THE INSOLVENCY INSTITUTE OF CANADA and
CANADIAN ASSOCIATION OF INSOLVENCY AND
RESTRUCTURING PROFESSIONALS
JOINT TASK FORCE ON
BUSINESS INSOLVENCY LAW REFORM

SUPPLEMENTAL REPORT

Industry Canada
235 Queen Street
Room 561-F
Ottawa, ON K1A 0H5

Attention: Corporate Law Policy Directorate

Introduction

The Joint Task Force on Business Insolvency Law Reform respectfully submits this report, supplemental to our March 15, 2002 Report, on behalf of the two leading organizations of insolvency professionals in Canada, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals (CAIRP). Descriptions of the two organizations are attached as Schedules C and D to the March 15, 2002 Report.

The proposals in this Supplemental Report have been formally approved by the two organizations with the exception of the additional proposal that is made by CAIRP alone and that is set out in Schedule S1. You already know the substantive content of this Supplemental Report. Its purpose is to formally confirm and record the response of the two organizations to the November 2003 Report of the Standing Senate Committee on Banking, Trade and Commerce and the additional work of the two organizations since 2002, virtually all of which was completed prior to the introduction of Bill C-55.

This Supplemental Report has been prepared as a result of further volunteer efforts of many members of the two organizations who participated in numerous Working Groups and meetings organized by the Joint Task Force following the release of the Senate Committee Report.

As was the case with the proposals in our March 15, 2002 Report, we have continued to do our best to approach the resolution of the issues on a principled basis and to use our practical in-depth knowledge of business insolvencies and of the existing Canadian insolvency system to recommend changes that we believe will advance effectively the economic and social policy goals of Canadians generally.

While we do not propose to set them out again, we continue to subscribe to the principles outlined in our March 15, 2002 Report under the headings "Background" and "Current Reform Priorities". In preparing this Supplemental Report we continued to be guided by the basic economic, social and procedural considerations set out under "Basic Considerations" in the March 15, 2002 Report.

Our additional proposals are set out in Schedule S to this Supplemental Report, grouped in categories corresponding to those contained in our March 15, 20002 Report, with one further category, "Other Issues", added. For ease of reference we have consolidated in Schedule A the March 15, 2002 proposals and the additional proposals contained in Schedule S. The list of categories in Schedules S and A is as follows:

A. Interim Financing

B. Going Concern and Asset Sales

C. Executory Contracts (including Collective Bargaining Agreements)

D. Governance (including Independence Issues/Role of the Monitor)

E. Plan Approvals

F. Preferences

G. Priorities

H. Bankruptcy Remoteness/Risk Management

I. One Statute or Two?

J. Income Tax

K. International Insolvency

L. Other Issues

Except as may otherwise appear in Schedule S, we continue to endorse the March 15, 2002 proposals. We reiterate our point in the March 15, 2002 Report that many of the proposals are linked to each other in the sense that we are recommending changes that would result in an integrated and coherent system. As a result, we would have a different view of some proposals if others are not accepted. We would be pleased to meet with you to discuss any of our proposals in detail.

Our Supplemental Report also includes Schedule T, a list of proposed, largely technical, amendments to the BIA and/or CCAA. In Schedule T, we provide commentary in respect of individual proposals where we feel it is necessary or appropriate.

The proposals in our March 15, 2002 Report and this Supplemental Report are not intended to be an exhaustive list of all the possible reforms to Canadian insolvency laws. Instead, they respond to the issues that should be given priority in this particular round of reform that has been advanced with the introduction of Bill C-55. We are hopeful that both our March 15, 2002 Report and this Supplemental Report will be of material assistance to you as the legislative process relating to Bill C-55 unfolds.

We wish to thank, in particular, Professors Tony Duggan and Janis Sarra who continued to act as Reporters for the Joint Task Force. Without their invaluable assistance (which was provided by them without regard to their personal views on the merits of the proposals) this Supplemental Report simply would not have been completed.

All of which is respectfully submitted on behalf of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals by the Steering Committee of the Joint Task Force, the members of which are:

Andrew J.F. Kent, Chair

Doug McIntosh, Vice-Chair

David E. Baird

Christie J.B. Clark

Gary F. Colter

Jean-Yves Fortin

Patrick McCarthy

Larry Prentice

James Stuart

June 30, 2005

SCHEDULE S

SUPPLEMENTAL REFORM PROPOSALS WITH COMMENTARY

INTRODUCTION

The March 15, 2002 JTF Report made eighty-six general reform recommendations (referred to below as "**Recommendations**"). This Schedule S to the Joint Task Force's Supplemental Report makes supplemental recommendations (listed numerically prefaced by "S", with explanatory commentary as appropriate) expanding upon, amending or varying the initial Recommendations in response to the November, 2003 Report of the Standing Senate Committee on Banking, Trade and Commerce. It also provides supplemental explanatory commentaries on some of the Recommendations.

A. INTERIM FINANCING

S1. Provide in BIA proposals for an express statutory power to authorize borrowing ("D.I.P. loans") and grant security in specified amounts for post-filing advances and supplies of goods and services necessary to fund the debtor during the restructuring proceedings, such power to be authorized according to criteria to be specified in the statute.

Recommendation 1 is an identical recommendation with respect to CCAA proceedings. S1 extends Recommendation 1 to apply to BIA proposal proceedings as well.

S2. Provide that a further factor be added to Recommendation 2, being whether the D.I.P. loans are necessary for the continuation of the business operations of the debtor or the preservation of its assets.

Recommendation 2 proposes seven factors that should be considered by a court when determining whether to approve a D.I.P. application. S2 adds an eighth factor.

Supplemental Explanatory Commentary

Recommendation 7 proposes that the court should not prime a registered or possessory security interest without at least 48 business hours notice to the affected secured creditor. To illustrate "48 business hours", if a hearing is scheduled for 10:00 a.m. on a Tuesday following a holiday Monday, the affected secured creditor would have to be given notice effective at a time prior to 10:00 a.m. the preceding Thursday. The notice period would not be abridgeable without the consent of the affected secured creditor.

Recommendation 8 proposes that "in deciding whether to exercise the power to prime other security interests, the court should be required to use the existing balancing of prejudices/limited prejudice test developed by the courts when exercising inherent jurisdiction". It is understood, in applying the "balancing of prejudices/limited prejudice", that it should be more difficult to obtain a priming D.I.P. loan than a D.I.P. loan that is subordinate to pre-filing security interests, and that the burden of proof on the debtor to show "limited prejudice" is a more difficult standard to

meet than the general standard of no "material" prejudice to creditors generally referred to in Recommendation 2.

Recommendation 10 proposes that if a priming D.I.P. lien is enforced, the court have the authority "to allocate on a just and equitable basis how the burden of the D.I.P. lien is ultimately to be borne by the primed secured creditors". The power of the court to allocate the burden of the D.I.P. lien should be exercisable by the court at any time during the proceedings and is an essential element if secured creditors are primed by the lien.

B. GOING CONCERN AND ASSET SALES

S3. Provide that another factor to be added to Recommendation 20 should be whether the sales process has been conducted by a qualified independent sales party reporting to an independent committee of the board of directors, either with or without supervision of the court.

Recommendation 20 proposes that the court should consider four factors in deciding whether or not to approve a material sale of assets during a CCAA proceeding. S3 adds a fifth factor for consideration.

S4. Provide that in the context of a sale or sale process administered by a debtor or insolvency administrator, the debtor or the insolvency administrator may, with prior approval of the court, enter into agreements that call for the payment of costs or fees, including,

(i) reimbursement of costs incurred by a prospective purchaser or bidder and

(ii) break fees payable to a bidder in circumstances where it submits a bid and the debtor subsequently elects to proceed with a higher bid submitted by another party, which is subsequently approved by the court.

provided that such fees or costs are reasonable in the circumstances, having regard to the nature of the transaction, the value of the assets in question and such other factors as the court considers appropriate.

The purpose of S4 is to expressly give the court the authority to adopt alternative methods of sale where appropriate in the context of concurrent cross-border proceedings or otherwise, while maintaining the authority to continue to apply more traditional Canadian insolvency sale practices.

Supplemental Explanatory Commentary

Recommendation 24 proposes that "in connection with a sale approved by the court, the debtor and the applicable insolvency administrators may provide the purchaser with information subject to privacy laws restrictions, provided that the purchaser agrees to comply with the policies, if any, of the debtor with respect to privacy and with applicable privacy laws". The intent of

Recommendation 24 is to facilitate the maximization of value. This authority should only be exercised to the extent necessary to achieve that purpose.

C. EXECUTORY CONTRACTS (INCLUDING COLLECTIVE BARGAINING AGREEMENTS)

S5. Provide that, upon request, the debtor must give the counterparty and/or the court an explanation of the business reason for the disclaimer of the counterparty's contract.

The Senate Committee recommended that greater restrictions be placed on disclaimer rights, apparently in order to protect the contractual counterparties as well as the estate. It is unclear what real evidence a debtor could lead to meet the proposed Senate Committee test and how a court could adjudicate the issue. At its core, the decision to disclaim involves the exercise of business judgment concerning a business plan and future prospects that are not by their nature subject to meaningful legal proof. After considerable debate within the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals, the Joint Task Force was instructed to recommend an alternative to the Senate Committee test – an obligation to explain the decision to disclaim so that in an egregious case there would be some scope for a review of the decision to disclaim.

S6. Provide that the court has the power to stay the legal set-off of pre-filing claims against post-filing obligations of the creditor.

Courts have interpreted section 18.1 of the CCAA as having overruled earlier cases giving the court the power to stay certain set-off rights. That power should be reinstated with respect to obligations of a creditor to the insolvent debtor that arise as a result of post-filing transactions.

S7. In order to partially implement Senate Committee Recommendation 31, provide that assignments of executory contracts are conditional on payment of debts due and owing up to the date of the assignment and the assignee becoming responsible for performance of the debtor's obligations following the assignment.

There is concern that the test proposed by the Senate Committee (Senate Committee Recommendation 31) that the assignment be conditional on remedying all "pecuniary loss" could arguably include damage claims that could be difficult to quantify on a summary basis, which would render the power to assign illusory.

S8. In order to implement Senate Committee Recommendation 30, provide that special provision should be made, along the lines of section 1113 of the United States Bankruptcy Code (see Appendix A), for the disclaimer and modification of collective bargaining agreements.

There is broad consensus amongst insolvency practitioners that the disclaimer power should apply to collective bargaining agreements like all other contracts, but that the power should be subject to special conditions that encourage both the debtor and the union to bargain an out-of-court resolution in good faith.

Supplemental Explanatory Commentary

The Recommendations with respect to executory contracts are generally intended to apply to all executory contracts. Accordingly, the amendments to the BIA and CCAA providing for disclaimers, assignments and termination to implement the Recommendations relating to executory contracts should (upon insolvency) replace provincial legislation such as section 38(2) of the *Commercial Tenancies Act* (Ontario) and include a repeal of section 146 of the BIA.

The principal objective underlying the requirement in Recommendation 26 to obtain consent of the monitor/trustee to the exercise of the debtor's right to disclaim executory contracts was to protect the estate from abusive conduct and/or bad business judgment of management, not to protect the contractual counterparties. Accordingly, the requirement that the monitor or trustee must consent to a proposed disclaimer was not intended to preclude the debtor from seeking court approval to a disclaimer in lieu of monitor or trustee consent.

With respect to Recommendation 26(c), for the reasons identified by Working Group A[1], consideration should be given to whether there are other types of contracts to which that provision should apply, not just purchase agreements.

Damages after termination of a contract resulting from a disclaimer are intended to be treated as a pre-filing claim. Accordingly, the combined effect of Recommendations 27 and 28 is not intended to permanently preclude a counterparty from exercising a right to set off cash collateral or deposits that were provided pre-filing against termination damages, or from exercising, after insolvency, set-off rights against pre-filing obligations once the contract is terminated (but not before).

Recommendation 30 proposes that trustees in bankruptcy and court-appointed receivers have the power to assign executory contracts. Implicit in Recommendation 30 is a prohibition against termination of an executory contract by the counterparty based on the debtor's insolvency; otherwise the right to assign would be illusory.

Because of the confusion that has arisen in the United States, consideration should be given to referring simply to "contracts" in any legislative provisions, and dropping the term "executory" which is currently used, for example, in BIA section 65(1).

D. GOVERNANCE (INCLUDING INDEPENDENCE ISSUES/ROLE OF THE MONITOR)

S9. Provide that, in addition to granting the court authority to grant a charge to secure fees and expenses of insolvency administrators, the court should also have authority to grant a similar charge to secure fees and expenses of counsel to insolvency professionals and the debtor.

---

[1] The papers of the various Working Groups referred to in Schedule S were forwarded previously to Industry Canada under separate cover.

S10. In order to implement Senate Committee Recommendation 25, provide for a general due diligence defence with respect to pre-filing statutory claims, in addition to specifying the matters for which independent directors (Recommendation 51) and directors and officers (Recommendation 52) are exonerated from personal liability.

S11. In order to implement Senate Committee Recommendation 29, provide that personal liability of insolvency administrators should be clearly separated from liability of the debtor in addition to specifying the matters in respect of which insolvency administrators are exonerated from personal liability pursuant to Recommendation 53.

S12. Provide that shareholder meetings of public companies during the restructuring process are not required unless authorized by the court.

S13. In order to partially implement Senate Committee Recommendation 35, provide that a proposed specified professional be required to file with the court, at the time of application for the CCAA initial order in the case of the monitor and other specified professionals retained at that time and at the time of application for confirmation in the case of other professionals, disclosure information with respect to the professional's prior involvement with the debtor.

S14. In order to partially implement Senate Committee Recommendation 35, provide that the CCAA and BIA require in respect of restructuring proceedings involving more than $5 million in claims that, after reasonable notice, the engagement of all specified professionals other than those acting for the debtor be confirmed by the court within a reasonable period of time after the making of the initial filing in the case of specified professionals retained at that time, and otherwise in advance of being retained.

S15. In order to partially implement Senate Committee Recommendation 35, provide that the CCAA and BIA require that, after reasonable notice, the engagement of lawyers acting for monitors or trustees under proposals where the aggregate claims of creditors are $5 million or more or that are proposed to act in a representative capacity and be paid by the estate be confirmed by the court in advance of being retained.

"Specified professionals" means parties retained on behalf of a debtor, as or by an officer of the court, or on behalf of any party that has been formally recognized by the court (e.g. representative counsel and advisors to official creditor committees), to provide specialized services relating to the proceedings and who are being paid by the estate. Professionals include, without limitation, lawyers, accountants, monitors, chief restructuring officers, trustees, receivers, investment bankers, actuaries and liquidators.

In determining whether to confirm the appointment of a specified professional, the onus would be on the applicant to satisfy the court that the professional has the appropriate professional qualifications and can provide independent advice to the party of interest, taking into consideration whether the professional can provide the engagement party with unfettered advice free from any conflicts or influence and whether a professional acting as a court officer can act in

an impartial manner with the ability to deal with the rights of all interested parties in a fair and even-handed manner. For example, this would generally preclude a member of historic management acting as a chief restructuring officer of the debtor.

In order to assist the court, the proposed specified professional would be under a positive duty to disclose certain information, including (i) any work the professional has done for the debtor within the 2 years prior to the filing, except as specifically relates to the filing; (ii) any work done on behalf of any interested party specifically relating to the debtor within the 2 years prior to the filing (other work done for interested parties need not be disclosed); (iii) any work performed on behalf of any parent of the debtor in the 2 years prior to the filing; (iv) any work done on behalf of any subsidiary or sister company of the debtor in the 2 years prior to filing; and (v) any other matter that might constitute a direct material conflict.

An actual conflict of interest (that includes both any existing conflict and any conflict likely or potentially likely to arise in the course of the administration) should disqualify a specified professional. A perceived conflict of interest should be considered a disqualifying fact only if severe enough to jeopardise the likelihood of the proceedings coming to a reasonable and efficient conclusion or if the perceived conflict of interest is severe enough to place the professional in a position where he cannot work in harmony with the party he is to represent.

Issues that, while not specifically disqualifying a specified professional from acting, should be seriously considered by the court include (i) whether the professional has a personal interest in the debtor, including as a creditor, a shareholder or a potential defendant in litigation relating to the debtor; (ii) whether the professional acted as an investment banker or advisor to an investment banker for outstanding securities of the debtor; (iii) whether the professional acted in any capacity as a director, officer or employee of the debtor; or (iv) whether the professional acted as an auditor of the debtor and the relevant financial statements are in question.

In considering issues the court should take into consideration whether the issue is *de minimis* and whether the issue or perceived issue can be resolved in a satisfactory manner that is more expedient than disallowing the appointment.

The court would also have the discretion to sanction the payment of fees for services performed by a specified professional in good faith prior to a determination by the court not to confirm the professional's appointment.

S16. Provide that the court has the power to remove a specified professional.

S17. Provide that the party with the primary obligation to advance a position and adduce evidence before the court should be the applicant and not the monitor.

S18. Provide that the monitor, unless otherwise required by the court, should avoid taking any legal position or filing a factum regarding contested legal disputes among other parties.

While it is understood and accepted that in reporting on factual matters, a monitor will necessarily put forward views – sometimes strong views – on business related matters affecting the applicants (e.g. the reasonableness of a plan), a monitor should not file a factum or take

positions on the legal aspects of any contested issues in the CCAA proceeding. Instead, advocacy of those legal matters should be left to the applicants and any stakeholders who are challenging a position being taken by the applicants.

S19. Provide for an amendment to CCAA section 11.7 to stipulate that the primary roles of the monitor are (a) to monitor the activities of the debtor for the benefit of all interested parties and the court, and (b) to work impartially with the debtor and all interested parties to facilitate the restructuring process.

Where the restructuring has failed, in appropriate circumstances, the court should have the discretion to appoint the monitor the receiver and manager of the debtor.

Supplemental Explanatory Commentary

The appointment of an interim receiver or interim manager under Recommendation 38 is not intended to be restricted to cases where there is a showing of fault. Accordingly, while proof that there is a risk of asset dissipation through activities outside the normal course of business or that there is no board of directors to direct the process would be considerations tending to support the appointment of an interim receiver, other matters such as a lack of confidence of key creditors in management could be sufficient to serve as a basis for appointment. The concept of interim "manager" was inserted to make it clear that the primary purpose of Recommendation 30 was to allow the restructuring process to continue under the leadership of the debtor but with the debtor managed by the "manager".

A key underlying social policy point is that existing management should have no proprietary right to control the process. The extraordinary legal powers given to the debtor are intended to be used to save the going concern business (if that makes business sense) primarily for the benefit of creditors, suppliers, employees and other interested parties, rather than management. The social policy justifications for giving insolvent debtors extraordinary powers are based on the benefit of preserving going concerns where the value of the going concern exceeds break-up value. They do not justify transferring value to whoever had legal control over the debtor entity prior to insolvency simply as a control premium.

A related point is that the value of the business and assets as compared to the claims should influence how the directors and officers and applicable insolvency administrators exercise their powers. In many cases, from a value perspective, either the general secured creditors or the general unsecured creditors have become the equity, and the persons controlling the process should exercise their authority to reflect that reality. On that basis, Recommendation 41 expressly requires that "the debtor's directors and officers and the applicable insolvency administrators shall take into account the priority of the claims of creditors and equity holders, and the apparent value of those claims in light of the likely range of values of the business and assets of the debtor".

Consideration should be given to amending the definition of "receiver" in BIA section 243 to include an interim receiver where the interim receiver has taken possession or control of a class of assets described in subsection (2). In view of how insolvency professionals are utilized in CCAA and BIA proceedings, consideration might also be given to dropping the term "interim" from "interim receiver" in the legislation since it appears to cause confusion.

Recommendation 42 proposes "that an interim receiver or a receiver within the meaning of section 243 of the BIA (excluding mortgagees in possession and other secured creditors directly enforcing their security) and a CCAA monitor must be a licensed trustee in bankruptcy". Implicit in that Recommendation is the requirement that the monitor be an officer of the court with a duty to represent all stakeholders impartially, act equitably and hold an even hand between competing interests as far as possible.

Recommendations 44 and 45 dealing with court-ordered charges in favour of insolvency administrators could be implemented by expanding BIA section 47.2(1) to include trustees, receivers and receivers and managers. A similar provision in the CCAA would accomplish the same result for monitors.

Recommendation 49 proposes "that when deciding whether or not to grant a charge in favour of the directors and officers, particularly in CCAA cases, the court shall consider whether the debtor's board has established appropriate governance mechanisms". In considering whether to grant a charge in favour of directors and officers, the court should have the discretion to impose ongoing corporate governance requirements as a condition to maintaining the charge as well as the right to withdraw the benefit of the charge from a director that has been removed for cause.

Implicit in insolvency administrators being exonerated from personal liability in Recommendation 53 is the parallel denial of an administrative claim against the estate (as opposed to an unsecured claim).

E. PLAN APPROVALS

Supplemental Explanatory Commentary

In order to better align the BIA and CCAA as regards the classification of secured claims, a provision like BIA section 50(1.4) could be incorporated into the CCAA.

The legislation implementing Recommendation 62 and Senate Committee Recommendation 40 relating to the subordination of equity claims could be modeled along the lines of section 510(b) of the United States Bankruptcy Code (see Appendix A).

F. PREFERENCES

Non-Arm's Length Transactions

S20. Provide generally for more effective remedies with respect to payments, conveyances and other transactions involving non-arm's length parties that reduced the value of the debtor's estate.

Preference Actions

S21. Provide that the existing preference periods under federal law (which would apply both to the BIA and the CCAA) be extended to 5 years with respect to non-arm's length parties, and 1 year for arm's length parties.

S22. **Provide with respect to preference actions that the existing presumption of debtor intent cannot be rebutted by non-arm's length creditors with respect to preferential transactions occurring within the 1 year period before the date of the initial bankruptcy event or initial CCAA order.**

Undervalue Transfers

S23. **Provide for the replacement in BIA and CCAA proceedings of the existing causes of action for settlements (BIA, s. 91) and reviewable transactions (BIA, s. 100) with a new single cause of action for undervalue transfers (which would also be used in place of provincial fraudulent conveyance laws). "Undervalue transfers" would be broadly defined to include, without limitation, conveyances of property, the provision of services and the occurrence of obligations by the debtor where the fair market value of the consideration received by the debtor was conspicuously less than the fair market value given by the debtor (e.g. the debtor's estate was conspicuously depleted by the transaction).**

S24. **Provide that the time periods for attacking undervalue transactions (referable to the period before the initial bankruptcy event or initial CCAA order) should be 5 years with respect to non-arm's length parties and 1 year with respect to arm's length parties.**

S25. **Provide that, with respect to non-arm's length parties, if the undervalue transfer occurred more than one year before the initial bankruptcy event or initial CCAA order, in order to attack the transaction it would have to be established that either (a) the debtor was insolvent at the time of, or was rendered insolvent by, the transaction, or (b) the debtor had fraudulent conveyance intent.**

S26. **Provide that, with respect to arm's length parties, in order to attack the transaction it would have to be established that both (a) the debtor was insolvent at the time of, or was rendered insolvent, by, the transaction, and (b) the debtor had fraudulent conveyance intent.**

Dividends

S27. **Provide that an insolvency administrator, within 5 years before the initial bankruptcy event or initial CCAA order for non-arm's length parties, or 1 year for arm's length parties, may challenge the debtor's payment of dividends, return of capital or redemption or buy-back of shares upon proof that the debtor was insolvent at the time or that the transaction rendered the debtor insolvent.**

Additional Safe Harbour

S28. **Provide, to the extent applicable in a business context (e.g. the debtor is the sole proprietor of a business), similar to protection in the case of a consumer insolvency, for an additional safe harbour for payments made in compliance with a family law court order or pursuant to a bona fide agreement between spouses for alimony or**

support payments that could otherwise have been the subject of a family law court order.

Remedies

S29. Provide that, when pursuing a non-arm's length party under one of the foregoing provisions, the plaintiff has the right to recover any share of the improper benefit directly or indirectly received from the transaction by any privy, where "privy" would be defined as a person not at arm's length to the non-arm's length creditor, transferee, shareholder, financier, director or officer, as the context may require.

S30. Provide that creditors have BIA section 38-type remedies in BIA proposal and CCAA proceedings in respect of all causes of action referred to in S15 to S22, inclusive, above (but without limiting the power of insolvency administrators to settle those claims subject to due process).

S31. Provide for a limitation period of 3 years from the date of the initial bankruptcy event or initial CCAA order to pursue the preference, undervalue transfer, creditor oppression and other related remedies provided for under federal law.

S20 to S31 attempt to create the "complete code" contemplated by Recommendation 64. A fuller discussion of the issues relating to fraudulent preferences, conveyances at under-value and other reviewable transactions is contained in the September 12, 2004 Discussion Paper of the Working Group on Preferences.[2]

G. PRIORITIES

S32. In order to implement Senate Committee Recommendation 20, provide that BIA section 136 be amended to give employees a super-priority claim for wages and the other matters set out in section 136(1)(d) up to the maximum amount recommended by Senate Committee Recommendation 20 ($2,000), but including a further $1,000 limit for out of pocket expenses incurred by the employee in the conduct of his duties.

S33. Provide that, if S32 is adopted, the super-priority for wage claims should rank ahead of the super-priority for unpaid source deductions.

S34. Provide that where a secured creditor pays an amount in respect of an employee's super-priority entitlement, the secured creditor is entitled to any preference of priority that such employee would have been entitled to had that amount not been so paid.

S35. Provide that the legislation should be amended to specifically provide that the court should be permitted to approve a proposal or sanction a plan of arrangement notwithstanding that any class of creditors ranking, either by statute law or by

---

[2] See footnote 1.

agreement, subordinate to all or part of the body of general unsecured creditors may have voted against the plan or proposal.

The fact of subordination need not, in and of itself, automatically result in the subordinated creditors constituting a separate class and having a potential veto over the restructuring plan.

Supplemental Explanatory Commentary

To implement Recommendation 71 proposing that the BIA priority rules apply in CCAA proceedings and to receiverships, the CCAA could be amended to either incorporate by reference or reproduce all the current and proposed new BIA priority rules. The CCAA priority of claims provisions should say that the court may not approve a plan unless it provides for payment in full of all super-priority claims and preferred claims, in the order that the statute ranks them, ahead of any other creditors' claims, unless otherwise agreed by the applicable class of creditors. Working Group H's paper[3] contains useful suggestions concerning the implementation of Recommendation 71.

The super-priority recommended in Recommendation 72 with respect to inventory and accounts receivable should be limited to amounts withheld and related interest, but should not extend to penalties.

The amendment to the legislation expressly recognizing voluntary contractual subordination contemplated by Recommendation 76 could be modeled after section 510(a) of the United States Bankruptcy Code (see Appendix A).

H. BANKRUPTCY REMOTENESS/RISK MANAGEMENT

S36. In order to implement Senate Committee Recommendation 38, provide that the BIA and CCAA should provide for reorganization, as well as liquidation, of business trusts, but the reorganization provision should not apply to securitization trusts and other special purpose financing trusts.

If S36 is adopted, section 8(e) of Working Group H's paper identifies a number of technical amendments that will have to be considered.

S37. Provide that Recommendation 80 be generalized so as to be applicable to any voting agreements entered into between creditors, whether or not entered into at the moment of a new financing, or whether or not in respect of a priority arrangement.

Supplemental Explanatory Commentary

The legislation should make it clear that creditors of the trustee(s) of a business trust, where the trustee(s) is/are entitled to indemnification out of the trust estate in respect of creditor claims,

---

[3] See footnote 1.

constitute creditors of the trust. The legislation should also provide that the bankruptcy of a business trust does not affect the bankruptcy of a trustee of that trust.

Recommendation 78 proposes that a corporation designated as a special purpose vehicle that "has no employees and has no assets other than financial assets relating to a specific financing transaction and publicly traded securities, cannot be subject to consolidated reorganization proceedings or a consolidated reorganization plan under the CCAA or BIA". The reference to "consolidated" proceedings or plans includes "joint" proceedings or plans.

To implement Recommendation 79 proposing that "financiers unrelated to and dealing at arm's length with the debtor are not stayed in reorganization proceedings from enforcing security over marketable securities for amounts owing under an eligible financial contract", the BIA could be amended to provide a new 69(2)(d) and 69.1(2)(d) as proposed in Working Group H's paper.

J. INCOME TAX

S38. Provide that a new provision be added to section 244 of the BIA specifically providing that Canada Revenue Agency provide 10 days advance notice of its intention to issue an enhanced requirement to pay under section 224 of the *Income Tax Act* or section 317 of the *Excise Tax Act.*

S39. Provide that upon commencement of an insolvency proceeding, accounts receivable that have vested in the Crown pursuant to an enhanced requirement to pay but that have not been collected should revest in the estate.

S40. Provide that, in the case of accounts receivable collected pursuant to an enhanced requirement to pay issued pursuant to section 317 of the *Excise Tax Act* in the interval between the date of a petition and the date of a receiving order, the Crown should remit the amounts so collected to the estate.

S41. Provide, if Recommendations S39 and S40 are adopted, that the GST component of accounts receivable should be subject to a deemed trust claim securing GST notwithstanding the commencement of insolvency proceedings.

S42. Provide that the existing deemed trust under section 222 of the *Excise Tax Act* is terminated by the commencement of proceedings under the CCAA as well as under the BIA.

The detailed provisions of S38 to S42 are intended as a more practical and less adversarial way of dealing with claims of the Crown.

K. INTERNATIONAL INSOLVENCIES

S43. Provide that, if the Model Law is adopted, the applicable statutory provisions should include a reciprocity requirement that it will only apply with respect to a foreign insolvency proceeding if the applicable foreign jurisdiction has adopted the Model Law.

S44. As an alternative to S43, provide that, if the Model Law is adopted, the applicable statutory provisions should not be proclaimed in force unless and until the Model Law is adopted and is in force in the United States.

S45. Provide that any adoption of the Model Law include a provision granting Canadian courts the discretion to determine, depending upon the circumstances of a case, that dual full insolvency proceedings with respect to the same debtor are appropriate.

S46. Provide that in ancillary proceedings, if the Model Law is adopted, the court would have the discretion to appoint a creditors committee as a condition of recognizing the foreign proceeding, taking into consideration all the circumstances of the case, on such terms as the court may determine.

L. OTHER ISSUES

Mass Tort Claims

S47. Provide for amendments to the BIA and the CCAA to grant the court discretion to facilitate, approve and assist in the implementation of settlements of significant contingent mass tort claims that if realized would render the debtor corporation insolvent including, without limitation, providing the courts with the express power for that purpose to grant channelling injunctions.

S48. Provide that Senate Committee Recommendation 28 be implemented.

A significant consideration for the court in granting the exemption contemplated by Senate Committee Recommendation 28 is the need to balance the economic and social issues that securities regulators are required to address with the economic and social issues related to restructuring of the debtor.

Appendix A

Section 1113 of the *United States Bankruptcy Code*

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b) (1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall –

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protection that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modification of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that –

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d) (1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such

hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employees to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Section 510 of the *United States Bankruptcy Code*

(a) A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.

(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may –

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

SCHEDULE A

CONSOLIDATED REFORM PROPOSALS

A. INTERIM FINANCING

1. Provide in CCAA cases for an express statutory power to authorize borrowing ("D.I.P. loans") and grant security in specified amounts for post-filing advances and supplies of goods and services necessary to fund the debtor during the restructuring proceedings, such power to be authorized according to criteria to be specified in the statute.

S1. Provide in BIA proposals for an express statutory power to authorize borrowing ("D.I.P. loans") and grant security in specified amounts for post-filing advances and supplies of goods and services necessary to fund the debtor during the restructuring proceedings, such power to be authorized according to criteria to be specified in the statute.

2. Provide that in deciding whether or not to authorize a D.I.P. loan, the court should consider amongst other things, the following factors:

   (a) what arrangements have been made for the governance of the debtor during the proceedings;

   (b) whether management is trustworthy and competent, and has the confidence of significant creditors;

   (c) how long will it take to determine whether there is a going concern solution, either through a reorganization or a sale, that creates more value than a liquidation;

   (d) whether the D.I.P. loan will enhance the prospects for a going concern solution or rehabilitation;

   (e) the nature and value of the assets of the debtor;

   (f) whether any creditors will be materially prejudiced during that period as a result of the continued operations of the debtor; and

   (g) whether the debtor has provided a detailed cash flow for at least the next 120 days.

S2. Provide that a further factor be added to Recommendation 2, being whether the D.I.P. loans are necessary for the continuation of the business operations of the debtor or the preservation of its assets.

3. Provide automatic statutory protection for D.I.P. lenders and debtors against tort damages and other claims for entering into court authorized D.I.P. loans in breach of pre-filing covenants and other obligations.

4. Provide that the court order itself can create the D.I.P. lien on the property of the debtor described therein without the need for security documents:

5. Provide that the D.I.P. lien need not be registered in order to be effective against pre-filing creditors or a trustee in bankruptcy, but notice of the order must be registered under the provincial personal property security laws applicable in the locality of the debtor, and against title to real estate in order to have priority over subsequent purchasers (with protection for purchasers acting in the ordinary course of business) and secured lenders acting for value and without notice of the court order.

6. Provide that the court has jurisdiction to provide that the D.I.P. lien has priority ("prime") over all or such other existing security interests as may be specified by the court (except source deduction deemed trusts).

7. Provide that the court shall not prime a registered or possessory security interest without at least 48 business hours notice to the affected secured creditor.

8. Provide that in deciding whether to exercise the power to prime other security interests, the court should be required to use the existing balancing of prejudices/limited prejudice test developed by the courts when exercising inherent jurisdiction.

9. Provide that at the time a priming D.I.P. lien is authorized, the court be given the statutory power to authorize and create liens to protect the primed secured creditors to the extent that they are prejudiced by reason that upon enforcement the proceeds of the collateral of such secured creditors are used to repay the D.I.P. loan (with the same rules concerning registration, priority, appeals etc. applying to such liens as apply to D.I.P. liens).

10. Provide that in the event that a priming D.I.P. lien is enforced, the court has the authority to allocate on a just and equitable basis how the burden of the D.I.P. lien is ultimately to be borne by the primed secured creditors.

11. Provide that with respect to advances authorized by a court order and made prior to receipt by the D.I.P. lender of written notice of any subsequent order (whether made by way of appeal or otherwise) varying, staying or rescinding the authorizing order, that the rights of D.I.P. lender under the authorizing order with respect to such advances shall not be affected by such subsequent order.

12. Provide (in both CCAA and BIA proposal cases) that unsecured claims for goods and services (including real property and true personal property leases) provided (in the ordinary course of business and consistent with the statutes and any court orders) post-filing have priority over pre-filing unsecured claims.

13. Provide (in both the CCAA and BIA proposal cases) that after filing, the debtor should not obtain additional credit from any person, including a supplier or a lender, without first giving the person appropriate notice of the proceeding.

14. Provide that the court shall not permit a CCAA or BIA proposal case to continue if it is not satisfied that adequate arrangements have been made for payment for post-filing goods and services.

15. Provide (in both CCAA and BIA proposal cases) that no payments are to be made or security granted with respect to pre-filing unsecured claims without prior court approval (obtained after the initial order), except that with the prior written consent of the monitor/trustee (unless otherwise ordered by the court) the following pre-filing claims can be paid:

    (a) source deductions;

    (b) wages (including accrued vacation pay), benefits and sales tax remittances not yet due or not more than seven (7) days overdue at the date of filing; and

    (c) reasonable professional fees (subject to subsequent assessment) incurred with respect to the filing.

16. Provide (in both CCAA and BIA proposal cases) that no payments are to be made or additional security granted with respect to pre-filing secured claims (including security leases) that are subject to the stay without the prior approval of the court.

17. Provide that during a reorganization proceeding if there is no readily available alternative source of reasonably equivalent supply, then in order to prevent hostage payments the court has jurisdiction, on notice to the affected persons, to order any existing critical suppliers of goods and services (even though not under pre-filing contractual obligation to provide goods or services) to supply the debtor during the reorganization proceeding on normal pricing terms so long as effective arrangements are made to assure payment for post-filing supplies.

B. GOING CONCERN AND ASSET SALES

18. Provide that in CCAA cases the debtor may with the prior approval of the court sell part of its assets and/or business out of the ordinary course of business in order to downsize and/or raise capital for a restructuring plan.

19. Provide that in CCAA cases the debtor may with the prior approval of the court sell all or substantially all of its assets and business on a going concern basis.

20. Provide that in deciding whether or not to exercise its authority to approve a material sale in the course of a CCAA proceeding, amongst other considerations, the court shall have regard to whether the sales process has been conducted:

    (a) in a fair and reasonable manner;

    (b) by an insolvency administrator;

    (c) by a credible, independent chief restructuring officer reporting to a credible, independent restructuring committee of the board of directors either with or without supervision of the court; and/or

    (d) in consultation with major creditors.

S3. Provide that another factor to be added to Recommendation 20 should be whether the sales process has been conducted by a qualified independent sales party reporting to an independent committee of the board of directors, either with or without supervision of the court.

21. Provide that absent exceptional circumstances, the court shall not approve a sale if controlling shareholders, directors, officers or senior management of the debtor have a significant financial interest in the purchaser or in the sales transaction, unless there was a proper sales process either subject to court supervision or conducted by persons acting independently of such persons.

22. Provide that the court has the power to vest assets (and to make any ancillary orders necessary to give effect thereto) wherever located, that are subject to a court approved sale, in the purchaser free of any interest of the debtor or of persons (including the debtor's secured creditors) claiming through the debtor, with the proceeds of such sale being automatically subject to the same secured claims in the same priorities as the assets were immediately before the time of vesting.

23. Provide that provincial bulk sales legislation does not apply to sales approved by the court.

24. Provide that in connection with a sale approved by the court, the debtor and the applicable insolvency administrators may provide the purchaser with information subject to privacy laws restrictions, provided that the purchaser agrees to comply with the policies, if any, of the debtor with respect to privacy and with applicable privacy laws.

25. Provide that if the debtor is to cease carrying on business and all or substantially all of its remaining assets are to be realized upon or sold other than on a going concern basis, that unless otherwise agreed by the unsecured creditors of the debtor pursuant to a plan of arrangement or proposal, the debtor is to be placed into bankruptcy or receivership.

S4. Provide that in the context of a sale or sale process administered by a debtor or insolvency administrator, the debtor or the insolvency administrator may, with prior approval of the court, enter into agreements that call for the payment of costs or fees, including,

(i) reimbursement of costs incurred by a prospective purchaser or bidder and

(ii) break fees payable to a bidder in circumstances where it submits a bid and the debtor subsequently elects to proceed with a higher bid submitted by another party, which is subsequently approved by the court.

provided that such fees or costs are reasonable in the circumstances, having regard to the nature of the transaction, the value of the assets in question and such other factors as the court considers appropriate.

C. EXECUTORY CONTRACTS (INCLUDING COLLECTIVE BARGAINING AGREEMENTS)

26. Provide that in CCAA proceedings, BIA proposals and BIA liquidation proceedings, the debtor (with the prior written consent of the monitor/trustee) or the trustee in bankruptcy should have the power to disclaim executory contracts (including real property leases) existing as of the date of commencement of the proceedings subject to the following primary limitations:

(a) the right of disclaimer shall not apply to eligible financial contracts, or to other financing agreements including security leases where the debtor is the borrower or lessee;

(b) where the debtor is the lessor of real or personal property, or the licensor of intellectual property, the disclaimer shall not affect the rights of the counter-party to maintain possession and use of the leased or licensed property, subject to the counter-party continuing to perform its obligations under the applicable lease or license except to the extent that its payment obligations thereunder would have been released (but for the disclaimer) by it setting off valid claims for damages for the debtor's failure to perform its obligations after the date of a disclaimer; and

(c) to the extent that any payments made pre-filing pursuant to an executory contract for the purchase of property created a lien or ownership rights in certain assets of the debtor according to the law applicable to the assets, upon disclaimer of the executory contract the purchaser should have a lien on those assets subject to any security interests or other claims having priority over such pre-filing lien or ownership rights.

S5. Provide that, upon request, the debtor must give the counterparty and/or the court an explanation of the business reason for the disclaimer of the counterparty's contract.

27. Provide that if such disclaimer rights are exercised in the course of a CCAA or BIA proposal case, the counter-party should have a provable pre-filing unsecured claim in the proceedings for any termination damages (determined according to existing formula in the case of real property leases) but no set-off rights with respect thereto.

28. Provide that in a reorganization proceeding, the counter-party to an executory contract should have the right to set off pre-filing claims against pre-filing obligations but not against post-filing obligations.

S6. Provide that the court has the power to stay the legal set-off of pre-filing claims against post-filing obligations of the creditor.

29. Provide that in connection with a court approved going concern sale of all or any part of the debtor's business, the purchaser may receive an assignment of any executory operating contracts (for greater certainty, not including eligible financial contracts) applicable to such business.

30. Provide that trustees in bankruptcy and court-appointed receivers should have the power to assign executory contracts (not including eligible financial contracts) both in connection with going concern transactions and on a liquidation basis.

S7. In order to partially implement Senate Committee Recommendation 31, provide that assignments of executory contracts are conditional on payment of debts due and owing up to the date of the assignment and the assignee becoming responsible for performance of the debtor's obligations following the assignment.

31. Provide that the foregoing rights to assign should not be limited by any prohibition on assignment contained in the executory contract, but shall not be applicable to any executory contract which under the general law applicable to the contract is not by its nature assignable.

32. Provide that the court may prohibit the assignment of an executory contract if the counter-party establishes that either:

    (a) the proposed assignee does not meet, in a material way, lawful criteria reasonably applied by the counter-party before entering into similar agreements (e.g. franchise agreements); or

    (b) the proposed assignee is less credit worthy than the debtor was when the executory contract was entered into, and reasonable assurances of payment have not been provided with respect to any credit required to be extended to the assignee by the counter-party under the executory contract after the assignment.

33. Provide that in the event of a CCAA filing, an executory contract (other than an eligible financial contract or financing agreement) should not be subject to termination by reason of the proceedings or the insolvency of the debtor.

34. Provide that in the event of a CCAA or BIA proposal case, any provision in an executory contract (other than an eligible financial contract) that by reason of the proceeding or the insolvency of the debtor changes the provisions of the executory contract in a manner that is materially adverse to the debtor's interests is void.

35. Provide that in the event of any insolvency proceeding with respect to a debtor, any provision in an executory contract (other than an eligible financial contract) that entitles the counter-party by reason of the proceedings or the insolvency of the debtor to purchase property of the debtor for total consideration that is less than current fair market value is void.

36. Provide that in connection with the approval of a plan of arrangement or proposal or of a sale in the course of a CCAA proceeding, the court has summary jurisdiction to declare an executory contract to be in full force and effect so long as there is no material uncured default other than the failure to pay pre-filing monetary claims.

37. Provide for express statutory recognition in the CCAA and BIA of the distinction between security leases and true leases of personal property, with security leases being treated as secured financings.

S8. In order to implement Senate Committee Recommendation 30, provide that special provision should be made, along the lines of section 1113 of the United States Bankruptcy Code (see Appendix A), for the disclaimer and modification of collective bargaining agreements.

D. GOVERNANCE (INCLUDING INDEPENDENCE ISSUES/ROLE OF THE MONITOR)

38. Provide statutory authority during CCAA and BIA proposal cases for the court to appoint an interim receiver and manager (being a licensed trustee in bankruptcy) in order to protect the debtor's estate or the claims of creditors, with such authority as the court may determine including the authority to manage the reorganization proceedings.

39. Provide that during the course of a CCAA or BIA proposal case, the court has the authority to replace some or all of the existing directors of the debtor if the governance structure of the debtor is impairing or could impair the process of developing and implementing a going concern solution.

40. Provide that the directors and officers, and applicable insolvency administrators, have a duty to notify the court on a timely basis if they have actual knowledge that there is a material risk that the debtor will be unable to pay wages or other debts being incurred during the course of a restructuring proceeding.

41. Provide that in exercising their duties during the course of a reorganization proceeding, the debtor's directors and officers and the applicable insolvency administrators shall take into account the priority of the claims of creditors and equity holders, and the apparent value of those claims in light of the likely range of values of the business and assets of the debtor.

42. Provide that an interim receiver or a receiver within the meaning of section 243 of the BIA (excluding mortgagees in possession and other secured creditors directly enforcing their security) and a CCAA monitor must be a licensed trustee in bankruptcy.

43. Provide that a monitor must, prior to its appointment, make written disclosure to the court of its business and legal relationships with the debtor.

44. Provide that during the course of a CCAA or BIA proposal case, the court has the authority to grant a court-ordered charge in favour of interim receivers and managers, monitors, trustees and other insolvency administrators up to a fixed amount to secure their reasonable fees and expenses, subject to assessment, and, up to another fixed amount to indemnify them against third party liability to the extent that insurance is not available on reasonable terms for such liability, with exclusions for wilful misconduct and gross negligence.

S9. Provide that, in addition to granting the court authority to grant a charge to secure fees and expenses of insolvency administrators, the court should also have authority to grant a similar charge to secure fees and expenses of counsel to insolvency professionals and the debtor.

45. Provide that the same rules concerning registration, priority, appeals, etc. shall apply to charges in favour of insolvency administrators as apply to D.I.P. liens.

46. Provide that service of the initial CCAA order or of notice of the commencement of a BIA proposal case on an insurer that provides unexpired directors' and officers' insurance, shall be deemed to be notice within the policy period of all claims that are subsequently made against the directors and officers relating to the failure of the debtor to pay pre-filing claims or the insolvency of the debtor.

47. Provide that during the course of CCAA or BIA proposal cases, the court has the authority to grant a court-ordered lien up to a fixed amount in favour of the debtor's directors and officers to indemnify them against third party liability for post-filing conduct to the extent that insurance is not available on reasonable terms for such liability, with exclusions for wilful misconduct and gross negligence.

48. Provide that the same rules concerning registration, priority, appeals, etc. shall apply to charges in favour of directors and officers as apply to D.I.P. liens.

49. Provide that when deciding whether or not to grant a charge in favour of the directors and officers, particularly in CCAA cases, the court shall consider whether the debtor's board has established appropriate governance mechanisms, whether by establishing an independent board committee, retaining a CRO or other means, for the proper management of the debtor's affairs during the course of the restructuring proceedings.

50. Provide that during the course of a restructuring proceeding the debtor shall not pay, or enter into an agreement to pay, retention bonuses, success fees, severance or termination pay or other extraordinary remuneration to its senior management, officers and directors without prior court approval, but that if so approved, the court shall have the discretion to provide that payment of all or part of those amounts are secured by a directors' and officers' charge.

51. Provide that the debtor's independent directors have protection from any personal statutory liability otherwise arising from the debtor's failure to pay pre-filing debts (e.g. wages, vacation pay, GST, etc.) so long as the debt is not more than seven (7) days overdue at the time of the commencement of a CCAA or BIA proposal case.

52. Provide that directors and officers shall have no personal liability for severance and termination pay claims arising during the course of a reorganization proceeding.

S10. In order to implement Senate Committee Recommendation 25, provide for a general due diligence defence with respect to pre-filing statutory claims, in addition to specifying the matters for which independent directors (Recommendation 51) and directors and officers (Recommendation 52) are exonerated from personal liability.

53. Provide that insolvency administrators shall have no personal liability for vacation, severance and termination pay claims arising upon the commencement of, or during the course of, insolvency proceedings, and that insolvency administrators shall have no personal liability for unfunded pension plan liabilities.

S11. In order to implement Senate Committee Recommendation 29, provide that personal liability of insolvency administrators should be clearly separated from liability of the debtor in addition to specifying the matters in respect of which insolvency administrators are exonerated from personal liability pursuant to Recommendation 53.

54. Provide that the court has the statutory authority to establish claims bar processes with respect to court created indemnity charges to facilitate the timely reduction of those charges during the course of the proceeding and their timely release at the end of the proceeding.

S12. Provide that shareholder meetings of public companies during the restructuring process are not required unless authorized by the court.

S13. In order to partially implement Senate Committee Recommendation 35, provide that a proposed specified professional be required to file with the court, at the time of application for the CCAA initial order in the case of the monitor and other specified professionals retained at that time and at the time of application for confirmation in the case of other professionals, disclosure information with respect to the professional's prior involvement with the debtor.

S14. In order to partially implement Senate Committee Recommendation 35, provide that the CCAA and BIA require in respect of restructuring proceedings involving more than $5 million in claims that, after reasonable notice, the engagement of all specified professionals other than those acting for the debtor be confirmed by the court within a reasonable period of time after the making of the initial filing in the case of specified professionals retained at that time, and otherwise in advance of being retained.

S15. In order to partially implement Senate Committee Recommendation 35, provide that the CCAA and BIA require that, after reasonable notice, the engagement of lawyers acting for monitors or trustees under proposals where the aggregate claims of creditors are $5 million or more or that are proposed to act in a representative capacity and be paid by the estate be confirmed by the court in advance of being retained.

S16. Provide that the court has the power to remove a specified professional.

S17. Provide that the party with the primary obligation to advance a position and adduce evidence before the court should be the applicant and not the monitor.

S18. Provide that the monitor, unless otherwise required by the court, should avoid taking any legal position or filing a factum regarding contested legal disputes among other parties.

S19. Provide for an amendment to CCAA section 11.7 to stipulate that the primary roles of the monitor are (a) to monitor the activities of the debtor for the benefit of all interested parties and the court, and (b) to work impartially with the debtor and all interested parties to facilitate the restructuring process.

E. PLAN APPROVALS

55. Provide expressly for the court to have the authority to establish claims bar dates for voting and/or distribution purposes under the CCAA, and for appropriate summary proceedings to resolve disputes.

56. Provide that the proof of claim date for CCAA plans shall be the date of the initial order.

57. Provide that in a CCAA proceeding, the debtor is required to obtain court approval of the classification of creditors proposed in its plan of arrangement before the plan is circulated to the creditors for voting purposes.

58. Provide that the "head count" test provided for with respect to creditor class approval for a reorganization be eliminated to reflect the development of vulture capital markets, and provide for the repeal of Section 110 of the BIA.

59. Provide that the rule contained in Section 54(3) of the BIA should apply in CCAA cases.

60. Provide that in connection with the court application to approve a reorganization plan, the applicable insolvency administrator be required to provide an opinion that it is reasonable to expect that any dissenting creditors will not receive less under the plan that they would receive in a liquidation.

61. Provide that a court approving a reorganization plan has the power to approve a reorganization of the equity of the debtor, either with or without shareholder approval.

62. Provide that all claims against a debtor in an insolvency proceeding that arise under or relate to an instrument that is in the form of equity, including claims for payment of dividends, redemption or retraction or repurchase of shares, and damages (including securities fraud claims) are to be treated as equity claims subordinate to all other secured and unsecured claims against the debtor, and which can be extinguished as against the debtor, in the discretion of the court, in connection with the approval of a reorganization plan either with or without the approval of the parties asserting such claims.

F. PREFERENCES

63. Provide for uniform rules under both the CCAA and BIA for challenging fraudulent preferences, conveyances at under-value and other reviewable transactions (collectively, "reviewable transactions"), with a CCAA monitor or a trustee under a proposal being authorized to exercise the same powers as a trustee in bankruptcy.

64. Provide for a complete code in federal insolvency law for challenging reviewable transactions by or on behalf of creditors, so that upon the commencement of insolvency proceedings, provincial laws (including the oppression remedy under corporate law) would no longer apply and a single national standard would be applicable.

Non-Arm's Length Transactions

S20. Provide generally for more effective remedies with respect to payments, conveyances and other transactions involving non-arm's length parties that reduced the value of the debtor's estate.

Preference Actions

S21. Provide that the existing preference periods under federal law (which would apply both to the BIA and the CCAA) be extended to 5 years with respect to non-arm's length parties, and 1 year for arm's length parties.

S22. Provide with respect to preference actions that the existing presumption of debtor intent cannot be rebutted by non-arm's length creditors with respect to preferential transactions occurring within the 1 year period before the date of the initial bankruptcy event or initial CCAA order.

Undervalue Transfers

S23. Provide for the replacement in BIA and CCAA proceedings of the existing causes of action for settlements (BIA, s. 91) and reviewable transactions (BIA, s. 100) with a new single cause of action for undervalue transfers (which would also be used in place of provincial fraudulent conveyance laws). "Undervalue transfers" would be broadly defined to include, without limitation, conveyances of property, the provision of services and the occurrence of obligations by the debtor where the fair market value of the consideration received by the debtor was conspicuously less than the fair market value given by the debtor (e.g. the debtor's estate was conspicuously depleted by the transaction).

S24. Provide that the time periods for attacking undervalue transactions (referable to the period before the initial bankruptcy event or initial CCAA order) should be 5 years with respect to non-arm's length parties and 1 year with respect to arm's length parties.

S25. Provide that, with respect to non-arm's length parties, if the undervalue transfer occurred more than one year before the initial bankruptcy event or initial CCAA order, in order to attack the transaction it would have to be established that either (a) the debtor was insolvent at the time of, or was rendered insolvent by, the transaction, or (b) the debtor had fraudulent conveyance intent.

S26. Provide that, with respect to arm's length parties, in order to attack the transaction it would have to be established that both (a) the debtor was insolvent at the time of, or was rendered insolvent, by, the transaction, and (b) the debtor had fraudulent conveyance intent.

Dividends

S27. Provide that an insolvency administrator, within 5 years before the initial bankruptcy event or initial CCAA order for non-arm's length parties, or 1 year for arm's length parties, may challenge the debtor's payment of dividends, return of

capital or redemption or buy-back of shares upon proof that the debtor was insolvent at the time or that the transaction rendered the debtor insolvent.

Additional Safe Harbour

S28. Provide, to the extent applicable in a business context (e.g. the debtor is the sole proprietor of a business), similar to protection in the case of a consumer insolvency, for an additional safe harbour for payments made in compliance with a family law court order or pursuant to a bona fide agreement between spouses for alimony or support payments that could otherwise have been the subject of a family law court order.

Remedies

S29. Provide that, when pursuing a non-arm's length party under one of the foregoing provisions, the plaintiff has the right to recover any share of the improper benefit directly or indirectly received from the transaction by any privy, where "privy" would be defined as a person not at arm's length to the non-arm's length creditor, transferee, shareholder, financier, director or officer, as the context may require.

S30. Provide that creditors have BIA section 38-type remedies in BIA proposal and CCAA proceedings in respect of all causes of action referred to in S20 to S27, inclusive, above (but without limiting the power of insolvency administrators to settle those claims subject to due process).

S31. Provide for a limitation period of 3 years from the date of the initial bankruptcy event or initial CCAA order to pursue the preference, undervalue transfer, creditor oppression and other related remedies provided for under federal law.

65. Provide for the expansion of Section 100 and/or the adoption of an oppression type remedy to create a more flexible mechanism for dealing with reviewable transactions, subject to creating safe harbour provisions.

66. Provide for the continuation of the English subjective test for preference provisions.

67. Provide specific safe harbour provisions for certain transactions involving financiers unrelated to and dealing at arm's length with the debtor, including:

    (a) eligible financial contracts;

    (b) sales pursuant to securitizations;

    (c) security given before, or as condition of, making advances including security delivered on margin calls, unless a material portion of proceeds of advances are used to repay unsecured obligations owed to the lenders or are otherwise received by the lenders or parties related to the lenders; and

    (d) guarantees from parent corporations of borrowings by its direct or indirect subsidiaries.

68. Provide that the court has the power to reduce or eliminate waiver fees, forbearance fees, work fees, default interest and other additional compensation paid to lenders and other creditors of the debtor within a specified period prior to the commencement of an insolvency proceeding as a result of defaults or expiry of credit facilities, if the court concludes such compensation was manifestly excessive in relation to additional risk and time being incurred or consideration provided by the creditors.

69. Provide that there is no doctrine of equitable subordination in Canada.

70. Provide for conflict of law rules with respect to reviewable transactions modelled after the PPSA conflict of law rules.

G. PRIORITIES

71. Provide that the BIA priority rules apply in CCAA proceedings and to receiverships of insolvent entities.

72. Provide that source deductions have automatic priority over all secured claims with respect to inventory and accounts receivable, other than purchase-money security interests, but not as against other secured claims.

73. Provide that the current priorities with respect to wage claims be maintained, with clarification that pension contributions are included in wages for the purposes of the BIA. **(Modified: See S32-34 below.)**

S32. In order to implement Senate Committee Recommendation 20, provide that BIA section 136 be amended to give employees a super-priority claim for wages and the other matters set out in section 136(1)(d) up to the maximum amount recommended by Senate Committee Recommendation 20 ($2,000), but including a further $1,000 limit for out of pocket expenses incurred by the employee in the conduct of his duties.

S33. Provide that, if S32 is adopted, the super-priority for wage claims should rank ahead of the super-priority for unpaid source deductions.

S34. Provide that where a secured creditor pays an amount in respect of an employee's super-priority entitlement, the secured creditor is entitled to any preference of priority that such employee would have been entitled to had that amount not been so paid.

74. Provide that the existing 30-day supplier's rights be repealed entirely.

75. Provide that if the existing 30-day rights are retained, the existing provisions should be left unamended except to foreclose the possibility of greater revindication and resolution rights arising under provincial law during the course of insolvency proceedings.

76. Provide that the insolvency statutes expressly recognize voluntary contractual subordination, and provide that subordinations can be enforced during the course of

insolvency proceedings by the debtor, applicable insolvency administrators or other creditors notwithstanding third party beneficiary/privity of contract rules.

S35. Provide that the legislation should be amended to specifically provide that the court should be permitted to approve a proposal or sanction a plan of arrangement notwithstanding that any class of creditors ranking, either by statute law or by agreement, subordinate to all or part of the body of general unsecured creditors may have voted against the plan or proposal.

H. BANKRUPTCY REMOTENESS/RISK MANAGEMENT

77. Provide that a business trust is subject to liquidation under the BIA, but cannot be reorganized.

S36. In order to implement Senate Committee Recommendation 38, provide that the BIA and CCAA should provide for reorganization, as well as liquidation, of business trusts, but the reorganization provision should not apply to securitization trusts and other special purpose financing trusts.

78. Provide that a corporation that is designated as a special purpose vehicle in its constating documents, has no employees and has no assets other than financial assets relating to a specific financing transaction and publicly traded securities, cannot be subject to consolidated reorganization proceedings or a consolidated reorganization plan under the CCAA or BIA.

79. Provide that financiers unrelated to and dealing at arm's length with the debtor are not stayed in reorganization proceedings from enforcing security over marketable securities for amounts owing under an eligible financial contract.

80. Provide that an agreement between a senior creditor and a subordinate creditor entered into at the time of the subordinate creditor's financing giving the senior creditor the power to control the vote of the subordinate creditor in a reorganization is enforceable, unless the subordinate creditor satisfies the court that the terms of the reorganization plan with respect to the subordinate creditor are manifestly unjust.

S37. Provide that Recommendation 80 be generalized so as to be applicable to any voting agreements entered into between creditors, whether or not entered into at the moment of a new financing, or whether or not in respect of a priority arrangement.

I. ONE STATUTE OR TWO?

81. Provide that there shall continue to be two reorganization systems, one for big companies (CCAA) and one for smaller corporations and other entities (BIA proposals).

82. Provide that a CCAA monitor shall make the following filings with the Superintendent's Office for record keeping purposes:

    (a) initial CCAA order within 10 days;

(b) debtor's initial list of creditors within 30 days;

(c) if a reorganization plan is consummated, a copy of the plan, the sanction order and a brief statement of affairs within 30 days; and

(d) if all or substantially all of the debtor's business is sold during the course of the proceeding, a brief statement of affairs within 30 days of closing.

J. INCOME TAX

83. Provide that distress preferred share treatment for tax purposes can be afforded for a specified period of time to qualifying debt by simply filing a notice of election without any need to actually convert the debt into preferred shares.

84. Provide that upon consummation of a plan of arrangement, the debtor can elect to use fresh start accounting for tax purposes as if it were a new taxpayer (including valuing its assets at fair market value), with prior tax obligations being dealt with as pre-filing claims.

S38. Provide that a new provision be added to section 244 of the BIA specifically providing that Canada Revenue Agency provide 10 days advance notice of its intention to issue an enhanced requirement to pay under section 224 of the *Income Tax Act* or section 317 of the *Excise Tax Act*.

S39. Provide that upon commencement of an insolvency proceeding, accounts receivable that have vested in the Crown pursuant to an enhanced requirement to pay but that have not been collected should revest in the estate.

S40. Provide that, in the case of accounts receivable collected pursuant to an enhanced requirement to pay issued pursuant to section 317 of the *Excise Tax Act* in the interval between the date of a petition and the date of a receiving order, the Crown should remit the amounts so collected to the estate.

S41. Provide, if Recommendations S39 and S40 are adopted, that the GST component of accounts receivable should be subject to a deemed trust claim securing GST notwithstanding the commencement of insolvency proceedings.

S42. Provide that the existing deemed trust under section 222 of the *Excise Tax Act* is terminated by the commencement of proceedings under the CCAA as well as under the BIA.

K. INTERNATIONAL INSOLVENCIES

85. Consider retaining the existing international provisions of the CCAA and the BIA with minor amendments since in substance they have worked successfully.

86. Whether the existing law is retained or the Model Law is adopted, provide for new provisions to ensure that Canadian creditors' interests are properly represented in any foreign proceeding by providing that as a condition precedent to the recognition by the

court of foreign insolvency proceedings, the court must either appoint a creditors' committee or a licensed trustee as a monitor with the powers stipulated by the court, and ensure provisions are in place to provide the creditors' committee or monitor with reasonable funding.

S43. Provide that, if the Model Law is adopted, the applicable statutory provisions should include a reciprocity requirement that it will only apply with respect to a foreign insolvency proceeding if the applicable foreign jurisdiction has adopted the Model Law.

S44. As an alternative to S43, provide that, if the Model Law is adopted, the applicable statutory provisions should not be proclaimed in force unless and until the Model Law is adopted and is in force in the United States.

S45. Provide that any adoption of the Model Law include a provision granting Canadian courts the discretion to determine, depending upon the circumstances of a case, that dual full insolvency proceedings with respect to the same debtor are appropriate.

S46. Provide that in ancillary proceedings, if the Model Law is adopted, the court would have the discretion to appoint a creditors committee as a condition of recognizing the foreign proceeding, taking into consideration all the circumstances of the case, on such terms as the court may determine.

L. OTHER ISSUES

Mass Tort Claims

S47. Provide for amendments to the BIA and the CCAA to grant the court discretion to facilitate, approve and assist in the implementation of settlements of significant contingent mass tort claims that if realized would render the debtor corporation insolvent including, without limitation, providing the courts with the express power for that purpose to grant channelling injunctions.

S48. Provide that Senate Committee Recommendation 28 be implemented.

Appendix A

Section 1113 of the *United States Bankruptcy Code*

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b) (1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall –

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protection that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modification of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that –

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d) (1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such

hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employees to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Section 510 of the *United States Bankruptcy Code*

(g) A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.

(h) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

(i) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may –

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

Schedule S1

CAIRP has a particular interest in governance issues since its members are required to follow the Association's Rules of Professional Conduct. Bill C–55 requires that a monitor must be a licensed trustee appointed under the *BIA*.

CAIRP believes that the appointment of a monitor under a CCAA proceeding should be subject to the same rules as the appointment of a trustee under s.13.3 (1) of the BIA. This would allow a company's auditor to be appointed as the monitor, in special circumstances, with the authorization of the court. The Association does not support the Senate Committee's recommendation for an outright prohibition on a company's auditor acting in the role of monitor.

BILL C-55:	**Bankruptcy and Insolvency Act:**
Section 129 Section 11.7 of the Act is replaced by the following: **11.7** (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act.* (2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company (*a*) if the trustee is or, at any time during the two preceding years, was (i) a director, an officer or an employee of the company, (ii) related to the company or to any director or officer of the company, or (iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company;	**13.3** (1) Except with the permission of the court and on such conditions as the court may impose, no trustee shall act as trustee in relation to the estate of a debtor (*a*) where the trustee is, or at any time during the two preceding years was, (i) a director or officer of the debtor, (ii) an employer or employee of the debtor or of a director or officer of the debtor, (iii) related to the debtor or to any director or officer of the debtor, or (iv) the auditor, accountant or solicitor, or a partner or employee of the auditor, accountant or solicitor, of the debtor;

SCHEDULE T

Technical and Administrative Amendments

PROPOSED AMENDEMENTS TO THE *BIA*

T1. Amendments to the definition of "Secured Creditor"

Recommendation. Provide for amended definitions of "secured creditor" in the *CCAA* and *BIA* so that both read as follows (the following is blacklined against the existing *BIA* definition):

"**secured creditor**" means a person holding a right that creates in substance a security interest in property of the debtor, without regard to its form or to the person who has title to property, including a person holding a mortgage, hypothec, pledge, charge or lien, on or against the property of the debtor or any part of that property, as security for a debt due or accruing due, or for the performance of any other obligation owed, to the person from the debtor or any other person, including debts or obligations owed jointly or jointly and severally, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

> (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the Civil Code of Quebec or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, ~~or~~and
>
> (b) any of (i) the vendor of any property sold to the debtor under a conditional or instalment sale, (ii) the purchaser of any property from the debtor subject to a right of redemption, or (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the Civil Code of Quebec entitled Prior Claims and Hypothecs that deal with the exercise of hypothecary rights;

Commentary. For historical reasons, the definitions in the two statutes, although similar, are not the same. There are no substantial reasons for the continuing distinctions between the two regimes. The definition of "secured creditor" under the *BIA* was amended in 2001 to add provisions to conform the legislation to the revised Civil Code of Québec. For some reason, no similar revisions were made to the *CCAA*. The main thrust of the Québec amendment was the deletion of the reference to a "privilege". The former Québec privilege has been replaced under the Civil Code of Québec by a more complex priorities regime.

Throughout the years, the common law provinces, and the territories, have also made substantial revisions to their personal property security legislation. Now all of the non-Québec provinces and the territories have adopted similar legislation which does away with the formalities of the old common law and forms of transactions. All are now governed by a common conceptual approach to personal property security law. The federal legislation should reflect this new reality.

In addition, the definition should be revised to override the decision of Farley, J. in *HSBC Bank Canada v. Expressway Concrete Supply Ltd.*, 14 C.B.R. (4th) 1. Farley, J. held that a claim by a creditor under a general security agreement against the bankrupt did not make the claimant a secured creditor because the promissory note for which the security had been granted was also co-signed by a non-bankrupt party; Farley, J. held that to be a secured creditor under the *BIA*, there must be a debt due or accruing due solely from the bankrupt debtor. *Expressway Concrete* was expressly not followed by Ground, J. in *Re Pike v. Bel-Tronics Co.*, 19 C.B.R. (4th) 262.

As a policy matter the March, 2002 JTF report recommended that the CCAA and BIA be amended to distinguish between true personal property leases and security leases, and to treat the latter as secured financings.

T2. Amendment to the definition of "Insolvent Person"

Recommendation. Provide for an increase in the minimum level of indebtedness for a person to fall within the definition of insolvent person from $1,000 to $5,000.

Commentary. As presently defined in the *BIA*, an "insolvent person", is a person whose liabilities to creditors amount to $1,000. This provision has been in the *BIA* unchanged for over half a century. While few people make an assignment owing only $1,000, occasionally borrowers with debts as low as $2,000 or $3,000 declare bankruptcy. A $5,000 requirement would be more reasonable.

T3. Delivery of validity and enforceability opinion by trustee

Recommendation. Provide that the period of time specified in section 13.4(2) of the *BIA* within which a trustee that also acts for a secured creditor must provide the Superintendent with a legal opinion as to the validity and enforceability of such secured creditor's security as against the estate of the bankrupt be lengthened from two to five days.

Commentary. Two days seems to be an unreasonably short time frame. A five day requirement would be more appropriate.

T4. Environmental liability of receivers

Recommendation. Provide that the class of persons who may benefit from the limitation of liability for certain environmental matters provided under section 14.06(1.1) of the *BIA* be extended.

Commentary. The protections under section 14.06(2) of the *BIA* extend to, among others, a "receiver" within the meaning of section 243(2) of the *BIA*. Receiver is defined by reference to all or substantially all of a certain category of assets. There appears to be no policy reason why the protection of the section, which relates to specific assets, should, or should not, apply as a function of whether or not the person is acting with respect to all or substantially all of the specified categories of assets.

T5. Disclaimer of environmentally contaminated real property

Recommendation. Provide for an amendment to section 14.06(4)(c) of the *BIA* whereby real property affected by an order of a regulatory body should be abandoned or released to the party who issued the order or, if it is a court order, the party who applied for the order.

Commentary. Questions have arisen as to whom the trustee is required to release its interest in environmentally contaminated property. This will clarify the issue.

Recommendation. Provide for an amendment to section 14.06(4) of the *BIA* so that, if a trustee incurs costs in connection with real property prior to the making of an order, the trustee would be entitled to a first ranking charge against the real property or any proceeds of disposition of the real property in the amount of the costs incurred.

Commentary. If an order is made and the trustee is put to its election under section 14.06(4), there is no provision to protect the trustee for costs legitimately incurred in connection with the property prior to the issuance of the order. As a practical matter, this would not be an issue where the order is made upon, or immediately following, the trustee's appointment. However, if there is a delay, the trustee runs the risk of being out of pocket if it abandons the property, as there is no mechanism to recover or create a charge for those costs. This has the effect of transferring the burden to the secured creditor or to the creditors of the estate generally, without recourse to the property.

T6. Trustee's obligation to make returns

Recommendation. Provide for an amendment to section 22 of the *BIA* that the trustee is responsible for making any return that the bankrupt was required to make during the period that commences one year prior to the commencement of the calendar year or at the commencement of the fiscal year of the bankrupt where that is different from the calendar year in which he became a bankrupt.

Commentary. A positive statement of the duties of the trustee will avoid confusion.

Recommendation. Provide for an amendment to section 149(4) of the *BIA* to clarify that the section refers to the duty of a trustee to make returns in accordance with section 22 of the *BIA*.

T7. Short-term investments.

Recommendation. Provide for an amendment to section 25 of the *BIA* to authorize inspectors or the court to allow investments of substantial funds in a large bankruptcy in short term government backed securities.

Commentary. This is to get around the problem encountered with *Confederation Treasury Services Limited* where the trustee had over $650 million in cash.

T8. Payments by cheque

Recommendation. Provide that section 25(2) of the *BIA* which requires that payments by a trustee out an estate trust account be made by cheque be repealed.

Commentary. In today's business world, this requirement is antiquated. The important concept to retain is that payments must be properly authorized, cash properly controlled, and transactions traceable. Beyond that, payments should be capable of being made by wire transfer, draft, etc.

T9. Limitation of trustee fees

Recommendation. Provide that section 39 of the *BIA* which limits the remuneration that a trustee may receive to 7½ % of the value of unencumbered assets be repealed.

Commentary. This limitation was first introduced over half a century ago. At that time, bank financing was primarily secured by mortgages on real property. As a result of the changes in credit granting practices, almost all assets are now fully encumbered. Accordingly 7½ % after payment to secured creditors is no longer appropriate. The procedure in British Columbia is to send to the creditors a notice advising that the trustee will be asking for an order that exceeds the 7½ % limitation on fees. To the unsophisticated reader this is just a red flag suggesting that the trustee is overcharging.

T10. Partnership provisions

Recommendation. Provide for an amendment to sections 43(15), 43(16) and 142 of the *BIA* to make clear that the bankruptcy of a partnership does not result in the bankruptcy of the partners.

T11. Proposal-related documents

Recommendation. Provide for an amendment to section 50(2) of the *BIA* that a trustee to whom documents relating to a proposal are provided is required to file such documents with the Official Receiver.

Commentary. While various documents must be lodged with a licensed trustee to commence proposal proceedings, there is no requirement that the trustee file these documents with the Official Receiver.

T12. Cash-flow statements

Recommendation. Provide for an amendment to section 50(6) of the *BIA* that the projected cash-flow statement filed by a trustee in accordance with section 50(6)(a) should cover the period of time from the beginning of the proceedings until the estimated date on which court approval of the proposal will be granted.

Commentary. The *BIA* does not stipulate the period of time that should be covered by the cash-flow statement. The practice has evolved to cover the period of time recommended above. It would be worthwhile to codify this as a required period of time.

Recommendation. Provide for an amendment to section 50.4(9) of the *BIA* to require the filing of a revised or updated cash-flow statement in connection with an application to extend the period within which an insolvent person may file a proposal.

Commentary. It may be that trustees are doing this as part of the report required to be filed under section 50.4(7)(b)(ii) but a positive statement as to the requirement would avoid confusion and ensure consistency.

T13. Harmonization of the *BIA* and *CCAA*

Recommendation. Provide for an amendment to sections 50(15) and 50.4(7)(b) of the *BIA* to harmonize these provisions with those similar provisions that apply in *CCAA* proceedings.

Commentary. There are a number of sections that were added to the *CCAA* in 1997 that were meant to be the same as certain comparable sections in the proposal sections of the *BIA*. There are some differences in wording between the two statutes. For example, section 50(15) of the *BIA* refers to "just and equitable" whereas section 5(3) of the *CCAA* refers to "fair and reasonable". The differences are more significant regarding the duties of monitors (*CCAA* section 11.7(3)) and trustees (*BIA* section 50.4(7)) to file material adverse change reports.

T14. Filing requirements

Recommendation. Provide for amendments to the applicable sections of the *BIA* to require the filing with a licensed trustee to implement the following:

When	There should also be filed	Applicable Section of the *BIA*
a) filing a Notice of Intention;	a resolution of the board of directors of the insolvent person authorizing the filing of the Notice of Intention.	50.4
b) filing a notice of assignment; and	a resolution of the board of directors of the insolvent person authorizing the filing of the assignment.	49
c) filing a proposal	(i) a resolution of the board of directors of the insolvent person authorizing the filing of the proposal; and (ii) a sworn statement of affairs of the insolvent person.	62(1)

Commentary. Case law supports the requirement that a resolution of the board of directors accompany filing of a Notice of Intention or a Proposal. These recommendations in part simply codify case law.

T15. Recipients of Notice of Intention materials

Recommendation. Provide for an amendment to section 50.4(6) of the *BIA* to made it clear that all documents filed with a licensed trustee in connection with the filing of a Notice of Intention should be sent to every known creditor.

Commentary. The section currently states that a Notice of Intention is to be sent to every

known creditor. The intention when the section was drafted was that creditors should receive the package of information set out in section 50.4(1) and not merely the Notice of Intention. This section should be amended to clarify the requirement.

T16. Material adverse change reports

Recommendation. Provide for an amendment to section 50.4 (7) of the *BIA* to require a trustee to distribute a report to every known creditor where the trustee ascertains a material adverse change in the insolvent person's projected cash-flow or financial circumstances.

Commentary. The section currently requires that a trustee file such a report with the Official Receiver. Such reports should also be sent to every known creditor.

T17. Court approval of proposals and plans

Recommendation. Provide for an amendment to section 58(b) of the *BIA* to reduce the 15-day notice period in respect of an application for Court approval of a proposal approved by the creditors.

Commentary. In practice under the *CCAA*, Court approval is often sought on no more than two or three days notice. There is no justification for the difference between the two notice periods.

T18. Deemed trust proofs of claim

Recommendation. Provide for an amendment to section 81 of the *BIA* to expressly provide for the filing of a Proof of Claim by Canada Revenue Agency for a deemed trust. The provision should provide that the trustee has 60 days from receiving the Proof of Claim to admit or reject the claim. Canada Revenue Agency will then have 30 days to respond to a disallowance.

T19. Registration of general assignment of book debts

Recommendation. Provide that section 94 of the *BIA* be repealed to eliminate the requirement for the registration of general assignments of book debts.

Commentary. This is now dealt with in provincial legislation.

T20. Minutes of creditors meetings

Recommendation. Provide for an amendment to section 105(4) of the *BIA* that minutes of meetings of creditors be retained as part of the records of proceedings of an estate.

Commentary. The section currently provides that the Chairman shall cause minutes of the proceedings to be drawn up "and entered in a book kept for that purpose." It is somewhat archaic to require a minute book.

T21. Workers' wage claims

Recommendation. Amend section 126 of the *BIA* to authorize the Court to appoint a representative to file claims on behalf of employees.

Commentary. This can correct the problems in *Re Rizzo & Rizzo Shoes Ltd.* (1995), 30 C.B.R. (3d) 1, 22 O.R. (3d) 385 (C.A.).

T22. Failure to file proof of security

Recommendation. Provide for an amendment to section 128 of the *BIA* to clarify that when a secured creditor fails to timely file a proof of security in response to a request from the trustee, and the trustee sells the property subject to the security, the fees and expenses of the trustee should be a charge on the proceeds ranking in priority to such secured creditor.

Commentary. The only case that touches on this is *Carter Oil & Gas Ltd. (Trustee of)* v. *400133 B.C. Ltd.* 1998 Carswell Alta. 1302, 77 Alta. L.R. (3d) 285, [2000] 1 W.W.R. 410, 217 A.R. 135 (Q.B.). In that case, the trustee had to argue that it was entitled to its costs ahead of the secured creditor. The trustee should not have to make that argument.

T23. Voting rights of creditors appealing disallowances

Recommendation. Provide for an amendment to section 54 of the *BIA* that a vote on a proposal shall not be finalized until all disallowances of claims by the trustee have either been dealt with by the Court or the 30 day appeal period following all disallowances has elapsed.

Commentary. Section 135(4) of the *BIA* permits a trustee to disallow a proof of claim. The disallowance is final unless within 30 days the affected party appeals the decision to the court. Case law has held that a creditor whose claim was disallowed was not entitled to vote because the appeal of the disallowance had not yet been dealt with by the Court.

T24. Obsolete transitional provision

Recommendation. Provide that section 136(j) of the *BIA* which confers preferred status on Crown claims against the estates of persons that became bankrupt prior to a prescribed date be repealed.

Commentary. It appears this was a transitional provision relating to previous amendments to the *BIA* that can now be deleted.

T25. Examination notes available to creditors

Recommendation. Provide for an amendment to section 161(2.1) of the *BIA* that the notes of an examination before the first meeting of creditors shall be made available at the first meeting of creditors and to any creditor who requests them.

Commentary. Section 161(2.1)(a) of the *BIA* provides that where an examination takes place before the first creditors meeting, the Official Receiver's notes "shall be communicated to the creditors at the meeting". In contrast, section 161(2.1)(b) provides that if the examination is held after the first meeting of creditors, "the notes shall be made available to any creditor who requests them".

T26. Unopposed discharges where fact(s) proven

Recommendation. Provide for an amendment to section 173 of the *BIA* that when no creditor opposes the discharge of a bankrupt, the trustee is not obligated to oppose the discharge.

Commentary. If a fact is proven against the debtor pursuant to section 173 and it is clear that there is absolutely no capacity for a debtor to pay pursuant to a Conditional Order and no creditors are opposing because they understand that there is no capacity to pay or they do not care, there should be no obligation on the trustee to incur the expense and time of opening a Court file and opposing the discharge. While the requirement serves to protect the integrity of the process, perhaps there is another less expensive alternative. For instance, the Certificate of Discharge could refer to some proven facts but discharge the debtor notwithstanding proof of such facts.

T27. Discharge of interim receivers

Recommendation. Provide for an amendment to section 79 of the Bankruptcy and Insolvency General Rules so as to limit the application of this provision to interim receivers appointed under section 46 or 47.1 of the *BIA* but not those appointed under section 47 of the *BIA*. Interim receivers appointed under section 47 of the *BIA* should only be obligated to provide the reports that are mandated by section 246 and should be required to apply for their discharge as soon as reasonably practicable following completion of their duties or as otherwise provided under the terms of the appointment order or other order of the Court.

Commentary. While the provision may be appropriate for interim receivers appointed under section 46 of the *BIA*, it does not make sense and seems to be unduly burdensome in the context of a section 47 receivership. Many practitioners may not even be aware of this requirement.

T28. Court ordered extensions and reductions of time periods

Recommendation. Provide for an amendment to section 187(11) of the *BIA* to allow a Court to abridge time periods prescribed by the *BIA* unless abridgement is specifically prohibited.

Commentary. The section currently permits the Court to lengthen prescribed time periods but is silent on abridgement.

T29. Expediting of appeals

Recommendation. Provide for an amendment to section 193 of the *BIA* to allow any party to bring a motion to expedite an appeal whether or not the party is an appellant, at least for proposal, receiver and interim receiver matters.

T30. Costs

Recommendation. Provide that sections 197 (5), (7) and (8) of the *BIA* which respectively, (i) provide a tariff for legal fees, (ii) limit costs to 10% of gross receipts less amounts paid to secured creditors, and (iii) abate fees in smaller estates be repealed.

Commentary. The tariff is cumbersome and rarely used. The limitation of costs is inappropriate for the same reason that the limitation of trustee fees is inappropriate. Finally, the

abatement of fees in smaller estates makes it almost impossible to get legal representation. While representation should be discouraged in summary administration estates, there are times when it is necessary.

T31. Failure to disclose fact of being undischarged

Recommendation. Provide for an amendment to section 199(a) of the *BIA* that undischarged bankrupts are required to disclose their status as an undischarged bankrupt only in circumstances where they are entering into a transaction with a value of $5,000 or more.

Commentary. Section 199(a) of the *BIA* imposes a very onerous obligation that is generally not honoured by self-employed bankrupts. Bankrupts are understandably reluctant to advise their customers of their bankruptcy since this may adversely affect their livelihood.

Recommendation. Provide for an amendment to section 199(b) of the *BIA* to increase from $500 to $5,000 the amount of credit that an undischarged bankrupt may obtain without disclosing his/her/its status as an undischarged bankrupt to the prospective lender.

Commentary. The amount of $500 has been in the *BIA* since at least 1950.

T32. Recognition of orders of courts of other provinces

Recommendation. Provide for an amendment to section 188(1) of the *BIA* that the orders of courts of other provinces are to be given full force and effect and are to be enforced by the forum court.

Commentary. The wording in section 16 of the *CCAA* in respect of the recognition of a court order of one province is slightly different from section 188(1) of the *BIA* dealing with the same topic. The two statutes should be the same in scope. The *CCAA* provision is preferable as it is broader and first states that the order is to have full force and effect and then goes on to state that it should be enforced. The *BIA* section only refers to enforcement.

T33. Mailings

Recommendation. Provide for an amendment to the *BIA* that documents may be distributed by fax or email.

T34. Notice of first dividend payment

Recommendation. Provide for an amendment to section 149(1) of the *BIA* so that the first two lines thereof read as follows:

> "The trustee shall, after the first meeting of the creditors and when the trustee has determined to pay a dividend, give notice..."

In addition, the requirement should be that the notice is sent by regular mail, not registered or certified mail as is the current stipulation in section 149(1).

T35. Interim distributions

Recommendation. Provide for an amendment to section 155 of the *BIA* to allow interim distributions in summary administration proceedings.

T36. Arbitration and mediation procedures

Recommendation. Provide for an amendment to section 170.1 of the *BIA* that the Court may direct mediation procedures.

T37. Notice to Canada Revenue Agency

Recommendation. Provide for an amendment to the *BIA* to create a central register to keep Canada Revenue Agency apprised by trustees of bankruptcies so that trustees can no longer pick and choose where they are sending notices.

T38. Service upon a trust

Recommendation. Provide for an amendment to the *BIA* that personal service of a petition for a receiving order or other documents may be made upon a trust by leaving a copy of the document in question with a trustee of the trust.

T39. Claims bars

Recommendation. In implementing JTF 2002 Recommendation 55 provide for:

(1) formalizing the use of negative creditor confirmation for both the *BIA* and *CCAA*;

(2) rationalizing the time periods for filing between both statutes;

(3) standardizing proof of claim documentation and codify penalties consistent with those prescribed under the *BIA* for false claims under the *CCAA*; and

(4) specifying the conditions under which judicial discretion to permit late filing may be exercised under both the *BIA* and the *CCAA*.

PROPOSED AMENDMENTS TO THE *CCAA*

T40. Listing of existing creditors

Recommendation. Provide for an amendment to section 11 of the *CCAA* to require that a company seeking relief file with its material a listing of the **[25]** creditors with the largest claims against it.

T41. Access to filed materials and orders in a proceedings

Recommendation. Provide for an amendment to section 11 of the *CCAA* to require the debtor or monitor to establish a web-based electronic location in which copies of all of the proceedings taken in the case shall be maintained, absent an efficient information storage and retrieval system

maintained by the court. The court should have the power to suspend or reduce the requirement in appropriate cases.

T42. Regular operations reports by monitor

Recommendation. Provide for an amendment to section 11.7(3) of the *CCAA* that the monitor shall provide monthly reports on the financial operations of the debtor to the Court.

T43. Appeals

Recommendation. Provide for amendments to sections 13 and 14 of the *CCAA* that appeals shall be governed exclusively by provisions in the *CCAA* to the exclusion of provincial rules.

Commentary. This will promote national consistency.

Recommendation. Provide for an amendment to section 14 of the *CCAA* to allow any party to bring a motion to expedite an appeal whether or not the party is an appellant.

T44. Foreign currency exchange rule

Recommendation. Provide for an amendment to the *CCAA* to adopt the foreign currency exchange rule in section 275 of the *BIA*.

T45. Mailings

Recommendation. Provide for an amendment to the *CCAA* that documents may be distributed by fax or email.

PROPOSED AMENDMENT TO THE *EXCISE TAX ACT*

T46. Assignments of Crown debts

Recommendation. Provide for an amendment to the *Excise Tax Act* to provide express authorization to validate an assignment of a Crown debt payable to a corporation. Such a provision would be similar to sections 220(6) and (7) of the *Income Tax Act*.

PROPOSED AMENDMENT TO THE *EMPLOYMENT INSURANCE ACT*

T47. Deduction from employee dividends

Recommendation. Provide for an amendment to section 46(1) of the *Employment Insurance Act* requiring a flat deduction of 15% (after the Superintendent's levy) from each dividend cheque payable for employment benefits to cover both source deductions payable as well as overpayments of EI. An additional line should be added to the Proof of Claim where employees are asked to differentiate between wages and expenses. In implementing this change, language in the amendment should make clear that when the trustee withholds this amount the trustee is not deemed to be the employer and corresponding liability does not attach.

Commentary. Employees receiving such dividends (with a flat deduction) may either have to pay additional taxes or have a refund when filing their annual tax returns. There would be no waiting period while HRDC reviewed dividend distribution, which would reduce HRDC's workload and costs, would speed up payments to ex-employees and would significantly reduce trustee's fees and expenses.