiver's powers are circumscribed by the provisions of the security agreement. Some security agreements may only deal with particular collateral, e.g., equipment. Thus, a private receiver could only take possession of such equipment and nothing else.

The duties of a private receiver are primarily owed to its appointing secured creditor. The private receiver owes no fiduciary duties to stakeholders at large. The private receiver does have a duty to account to interested parties with respect to the realization.

The common law defines the private receiver's duty of care to stakeholders. This duty of care has now been statutorily defined in the BIA, the Ontario *Personal Property Security Act* (PPSA) and the Canada *Business Corporations Act* (CBCA). Section 247 of the BIA requires a receiver (of every type) to act honestly and in good faith and to deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner⁴⁹.

A useful power that private receivers now have is the right⁵⁰ to apply to the court for directions with respect to carrying out its duties. This gives a privately appointed receiver the ability to obtain some immunity from the court with respect to its decisions or acts.

Additional useful protections extended to private receivers are set out in sections 14.06 (1.2) and 14.06(2) of the BIA. These provisions limit the potential liability of "trustees" with respect to certain employment and environmental matters. For the purpose of these provisions, the definition of a trustee extends to a private receiver.

(iii) Status of the Privately Appointed Receiver

The private receiver is, in reality, the agent of the secured creditor. In order to attempt to limit liability, secured creditors usually provide in their security documentation that the receiver is deemed to be the debtor's agent and that the debtor is responsible for the receiver's acts, defaults, and remuneration. However, the case law⁵¹ is clear that, when taking possession of assets and realizing thereon, the receiver is acting as the agent for the secured creditor. If the receiver carries on the business, it does so as agent for the debtor.

⁴⁹ PPSA Sections 59(4) and 63(2) and CBCA Section 99

⁵⁰ PPSA Section 60(2), BIA Section 249 and CBCA Section 100

⁵¹ *Peat Marwick Ltd. v. Consumers Gas Co.*, [1981] 29 O.R. (2d) 336 (C.A.).

(iv) Realization

When a private receiver sells the collateral as agent for the secured creditor, the secured creditor must give notice of the sale to the debtor and other stakeholders. The appointment of a private receiver does not exempt a secured creditor from giving notice under the Ontario *Mortgages Act*, with respect to real property, or under the PPSA with respect to personal property.

Subject to restrictions in the security document, a private receiver can sell the collateral using any process (e.g., tender, auction or listing with an agent) which is commercially reasonable with respect to the collateral in question. The conveyance documents generally recite the basis of the receiver's ability to sell and purchasers must be satisfied that there has been due compliance with the relevant statute. Generally, purchasers (particularly American purchasers) feel uncomfortable in purchasing significant assets from a private receiver. Problems can arise in subsequent re-sales or financings in satisfying a subsequent purchaser or financier that all appropriate steps and notices were given by the selling receiver. Purchasers are, generally, more comfortable in dealing with vesting orders.

A sale by a private receiver is not approved by a court order. Thus a sale by a private receiver still leaves the receiver and its appointing creditor exposed to a claim of improvident sale by affected stakeholders. Similarly, guarantors of the principal debt may try to raise the issue of an improvident sale as a defense in a guarantee claim.

(c) Court-Appointed Receivers – CJA

(i) Appointment

The Ontario *Courts of Justice Act* (CJA)⁵² and the Ontario Rules of Civil Procedure (Rules)⁵³ empower the court to appoint a receiver where it is “just and convenient to do so” on such terms as are “just”.

A mere reading of these provisions makes it evident that the receivership remedy is a flexible, open-ended remedy. It should be noted that as the CJA and Rules are provincial legislation, a receiver appointed thereunder only has power within Ontario and must seek a recognition order if it intends to act in another province or territory of Canada. (see also comments below under the heading “Interim Receiverships/National Receiver”).

The application/motion to appoint a receiver can be made without notice to the debtor or other stakeholders in the case of urgency, e.g. assets being dissipated. Counsel for the moving party must bear in mind the normal requirements with respect to motions brought without notice, and in particular, the obligation to make full and fair disclosure of all relevant facts.

⁵² CJA Section 1.01

⁵³ Rule 41

Where a secured creditor is seeking to enforce its security by way of the appointment of a receiver by the court, whether or not it has given notice, it is not sufficient to merely set out the fact that the creditor holds security and that there has been a default. Evidence must be advanced to satisfy the requirement that the order be “just or convenient”. The courts are reluctant to be used by secured creditors in a prophylactic manner solely for the purpose of insulating the creditor and its receiver from liability. Therefore, the material seeking the appointment of the receiver should recite facts such as lack of cooperation on the part of the debtor, dissipating assets, competing creditors or difficulty in realization.

The recent decision of the Supreme Court of Canada in *T.C.T. Logistics*⁵⁴ put a chill on the use of receivership remedy in unionized environments where successor employer status may attract substantial exposure to the receiver. Orders appointing receivers typically declared that if the receiver operated the business it could not be declared a “successor employer” under labour law. A successor employer takes on the responsibility of the former employer for such things as payment of pension obligations – which may be very significant. In *TCT*, the Supreme Court said that the courts do not have jurisdiction to make such a declaration – only specialized labour tribunals can do so. Thus, the practice hopefully evolved of trying to sell companies through a CCAA liquidation process. As the CCAA is a debtor in possession process, the employees remain employed by the debtor and successor ship issues should be avoided. This assumes cooperation of the debtor. The amendments to the BIA cure this problem as they provide that a trustee or receiver do not inherit successor liability under collective agreements.⁵⁵ It is anticipated that there will now be more receiverships going forward.

(ii) Provisions of the Appointing Order

Twenty-five years ago, receivership orders were quite short – under ten pages long. Modern receivership orders are lengthy and contain a broad array of powers, rights and protections. A group of Ontario lawyers and judges have developed a standardized receivership order for Ontario, which deals with the following topics:

- (I) the appointment of the receiver generally, without posting security;
- (II) a description of the receiver’s powers, including:
 - a. the right to take possession of assets, and to preserve them;
 - b. the right to operate the business;
 - c. the right to market and sell the assets, with or without court approval;

⁵⁴ *GMAC Commercial Credit Corporation – Canada v. T.C.T. Logistics Inc.* [2006] 2 S.R.C. 123, 2006 SCC 35

⁵⁵ BIA Section 14.06(1.2)

- d. the right to apply for a vesting order.
- (III) provisions dealing with cooperation with the receiver by way of providing information and assets to the receiver;
- (IV) stays of proceedings as against the receiver and as against the debtor and its assets;
- (V) requirements to continue services to the receivership estate on the conditions that normal prices or charges are paid;
- (VI) provisions dealing with environmental matters;
- (VII) provisions dealing with the receiver, and in particular a limitation of liability and provisions dealing with payment of the receiver and its counsel;
- (VIII) provisions dealing with the funding of the receivership by way of receiver certificates and granting a charge over the receivership assets for those borrowings; and
- (IX) lastly, general provisions dealing with the right of the receiver and others to apply for directions.

(iii) Marketing of the Assets

The initial appointing order can provide for the marketing of assets by the receiver as is deemed appropriate. However, when dealing with difficult assets, or in highly contested situations, it may be advisable for the receiver to obtain the court's blessing on its marketing process and material. This can be done in the appointing order (if there is sufficient time and if the receiver has sufficient knowledge of the assets), but, more generally, it is done by way of a separate motion. Obtaining approval of the receiver's confidential information memorandum and the terms and conditions of sale will limit any bickering at the sale approval hearing with respect to the fairness or adequacy of the marketing process.

(iv) Sale Approval Motions

The appointing order usually contains permission for the receiver to sell certain assets, below a monetary threshold, without obtaining court approval. Generally, the sale of material assets requires court approval on notice to all parties with an interest.

After conducting the marketing process, the receiver will recommend a purchaser or purchasers of the assets under its administration. Unlike the private receiver, the court-appointed receiver is a principal, not an agent of the secured creditor or debtor. Accordingly, the appointing secured creditor does not have the power to dictate the actions of the receiver. The receiver does not have

a duty to obtain the best price but, rather, to do everything reasonably possible in the circumstances to obtain the best price. The court will give deference to the recommendations of its receiver and not likely question the business judgment of the court-appointed receiver in selling the assets.

The making of the sale approval order effectively insulates the receiver and the appointing creditor from a claim of improvident sale by the debtor, its guarantors or its other stakeholders.

On a motion for approval of a sale, the court is very concerned with the fairness and integrity of the process by which offers for the assets are obtained. Accordingly, provided it is satisfied with the process, the court should approve a sale even if a prospective purchaser shows up at court with a higher offer. Courts in Ontario are wary of receivership sales becoming auctions on the courthouse steps and will only consider last minute offers if they are so much better than the accepted offer that they raise concerns about the fairness of the marketing process.

(v) Distribution Motions

The order appointing the receiver will commonly empower the receiver to distribute the proceeds of sale to stakeholders upon further order of the court⁵⁶. The requirement that the receiver return to court for an order directing it to distribute the proceeds insulates the receiver from claims that it distributed the proceeds to the wrong stakeholder or in the wrong proportions. On a distribution motion, the receiver will produce an interim statement of receipts and disbursements and will describe the relative priority and entitlement of stakeholders to the proceeds of sale. The receiver will also generally present a statement of its fees and disbursements (including those of its legal counsel) for approval by the court.

(vi) Priority for Arrears of Wages and Pension Contributions and Rights of Unpaid Suppliers

As in the case of a bankruptcy, the amended BIA creates a super priority in a receivership for arrears of wages and pension plan contributions. The rights of unpaid suppliers also apply in a receivership.

(vii) Discharge of Receiver

Upon completion of the administration of the receivership the receiver may apply to the court for an order discharging the receiver. The receiver will report to the court on its activities and on any assets that might remain to be realized upon. A final statement of receipts and disbursements is presented together with a final statement of the receiver's fees and disbursements. The order discharging the receiver will approve of the activities of the receiver, approve the receiver's fees and disbursements (including those of its legal counsel), direct that the remaining funds be

⁵⁶ The receivership order generally permits the receiver to pay its fees and disbursements and the fees and disbursements of its legal counsel on an ongoing basis without prior approval, but subject to approval after the fact by the court.

distributed to creditors, terminate the receivership and discharge the receiver. The discharge order will also commonly contain some confirmation of the limited liability of the receiver. Where the receiver must take some ancillary step following the discharge order (e.g., filing tax returns), the receiver is authorized to do so and provision is made for payment of its fees.

(d) Interim Receiverships/National Receiver

Under the BIA, a secured creditor must deliver a notice of its intention to enforce its security. Thereafter, the secured creditor must wait out a 10-day notice period before take further steps, with one exception: the appointment of an interim receiver. Such appointment is intended to stave off the ability of a debtor to dissipate or hide assets during the notice period. It is quite clear that the intent of the Parliament was to create a receiver for an interim period, with limited powers, until the notice was given and/or matured. However, creative counsel (and a creative court) latched upon the language in Section 47(2)(c) of the BIA – which allowed an interim receiver to “take such other action as the court considers advisable” – to craft a new and flexible remedy under the auspices of the appointment of an “interim” remedy. Many remedies historically available only in a “receivership” became available in an “interim receivership”, with certain procedural advantages for creditors.

The amended BIA now makes it clear that the appointment of an interim receiver is indeed interim. This will stop the previous practice of using interim receiverships to achieve far-ranging remedies.⁵⁷

However, the amendments also create a new “national receiver”⁵⁸. This receiver can be appointed by court order to take possession and control over property where there is a security agreement or legislation that authorizes the appointment of a receiver. The receiver will have power to take possession of all the assets of a business debtor and to take such other action as the court considers advisable. The extent of those powers is not enumerated and will be flushed out as cases evolve.

The advantage of the BIA national receiver over a CJA receiver is that the national receiver will be able to operate in various provinces without the requirement of obtaining recognition orders.

⁵⁷ BIA Section 47.1

⁵⁸ BIA Section 243

7. CONCLUSION

This paper is an attempt to familiarize American readers with the types of regimes you may encounter if you are involved in a Canadian insolvency situation. Hopefully, this paper will assist in answering some of your basic questions and will help you identify issues and opportunities in your business dealings.

FOR MORE INFORMATION

<i>Toronto</i>	<i>Aubrey Kauffman</i>	Direct Line: 416 868 3538 E-mail: akauffman@fasken.com
	<i>Edmond Lamek</i>	Direct Line: 416 865 4506 E-mail: elamek@fasken.com
	<i>Stuart Brotman</i>	Direct Line: 416 865 5419 E-mail: sbrotman@fasken.com
<i>Vancouver</i>	<i>John Grieve</i>	Direct Line: 604 631 4772 E-mail: jgrieve@fasken.com
	<i>Marcel Peerson</i>	Direct Line: 604 631 4771 E-mail: mpeerson@fasken.com
	<i>Kibben Jackson</i>	Direct Line: 604 631 4786 E-mail: kjackson@fasken.com
<i>Montreal</i>	<i>Alain Riendeau</i>	Direct Line: 514 397 7678 E-mail: ariendeau@fasken.com
	<i>Luc Béliveau</i>	Direct Line: 514-397-4336 E-mail: lbeliveau@fasken.com
	<i>Eric Menard</i>	Direct Line: 514 397 4357 E-mail: emenard@fasken.com
	<i>Serge Guerette</i>	Direct Line: 514 397 7461 E-mail: sguerette@fasken.com
<i>Quebec City</i>	<i>Jean G. Morency</i>	Direct Line: 418 640 2002 E-mail: jmorency@fasken.com

We have additional offices in the following business centres:

Calgary:

3400 First Canadian Centre
350-7th Avenue SW
Calgary, AB, T2P 3N9
Canada

Tel: 403 261 5350

London:

17 Hanover Square
London, England
W1S 1HU

Tel: +44(20) 7917 8500

Johannesburg:

PostNet Suite #430
Private Bag X9924
Sandton, 2146
South Africa

Tel: +27(11) 685 0800

www.fasken.com