INTERNATIONAL INSOLVENCY INSTITUTE

Statutory Review of the BIA and CCAA

1. Rights of IP Licensees: -

The 2009 amendments were a constructive approach to the issue of the rights of IP licensees in bankruptcies and reorganizations but did not deal with all of the consequent issues that arise on the disclaimer or affirmation of IP licenses in bankruptcy. The 2009 amendments were taken largely from the legislative protection provided to licensees in the United States under Section 365(n) of the United States Bankruptcy Code. There is currently a debate with regard to the extent and appropriateness of protection provided by Section 365(n) and there is currently legislation before Congress that would alter Section 365(n). Not all licenses of intellectual property are alike and there are distinctions in the kind of protection that is intended to be provided by patents, for example, on one hand and trademarks, for example, on the other. A patent, generally speaking, is intended to protect the interests of the patent holder while trademark protection is intended to protect the public. Consequently, provisions respecting the continuation of intellectual property licenses in those two very different kinds of intellectual property may need to differ since they are aimed at achieving different ends. The International Insolvency Institute has undertaken an international study of protection provided to intellectual property assets in bankruptcies and insolvencies and we will forward the results of that survey to you in due course for your consideration going forward.

2. Initial Orders

Initial Orders started reasonably and then grew enormously over the years. (Compare a CCAA Order from 1994 with one from 2014 for the contrast.) The original breadth of the early CCAA Orders was necessary at the time when the CCAA was only 20 sections long. The growth in the length of CCAA Orders is probably attributable to creative lawyering which seeks to cover all contingencies all of the time.

Over the last several years, courts have approved initial orders in standard forms that have been developed by, among others, the Commercial List User Committee of the Ontario Superior Court of Justice at Toronto (of which I am a

member). To the extent that several courts have now focused on vary similar terms for commencing CCAA proceedings, it would be timely to take the existing practice that has developed (or at least the more significant aspects of it) and incorporate those provisions that are considered necessary into the actual text of the CCAA so that CCAA Orders can again become comprehensible and useful, especially to stakeholders outside the legal profession who are asked with understanding what they say.

3. Claims Processes: -

Claims process has become overly and unnecessarily elaborate and extensive. In the vast majority of cases, there is usually no controversy regarding the amount of the claim but claimants, no matter how small their claim, are invariably now put through a complicated claims process which usually results in the claim being formally reviewed and then allowed by the Monitor in the amount that is shown on the books and records of the reorganizing business. It would be much easier if this process could be avoided if the creditor is in agreement with the amount of its claim as shown on the books and records of the reorganizing business. In other words, disputed claims would be dealt with on an exceptions basis when there is an actual disagreement or difference of opinion on the amount of the claim. Some claims, of course, will not be susceptible to this process, e.g., a secured claim to particular assets which may or may not form part of the collateral comprised in the security held by the secured creditor. By adopting an exceptions process to the claims process, the cost, inconvenience, expense and delay incurred in the current structure for valuing and exploring claims to which no one has any appreciable objection could be avoided.

There is a controversy arising from the current structure of claims processes that should be addressed. In complicated cases, the claims process is initiated by the Monitor. There is a divergence of opinion as to whether the decision of the Monitor is entitled to curial deference (i.e., the respect that a higher court gives to a lower court) but it is difficult to see how this principle should apply to a chartered accountant charged with the overview of the preparation and progress of a plan of reorganization. There is an issue as to whether the allowance and disallowance of claims should be delegated to non-judicial officials without the consent of the parties involved. The process by which Monitors adjudicate claims of creditors needs to be reviewed and, at the very least, some form of specific

procedure should be put in the legislation if this practice is to continue and to be respected.

4. Court Applications: -

Part of the reason for the enormous numbers of lawyers and clients at court hearings in major cases is the lack of a procedure that would clearly and specifically spell out (and limit) the extent of the relief that is being sought. Clients and their counsel can be justifiably concerned, based on many years of experience, that orders will be made on the spot in any particular court application if it appears convenient to the parties in court at that time that those orders should be made. Consequently, there is a concern among counsel that if they do not appear on a motion and an order is made affecting their clients, they could be criticized (or worse) for failing to attend on the motion and protect their client's rights.

If parties could be satisfied that the only relief that would be granted by the court on a particular application was the relief specified in a draft order circulated with the application to the court, there would be far fewer attendances in court by parties whose main interest is simply to monitor the course of the proceedings in the case. One helpful process that is developing is a form of "Certificate of No Objection" process under which the counsel for the moving party circulates in advance of the hearing of the motion a Certificate of No Objection indicating that no objections have been received to the relief being sought. In theory, there should be no need for anyone but the parties directly affected to attend on the motion which would save, collectively over all of the CCAA proceedings that take place in Canada, enormous amounts of professional costs that are incurred in simply safeguarding the interests of parties to the proceedings from unannounced and unanticipated requests for relief during the hearing of a motion. Part of this process would involve a deadline for objections to be filed in advance of the return of the motion so that it can be clear to the Monitor or the moving party that a Certificate of No Objection can be properly issued and served on the parties to the proceeding.

5. Role of Unsecured Creditors: -

It would clearly add fairness and transparency to proceedings under the BIA and the CCAA if unsecured creditors generally had the ability to participate in negotiations relating to sales of assets, preparation of Plans of Reorganization

and the measures necessary to financially restructure an ailing business. Functionally, it would seem that Canada is moving toward a model that recognizes greater rights of participation by unsecured creditors in bankruptcy proceedings. It is interesting to note that the BIA has had provision for the appointment of Inspectors for literally decades. While eschewing the appointment of informal creditors' committees, Canadian courts now routinely allow creditors' committees from foreign jurisdictions to participate in Canadian reorganizations. Canadian courts also routinely allow so-called "Informal Creditors Groups" to appear and participate in Canadian reorganizations and restructurings without much enquiry as to the interests or the identify of the parties that are ostensibly represented in such informal groups.

More recently, Canadian courts have often appointed representative counsel to represent particular interests or claims available to particular sets of creditors. The Nortel case, for example, has at least 7 representative counsel (and possibly as many as 10 – it is difficult to tell from the public record) appointed to represent various unsecured claims and interests in the proceedings. The Nortel case (along with many others) has also had active participation by foreign Unsecured Creditors' Committees and by a number of "Informal Creditor Groups." It is glaringly evident by contrast in those cases that no counsel has been appointed or entity created to represent the interests of general unsecured creditors (apart from being included in the Monitor's general duty to all creditors of the reorganizing business). Some insolvency administrators favour the creation of creditors' committees to represent unsecured creditors in large cases because the committee structure provides them with a means of effectively communicating and negotiating with the general unsecured body of creditors. The basis is that the creditors' committee represents all of the unsecured creditors of a reorganizing business and has a fiduciary duty to them.

The only disadvantage that is usually cited in opposition to the creation of creditors' committees is the cost. Creditors' committees as independent entities should be able to engage professional advice on the treatment of unsecured creditors in complicated proceedings and, if considered appropriate, to take actions on behalf of the debtor company that the company itself or the Monitor decline for whatever reason to proceed with. The BIA currently contains a provision that seems to permit the Court to secure payment of the professional costs of parties who have materially contributed to the progress and

development of a plan of reorganization: BIA, s.64.2. This power has been used to cover the costs of informal Creditors' Committees and would also be appropriate in the case of formal Creditors' Committees.

The most appropriate means to deal with the issue of expense is probably to treat the costs of a creditors' committee as a cost of the administration as under BIA s.64.2. The expenses of a creditors' committee in protecting the interests of creditors in a complex reorganization are no less worthy of support than the costs incurred by representative counsel appointed by the Court to do the same thing. In fact, having a creditors' committee would, in major cases, reduce the expense of the representation of unsecured creditors by focussing unsecured creditors' contributions in a single entity whose costs can be more easily controlled than those of several independent representative counsel. The expenses of a creditors' committee, of course, would remain in the jurisdiction of the Court as to entitlement, appropriateness and quantum which ought to be a sufficient safeguard against unnecessary or egregious claims for reimbursement for professional costs or other expenses incurred by the committee. In cases of sensitivity, the creditors' committee could be asked to provide a budget for anticipated involvement in various aspects of the reorganization which would then be binding on it absent a Court order to the contrary. There would seem to be no compelling argument against allowing for the creation of creditors' committees but, for clarity, the power to appoint creditors' committees should clearly be included in Canada's insolvency legislative framework.

6. Acting in Good Faith: -

Incorporating a provision in the CCAA directing or providing that creditors to CCAA proceedings must act in good faith is probably a solution for which there is no identifiable problem. The suggestion implies that there have been substantial abuses in CCAA cases and that acting in bad faith is a serious problem in CCAA reorganizations. It is difficult to understand how that claim can be properly advanced. It would also be very difficult to frame an enforceable obligation to act in good faith because of the difficulty in defining, in particular situations, how to express a duty of good faith and to identify the parties to whom a duty of good faith would be owed if a specific statutory duty of good faith were created. The concept would certainly lead to increased and expanded litigation which would be a distraction from the need for stakeholders to proceed to discuss and negotiate a viable plan of reorganization in complex insolvencies.

The Courts certainly have the jurisdiction and the power to deal with examples of bad faith when they are identified.

The only area in which a duty of good faith might be appropriate is in the case of voting on plans of reorganization. For example, if a particular creditor is a competitor to the debtor and seeks to prevent the debtor from negotiating a viable plan of reorganization for competitive reasons, that kind of conduct is inappropriate and should be sanctioned. The easiest remedy to implement, however, is not to expose the offending creditor to a claim for damages for failing to act in good faith, but to disqualify that creditor from voting on the plan. Other than that, there would appear to be no justifiable reason to expect that enacting a duty of good faith in whatever terms could be imagined would improve the Canadian system for reorganizations and restructurings.

7. Financial Contract Exemptions in Bankruptcy: -

In common with many other countries, Canada has adopted provisions that deal with "Eligible Financial Contracts" (EFC's) in insolvency situations. The origins of these provisions probably go back many years to the work of ISDA to insert provisions in bankruptcy legislation to avoid an insolvency administrator "cherrypicking" contracts to honour where its estate was "In the Money" and rejecting/disclaiming contracts when the estate was "Out of the Money". From those modest beginnings, provisions dealing with financial contracts are on their way to constituting a separate, parallel form of bankruptcy proceeding that is not subject to bankruptcy legislation of general application. The basis for this evolution is customarily thought to be the need to protect the capital markets from the collapse of "systemically important financial institutions" (SIFI's). The underlying principle is that transactions involving the various forms of EFC's on the market that trade between major financial institutions should be dealt with separately in insolvency cases so as to prevent harm to financial markets and to avoid the risk of Lehman-type collapses among financial intermediaries that fall within ambit of "systemically important financial institutions" (SIFI's). If, as seems likely, Canada's major trading partners have enacted these types of provisions in their insolvency legislation, it would be difficult for Canada to play a hold out role.

There is concern, however, that the breadth of these exemptions from bankruptcy legislation is unnecessarily wide and that they catch transactions that

were never considered necessary to provide protection to SIFI's. In addition, the exemption provisions have lead to ingenious corporate drafting so that even ordinary garden-variety transactions between parties that are in no way SIFI's can be regarded (and have been held) to be exempt transactions which certainly goes far beyond the original intent of the exemption provisions. From a policy point of view, the exemptions have essentially established a parallel bankruptcy system under which certain ordinary transactions are exempt from bankruptcy legislation because of the form in which they are constructed while other transactions of the same intent and affect are subject to bankruptcy legislation. It is triumph of form over substance. If transactions are structured in a particular form, they will exempt from normal bankruptcy provisions. This result is well beyond creating protection that is necessary to save systemically important financial institutions and promote the efficient functioning of capital markets. It would be better policy and fairer for stakeholders involved in the bankruptcy process if the exemptions from bankruptcy legislation were narrowly confined to achieve their original objective of protecting systemically important financial institutions from the consequences of financial failure. These developments and the progressive growth of exemptions from bankruptcy legislation of general application are amply illustrated by a presentation made at the International Insolvency Institute's 14th Annual Conference in Mexico City earlier this year by Edwin E. Smith of Bingham McCutchen, a recognized expert in eligible financial contracts and the operation of capital markets. A copy of Mr. Smith's very cogent presentation on these issues is attached.

8. Creditors Lists and On-Going Financial Disclosure: -

It would seem apparent that transparency in reorganizations and restructurings requires that parties in interest know the financial condition of the reorganizing business. Consequently, the Monitor in a CCAA proceeding should maintain a list of creditors of the reorganizing business. Mathematical precession in the amounts of the claims of creditors is not necessary and a listing of creditors could be divided into several parts, each of which would cover a mathematical range of amounts. In a sense, the listing would divide creditors into Small, Medium and Large Claims which would be determined according to the size of the reorganization.

More importantly than creditor lists, however, is the provision of current financial information to creditors concerning the financial position and business

prospects and results of the reorganizing business during its period of CCAA protection. Every business of any significant size anywhere in Canada will be used to preparing monthly, quarterly and annual financial reports and there would seem to be no good reason why reports of this kind could not be made available to Creditors (or to a Creditors Committee) unless there were serious issues of competitive disadvantage that would result in which case the court could excuse the reorganizing business from providing some of this information. The court always has the authority and jurisdiction to protect against the release or disclosure of confidential information.

9. Empty Voting and Disclosure of Economic Interests: -

The problem usually identified in this area is that, because of the plethora of financial instruments currently in existence, it is possible for a creditor to assign the benefit of its claim to a third party while remaining as the creditor of record in the reorganization. The basis of reorganizations under Canada's insolvency legislation is that creditors are assumed to have an interest in the debtor against whom they have claims. If a creditor has assigned the interest in its position to a third party but remains as a creditor of record, it would be consistent with the objectives of Canada's insolvency legislation to require that the assignee of the claim be the creditor of record. Many claims bar proceedings in CCAA proceedings now require creditors to indicate whether they have assigned their claim to a third party but that is not a continuing obligation. A claim or the economic interest in a claim could be assigned following the submission of a proof of claim and there is currently no structure in place by which it can be determined where the actual economic interest in the claim is held.

A policy to eliminate empty voting would be difficult to construct and statutory requirements may not be the answer. Moreover, empty voting is probably not an issue of importance or concern in most reorganizations and restructurings. So, on an exceptions basis, it might be easier, less expensive and less controversial if the Monitor were given a specific statutory power to require a claimholder to confirm that it continues to have the entire economic interest in the claim it has filed or the liability that is recorded on the books and records of the debtor and to confirm, if it has assigned that economic interest in whole or in part, the identity of the party to whom it has assigned the interest so that the assignee can be treated as the creditor of record for purposes of the company's restructuring.

10. Pre-Filing Reports: -

The practice of pre-filing reports is now developed and seem to have the advantage of allowing an independent financial and business analysis of the prospects of a successful reorganization by a prospective CCAA debtor. The latent criticism of pre-filing reports is that the accounting firm selected to do the pre-filing report will inevitably come up with a report that recommends that it be appointed the Monitor in the subsequent CCAA case. This can be seen as a conflict of interest. Rather than disallowing the concept of pre-filing reports, however, the solution might be require pre-filing reports from two different professional firms so that an element of objectivity can be injected into the situation if a conflict of interest is the concern. This would not take additional time since the two reports could be completed contemporaneously and, because pre-filing reports are usually prepared in a reasonably short time frame, it should not materially increase the expense of becoming ready for the initiation of a CCAA case.

11. Stalking Horse Bids: -

Stalking horse bidding procedures have proved their value time and time again in Canadian restructurings. They are a form of ensuring that maximum value is obtained on the disposition of assets of the reorganizing debtor. Historically, the Courts have looked to Trustees and Monitors to survey the market and to come back with a recommendation as to a prudential sale to a prospective purchaser. What this approach lacks is an element of competition among the potential buyers of the assets being sold. This competition aspect is not to be underestimated. In the Nortel case, Nortel's IP, when put up for sale, produced a bid of $900M as submitted to the Monitor which, in a normal CCAA case, the Monitor would have accepted and recommended to the Court. By the use of a stalking horse procedure, however, competing bids were received and, when the asset sale went to an auction, the final purchase price for the assets being sold was approximately $4.5B, i.e., a 500% improvement on the original offering price. Most of Nortel's other sales produced purchase prices that were well in excess of the original stalking horse bid and the Nortel stakeholders benefitted to the tune of several billion dollars from using the stalking horse process. The same principles would apply to most significant CCAA reorganizations. It may not be necessary to specifically revise Canadian insolvency legislation to provide for stalking horse bidding procedures as those are now commonly used. It might be

sufficient to provide specific jurisdiction to the Court to entertain stalking horse bidding procedures and related auctions in the course of disposing of assets of a reorganizing debtor.

12. Hardship Funds: -

It is now common for hardship claims processes to be implemented in major CCAA restructurings when those restructurings are likely to continue for some time so as to avoid prejudice to particular groups of vulnerable creditors.

Due to the increasing length and complexity of modern CCAA cases, there are certainly situations in which vulnerable smaller creditors are seriously prejudiced by having to wait a long time for payment of funds that are urgently needed to deal with their urgent financial needs. It has become commonplace for CCAA cases to create hardship claim procedures under which vulnerable creditors can, in appropriate cases, be given an interim distribution on account of their claims if it appears that payment of their claims will be delayed and that they would unnecessarily suffer financial hardship as a result. These situations are best addressed by the Court on a case-by-case basis and it would be difficult, if not impossible, to formulate a set of specific criteria that could be enacted into legislation to govern the treatment of hardship claims in major CCAA cases. Major creditors do not usually object to hardship claims procedures, probably on the basis that the distributions to hardship claimants would be made in any event and that the demonstrated hardship justifies allowing an earlier distribution than requiring hardship cases to await the culmination of negotiations among the major creditors of the estate. If necessary, the only significant legislative change would be to provide a specific head of jurisdiction in the BIA and the CCAA to permit interim distributions to claims that are found to be genuine hardship claims whose payments is recommended by the Monitor or the Trustee.

This concept does bring up the concept of smaller claims generally. Consideration could usefully be given to allowing the Court to permit interim distributions to creditors who fall within what is commonly now called a "convenience class" of creditors. If minor or small creditors are allowed to be paid early on in the case with the approval of the Trustee or Monitor and the Court, it would facilitate the administration of a major case by reducing the number of creditors that the administration of the case must necessarily involve.

At a certain level of claim, it is usually more effective to pay small claims in full to take them out of the administration of the case than to continue to deal with them on a continuing basis for claims proving, voting and the distribution in the normal course with the major creditors of the estate. As an elaboration on that procedure, provision could be made for claims of that kind to be assigned to the Monitor so that there is no continuing involvement by the holder of minor claims to avoid the necessity to "true up" claims at the end of the administration.

13. Third Party Releases: -

The CCAA has shown (in the *Asset Backed Commercial Paper* case), that third party releases can be appropriate and advantageous in complex CCAA cases. The *ABCP* Case set out criteria for that result which are worth considering. Releases of directors and officers, lenders, professional advisors and others have been routine in CCAA plans for some time. This can be supported on the basis that the parties being released are merely ancillary players in the overall restructuring or parties who have contributed to the success of a plan of reorganization. Third party releases of major creditors or those with a very significant involvement in the restructuring can probably be justified on the basis of their contribution to the success of the restructuring. If a third party has not contributed to the success of the restructuring, financially or otherwise, it is difficult to see a justification for providing it with a release of all liabilities without any form of disclosure being made as to what liabilities may actually be being released. It is probably impossible to formulate a rule as to when a third party release should be given and when it should not be given so the matter is probably best left in the discretion of the Court. The change in the legislation would be to allow a plan of reorganization to provide for a third party releases on certain terms and conditions including, among other things, disclosure of any facts that might justify a claim and disclosing the contribution made by the proposed Releasee to the success of the plan of reorganization.

14. Special Purpose Entities: -

In principle, there should be no compelling reason for excluding businesses that carry on business in Canada from the application of Canadian insolvency legislation. That conclusion addresses a number of kinds of organizations, e.g., railways, that are excluded from insolvency legislation on historic grounds, presumably that they were regulated by other agencies and were intended to be

placed beyond the reach of litigation and the Courts. Whether that continues to be a viable position is questionable and there have been recent examples of railway companies seeking and being granted protection under the CCAA in any event. There is also a case to be made that it would be appropriate for the BIA to apply (with special provisions) to regulated companies in the financial services industry. Because of the sensitivity of those kinds of businesses and their importance to the economic well being of their locality or their country, the better position should probably be that they cannot be forced into bankruptcy but their supervising authority should be able to place them in bankruptcy for the proper administration of their assets and liabilities if they are clearly insolvent. This might reduce the need for the Winding Up and Restructuring Act which is essentially a parallel bankruptcy proceeding for companies in the financial services area. There is considerable merit in reducing the number of separate independent insolvency-related statutes that are available to various companies, organizations and associations in Canada.

Similarly, there would seem to be no principled reason why a trust should not be subject to normal bankruptcy procedures and this could be clarified in the new legislation. There may be other kinds of entities to which insolvency legislation of general application could usefully apply. If it is considered that some types of associations should be shielded from involuntary proceedings, that could be accomplished but the bankruptcy structure could be usefully made available to entities that are currently precluded from seeking bankruptcy protection without any great harm or inconvenience to them.

15. Streamlined Small Business Proposal Proceeding: -

There would be little doubt that a simplified less expensive proposal process for SME's would be advantageous in Canadian insolvency legislation. A truly effective process of this kind however, might be difficult to develop. The legislative tendency would be to focus on abbreviating the time period available for the reorganization which, as we have seen in the current Proposal provisions of the BIA, results in a series of negotiations and applications to the court for extensions of time for a Proposal to be filed. To be effective, a process of this kind should probably involve an insolvency administrator with Monitor-type powers rather than simply those of a proposal Trustee as that position is currently structured. It would be helpful to a simplified process of this kind if some of the strict requirements on the present proposal process as to time frames and as to

payment of particular types of claims could be ameliorated with the consent of the classes of creditors involved. The alternative to a simplified proposal process which keeps the business of the debtor in place is, of course, a sale of the business as a going concern. These types of sales, however, often (and perhaps usually) wipe out subordinate creditors' claims completely and reduce recoveries to most stakeholders. The policy risk is that if formal proposal processes are made more complicated and time-consuming, the alternative of a quick sale as a going concern without a restructuring will become increasingly commonplace.

16. Division One Proposal Extensions: -

It is probably generally accepted within the insolvency profession that an initial period of 30 days following the filing of a Notice of Intention to file a Proposal is insufficient to negotiate and develop a Plan of Reorganization which will restructure the financial condition of the reorganizing business. That time frame should almost certainly be extended to 45 days and might even be usefully extended to 60 days. It would be worth considering allowing subsequent extensions to be made available upon the consent of an appropriate majority of the creditors of the business in the first instance. Extensions, of course, should be notified to all of the creditors and creditors who oppose an extension of time should be free (as they are currently) to apply to the Court to terminate the debtor's protection or curtail the amount of time that it is seeking to present a proposal to its creditors. There should be some protection against indefinite extensions of time for filing a proposal and the current requirement that a proposal proceeding be completed essentially within six months of the filing of the debtor's Notice of Intention to make a proposal is probably realistic time limit within which to present a proposal.

17. Liquidating CCAA Proceedings: -

In principal, there should be no objection to a business being liquidated in a CCAA proceeding without the need to engage the structure of a formal bankruptcy proceeding. There is probably a distinction to be drawn between liquidating proceedings that take place through a formal plan of reorganization presented to the creditors and liquidating proceedings that take place simply through the Court-supervised sale of the debtor's business and assets. Inasmuch as all CCAA proceedings take place under the supervision of the Court and the oversight of a court-appointed Monitor, any creditor that is aggrieved with any

aspect of the proceeding may seek to have the Monitor intervene or may apply directly to the Court for relief to prevent or curtail whatever activity it is concerned about.

From a legislative point of view, there would almost certainly be a definitional problem in setting out in legislation what is a "liquidating CCAA". One area of protection for stakeholders would be to ensure that, when there is no remaining equity in the reorganizing company, that the financial and other advisors representing the company are no longer be required, absent an order to the contrary by the supervising court. Again, unfortunately, Nortel is an example of the need for improvement. Over four years ago, Nortel abandoned its attempts to reorganize, the Monitor was given expanded powers and the dispositions of its business began. Notwithstanding that conversion to a liquidation proceeding, Nortel's shareholders have continued to be represented in all of Nortel's subsequent proceedings at the expense of Nortel's remaining stakeholders.

The tipping point in cases of this kind might be when the Monitor is given expanded powers by the Court. At that point, the Monitor is essentially performing the functions that a Trustee in bankruptcy would perform under the BIA and some statutory codification of the responsibilities and obligations of a Monitor in those circumstances should be set out. There has usually been a reluctance to convert CCAA cases into bankruptcy administrations even after the prospects for a reorganization have entirely disappeared. This is partly the result of the very broad CCAA stay of proceedings that is invariably initiated in the initial order in the CCAA proceedings. Perhaps the answer is to create a set of powers and responsibilities that would be applicable to a "Liquidating Monitor" when it is determined or ordered that a successful of reorganization cannot be negotiated or implemented. The powers of a "Liquidating Monitor" would be analogous to those of a Trustee in Bankruptcy in a BIA administration but conveying powers to a "Liquidating Monitor" would avoid the complications currently attendant in attempting to convert a CCAA proceeding to a bankruptcy administration.

18. Employees' Claims: -

No one disagrees with the concept that employees' claims should be given priority in insolvency cases. The goal of protection of employees' claims, however, is probably more securely achieved through a different mechanism

than those currently in our present bankruptcy legislation. Super-priority claims, director liability provisions, deemed trusts, etc., provide a variety of individually-oriented claims, all of which must be dealt with during a reorganization or a restructuring on a case-by-case basis. It would be more efficient, less costly to reorganizing businesses and less deleterious to credit availability in Canada to consider the use of a different model for the protection of employee claims.

The model could be a centrally-administered Bankruptcy Insurance Fund that would protect the employees in the event of their employers' insolvency. This would not depart very far from existing Canadian practices. Employees are accustomed to deductions for employment insurance, for pension plan contributions, for workplace safety insurance funds and the like. None of those programs deal individually with individual employees' claims or security interests for specific individual claims in insolvencies and restructurings. We are not sure if any analysis has ever been done on the extent of losses suffered by employees as a result of the insolvency of their employer. The general view would probably be that a small weekly deduction from an employee's wages or salary would soon create a very large fund to protect employees generally against the insolvency of their employer and, at that point, the rate of contribution could be reduced to match the Fraud's claims experience. A fund of this kind is probably best administered through the employment insurance structure that is already in place. If this is sensitive to political interests, the fund could require shared contributions between the employer and the employee and, after initial period of assessment, the contributions to the fund could be reduced to whatever level is appropriate to cover employee losses in insolvencies based on actual experience. This would be far more efficient and effective than the current system and would lead to the elimination of credit restrictions that are imposed by lenders to protect themselves against super-priority claims that come ahead of security from a debtor that enters the reorganization proceeding.

19. Employees' Claims in Asset Sales: -

Employees' claims are appropriately and historically directed at their employers rather than the assets owned by the employer. Consequently, employees' claims are conventionally asserted against the employer and are paid by the employer or from the proceeds of the sale of the employer's assets. Allowing employees to make claims against particular assets would inevitably have a very prejudicial

affect on asset sales in reorganizations and insolvencies to the prejudice of all creditors, including employee creditors. There would seem to be no principled basis for permitting or establishing rights of employees to assert employment-related claims against particular assets owned by the employer. Setting up a system of that kind would not protect existing innocent creditors from having their claims diminished or extinguished by claims of employees and would have a seriously negative effect on credit availability in Canada without significantly improving recoveries to employees in insolvency cases.

20. Oppression Remedy: -

Fundamentally, the oppression remedy is intended to provide the Court with jurisdiction to remedy conduct that is unfairly prejudicial or which unfairly disregards the interests of creditors and others. The oppression remedy is probably available in insolvency proceedings in any event. To the extent that there is any ambiguity as to the availability of oppression remedy provisions which provide for equitable relief, it would be useful for the availability of the oppression remedy to be specifically set out in the BIA and the CCAA. To accompany this grant of jurisdiction and to protect the interests of creditors generally, there would need to be consideration given to the extent to which the oppression remedy could be used to reclassify the claims of creditors, to subordinate some creditors' claims to the claims of other creditors and to affect the rights of properly secured creditors. In a non-bankruptcy context, the oppression remedy is intended to remedy the state of rights and obligations between two parties. The bankruptcy context, of course, involves all creditors and great care should be taken to ensure that oppression remedy relief granted to a particular creditor does not in fact prejudice the rights of secured creditors generally or other creditors who have not been party to the conduct of the oppression remedy seeks to remedy.

21. Treatment of Enterprise Groups: -

Reference is made to the International Insolvency Institute's *Guidelines for Coordination of Multinational Enterprise Group Insolvencies* which can be accessed by following the attached link to the website of the International Insolvency Institute: www.iiiglobal.org/enterprisegroup

22. Director Disqualification: -

It is unclear whether disqualification is an effective remedy or penalty for directors who have been guilty of misconduct in relation to the affairs of their corporation. If the object of disqualification is to discourage or prevent "misconduct", a more effective way of achieving that result would be to create a specific standard of care for directors of insolvent corporations and provide creditors with remedies for breach of that duty of care. Remedies for breach might also be made statutorily available to the Monitor or the Trustee in Bankruptcy on behalf of all creditors.

23. Renaming the Bankruptcy and Insolvency Act: -

There is probably still a social stigma associated with "bankruptcy", particularly in the consumer debtor context. Since "insolvency" includes bankruptcy, perhaps a better name would be the "Restructuring and Insolvency Act" which would better emphasize the rehabilitative aspects of the legislative scheme.

24. Key Employee Retention Bonuses: -

Key employee retention bonuses have become a regular part of complex restructurings. They are necessary to retain important employees and officers of a business who are familiar with it so as to prevent the reorganizing business from becoming a leaderless ship with no direction and no capable management. Key employee retention programs are almost always approved by the Court and, if there is any doubt about that, a provision could be usefully included in insolvency legislation requiring the approval of the Court to any key employee retention programs and bonuses. If Court approval is required for key employee retention bonuses, there should be no need to consider director and officer liability for those programs. If there is some concern that key employer retention programs will not be properly funded so that the key employees do not receive the bonuses that have been agreed upon, the criteria for court approval of key employee retention programs should be that sufficient funding for those programs should be demonstrated as part of the court approval process.

25. Interest Claims: -

The existing situation regarding interest claims is probably sufficiently clear that no legislative action would be required. That is, interest claims on unsecured obligations cease at the date of bankruptcy and interest claims on secured claims

continue provided that they are covered by the value of the collateral that is subject to the security. If it is considered necessary on the equivable grounds or otherwise to give the Court the jurisdiction to review the rate of interest being charged, that could be a specifically-enumerated power provided to the Court in the amendments to the legislation.

26. Unpaid Suppliers: -

There is considerable merit in providing a limit of form of protection to suppliers who supply product to a reorganizing or liquidating business shortly before the commencement of the reorganization or the liquidation. The stay of proceedings that is imposed in those cases prevents the supplier from attempting to recover the product that it has very recently delivered to the reorganizing business and it is unfair for the reorganizing business to keep the advantage of the delivery of that product while seeking a stay of the supplier's remedies. Perhaps an application for CCAA protection should include disclosure of unpaid product supplied to this debtor within, say, 30 days of the CCAA filing.

27. Applicability of Asset Sale Test: -

It is clear that not every sale of assets in a restructuring is sufficiently important or material to warrant the time and attention of the court and the professionals for stakeholders who are involved in the case. Canada seems to have adopted from the United States (which has a specialized, dedicated bankruptcy bench) the practice of seeking court approval for almost all non-routine aspects of the administration of a restructuring. This can be contrasted with practice and procedure in other countries where very few applications for court approval are brought. Their practice is based on the view that the court-appointed insolvency administrator is a skilled professional exercising his professional judgment which the court ought not to interfere. Perhaps there is room to consider an exceptions-based approach to asset sales below a certain proportionate threshold in the sense that the insolvency administrator would notify the creditors of a pending potential sale such that parties who disagree with the propriety of the sale could then indicate their opposition to it and take the matter to a contested court hearing. Minor sales and sales of minor assets are almost never opposed if the evidence in favour of the sale is adequate and eliminating court approval for sales in this area would be a considerable benefit to all of the stakeholders and would significantly reduce the cost of administration in major reorganizations.

28. Unified Insolvency Law: -

There is considerable merit in developing a unified insolvency law if the suggestion is that particular types of reorganizations will be given their own Part in the statute so as not to lose the flexibility of the CCAA and/or to distinguish between small, routine reorganizations and restructurings and large complicated cases. The most recent sets of amendments to Canada's insolvency legislation shows that a legislative convergence is actually taking place. If a unified insolvency law is promulgated, there should be a distinction or distinctions between portions of the law that relate to restructurings and portions that relate to liquidations as the two processes have different consequences and certainly have different levels of creditor interest and different dynamics.

29. Codification of Receiverships: -

It would be useful to have a single kind of receiver for all insolvency situations. It would be helpful for the power and authority of the court to appoint a receiver in an insolvency to be found in insolvency legislation. If the functions of a receiver appointed under insolvency legislation need to differ depending on the nature of the case or the need in a particular situation, those distinctions should be made clear in the legislation.

30. Appeals in CCAA Proceedings: -

The requirement that leave of the Court of Appeal be obtained for *any* appeal in a CCAA case is unnecessarily restrictive, especially having regard to the appellate authority to the effect that appeals in CCAA proceedings are to be discouraged. There is contrasting authority from the Court of Appeal in British Columbia to the effect that the policy restriction against appeals in CCAA cases is intended to operate on issues that are time-critical in a CCAA reorganization where an appeal would detrimentally affect the progress and outcome of reorganization to the prejudice of the stakeholders involved in it. Of course, not all decisions or orders in CCAA cases are in that category and situations that involve issues which can be decided without affecting the course of a CCAA restructuring should be subject to the same appeal procedures as normal civil appeals. In addition, it would be useful to have consistency between the BIA and the CCAA as to what kinds of appeals need to be restricted and what kinds of appeals do not need to be restricted, perhaps focusing on whether the appeal is in context of a currently-proceeding reorganization or not. Appeals in liquidating CCAA cases

will illustrate the inapplicability of the policy against allowing appeals in CCAA proceedings to disputes in those kinds of cases.

31. Arbitration Proceedings in Insolvency Cases: -

Although arbitration has historically been regarded as requiring the consent of all parties, it can be a useful mechanism to resolving particular kinds of disputes, especially if the parties involved are agreeable to arbitrating the disputes in question. It would be useful for insolvency legislation to empower the court to direct or allow arbitration of particular issues arising from disputes in insolvency cases. In a sense, Canadian practice may already be there because Canadian courts can refer disputes to other parties for determination and recommendations (usually with a report back to the court that directed the reference). It would be not much of a leap to allow the court to direct arbitration in the same circumstances.

32. Appointment of Court Officers in Insolvency Cases: -

There seems to be not much of a limit on the kinds of officers that can be appointed by the courts in insolvency cases. Consequently, there has developed the position of Chief Restructuring Officer which formerly was a corporate position with a reorganizing business but which has now morphed into being a judicial appointment by the court. There seems to have been no discussion regarding whether the authority of the court is needed for the appointment of a Chief Restructuring Officer. Other functions have also been made subject of appointments of officers by the court such as Claims Officers and Plan Administrators whose functions do not appear in the legislation.

This is essentially giving judicial credence to positions that are essentially corporate positions and procedures and there seems not to be any demonstrated or recorded need for the involvement of the court in these processes. The tendency of the court is to regard anyone appointed by court order as being presumptively independent and more knowledgeable and authoritative than those who have not been appointed by the court. This takes away from the level playing field between creditors and the administration of the insolvency case where it is not fair to do so (as in the case of claims processes). It may not be a good idea to entirely remove the power of the court to appoint administrators but it would be constructive if the kinds of insolvency representatives that can be appointed by the court could be at least enumerated, with some description

given to the powers that they would be authorized to exercise in insolvency situations. What is often lacking in the appointment of ancillary court-approved administrators, moreover, is disclosure sufficient for creditors to conclude that the proposed appointee is not in a conflict situation and that proposed appointee is properly qualified for the position and that its prearrangements are publicly disclosed.

In the time available, we have not had the opportunity to expansively consider all of the commercial issues and administrative issues listed in the discussion paper, all of which are worthy of consideration and comment. As we go forward with additional input from, particularly, our Canadian Members, we will revert with additional views and suggestions on how best to improve Canadian insolvency legislation.

By way of background, in past revisions to Canada's insolvency legislation, I have been privileged on occasion to provide advice to the Department and have testified before the Senate Banking, Trade and Commerce Committee and the House of Commons Industry Committee on the most recent reforms to Canada's bankruptcy legislation. I made submissions on each occasion to the Parliamentary Committees respectively involved. I would look forward to being able to answer any questions or to respond to any inquiries on the brief policy-oriented submissions made in this correspondence. With very best regards.

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Note: The comments above are those of the writer and do not necessarily represent an official position of the International Insolvency Institute or its Members.