COMMERCIAL RESTRUCTURING AND INSOLVENCY IN CANADA

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Introduction

Commercial restructuring and insolvency law in Canada is not memorialized in any single statute. Canadian restructuring and insolvency law refers to the complex matrix of statutory and common law rules that govern the rights and responsibilities of creditors and debtors in situations where the debtors are in some form of financial distress. These insolvent debtors may become subject to a host of different formal or informal proceedings, with bankruptcy proceedings being only one such form.

Bankruptcy and insolvency are oftentimes thought to be – by laypersons, media and legal professionals not practicing in the area – one in the same thing. An enterprise that ceases operations or cannot meet its obligations is commonly said to have "gone bankrupt". A company that becomes subject to a court supervised process as a result of some form of financial distress is often referred to as having become subject to "bankruptcy proceedings." Despite their colloquial use as synonymous terms, however, the distinction between bankruptcy and insolvency is a critical one.

Bankruptcy is a legal status. Insolvency is a financial condition. An insolvent company is unable to meet its obligations generally as they become due or its liabilities exceed the value of its assets. When a commercial entity becomes bankrupt, on the other hand, it loses the legal capacity to deal with its assets and a trustee in bankruptcy is appointed over those assets with a mandate to, among other things, liquidate the assets and distribute the proceeds of sale to creditors.

In addition to bankruptcy, an insolvent business may be rehabilitated by a restructuring of the corporation and its debts under one or more statutes governing commercial insolvencies. Such "debtor-in-possession" ("DIP") proceedings may also result in the sale of some or all of the assets of the insolvent business.

Alternatively, the assets of a business may be liquidated or sold on a going-concern basis in creditor-initiated proceedings. Such proceedings may include the appointment of a receiver of the business (appointed privately or by a court), by the exercise of other private remedies of a secured creditor under its security or through some combination of the above.

Set out below is a summary of Canadian restructuring and insolvency law. A number of significant amendments to Canada's insolvency legislation took effect on September 18, 2009. The impact those amendments had on Canadian insolvency law is discussed in this summary.

1. Canada's Insolvency Statutes

Canada has four key insolvency statutes:

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1. *Companies' Creditors Arrangement Act* ("CCAA"). The CCAA is the principal statute for the reorganization of a large insolvent corporation that has more than C$5-million of claims against it or which is part of an affiliated group of companies that has more than C$5 million of claims in the aggregate. The CCAA is a federal statute with application in every province and territory of Canada and is generally analogous in effect to Chapter 11 of the U.S. *Bankruptcy Code* ("U.S. Code"), although there are a number of important technical differences. As discussed below, the sale of a debtor's business and assets in a CCAA proceeding is permitted even in the absence of a formal plan of reorganization.

2. The *Bankruptcy and Insolvency Act* ("BIA"). The BIA is also a federal statute that includes provisions to facilitate both the liquidation and reorganization of insolvent debtors. The liquidation provisions, which provide for the appointment of a trustee in bankruptcy over the assets of the insolvent debtor, are generally analogous to Chapter 7 of the U.S. Code, although there are a number of important technical differences. The reorganization provisions under the BIA, known as the "proposal" process, are more commonly used for smaller, less complicated reorganizations than those that take place under the CCAA because the BIA proposal provisions have more stringent timelines and provide less flexibility than the CCAA. The BIA also provides for the appointment of an interim receiver to protect and preserve assets in certain circumstances and, as a result of the 2009 amendments, a receiver with national power and authority. A receiver appointed over all or substantially all of the assets of an insolvent company must be a licensed trustee in bankruptcy – typically the licensed insolvency professionals in an accounting or financial advisory firm.

3. The *Personal Property Security Act* ("PPSA"). The PPSA governs the priorities, rights and obligations of secured creditors, including a secured creditor's right, following a default by the debtor, to enforce its security and dispose of assets subject to its security (including on a going-concern basis). Each province of Canada, except Quebec (which has its own unique *Civil Code*, modelled on the French Napoleonic Code) has enacted a version of the PPSA. The PPSA is analogous to, and modelled on, the *Uniform Commercial Code* enacted in each U.S. state.

4. Provincial *Rules of Court*. In all provinces except Quebec, it is also possible to sell an insolvent business, by way of liquidation or going-concern sale, through a court-appointed receiver. Each province, other than Quebec, has "Rules of Court" similar to Ontario's *Courts of Justice Act*, which allow the court to appoint a receiver and/or receiver and manager when it is "just or convenient" to do so. The receiver, by way of court order, can be granted the right to take possession of, and sell, the assets subject to the receivership. Receivership is an available remedy in Quebec under the federal BIA.

Proceedings under the CCAA and BIA are subject to the oversight of the federal government office known as the Office of the Superintendent of Bankruptcy. The federal government also appoints Official Receivers to carry out statutory duties in each bankruptcy jurisdiction across Canada. The Official Receivers report to the Superintendent of Bankruptcy.

2. Reorganizations Under the CCAA

2.1 Who qualifies for relief under the CCAA?

To apply for relief under the CCAA, the debtor must:

(a) be a Canadian incorporated company or foreign incorporated company with assets in Canada or conducting business in Canada (certain regulated bodies such as banks and insurance companies are not eligible to file under the CCAA or BIA but instead may seek relief from creditors under the *Winding-Up and Restructuring Act*). As a result of the 2009 amendments, income trusts (business trusts established for commercial investments) also qualify for relief. Partnerships cannot apply under the CCAA, but, as discussed below, relief has been extended to partnerships in certain circumstances;

(b) be insolvent or have committed an “act of bankruptcy” as within the meaning set out in the BIA. The CCAA does not contain a definition of insolvency; however, courts have held that reference may be had to the definition of insolvency under the BIA. Accordingly, a company will qualify for relief under the CCAA if it is insolvent on a cash flow basis (i.e. unable to meet its obligations generally as they become due) or on a balance sheet test (i.e. has liabilities that exceed the value of assets). Further, the Ontario Superior Court of Justice has held that in determining whether a debtor is insolvent for the purposes of the CCAA, courts may use a “contextual and purposive approach”. A debtor may be considered insolvent if the debtor faces a “looming liquidity crisis” or is in the “proximity” of insolvency even if it is currently meeting its obligations as they become due. It is sufficient if the debtor reasonably anticipates that it will become unable to meet its obligations as they come due before the debtor could reasonably be expected to complete a restructuring of its debt; and

(c) have in excess of C$5-million in debt or an aggregate in excess of C$5-million in debt for a filing corporate family.

Partnerships and solvent entities do not qualify as "applicants" under the CCAA, and cannot file plans of arrangement or compromise under the CCAA. Nonetheless, Canadian courts have routinely extended the stay of proceedings and other relief granted to the qualifying insolvent applicants, to partnerships (where the partners themselves have filed) and even solvent entities affiliated with the applicants, where there is a finding that it is appropriate to do so in the circumstances. For example, relief has been extended to partnerships where the business of the partnership is inextricably entwined with the business of the applicants and granting certain relief to the partnership is required for an effective reorganization of the qualifying applicants.

2.2 How does a company commence proceedings under the CCAA?

Unlike Chapter 11, no new bankruptcy estate is created upon a CCAA filing and the CCAA does not allow a debtor company to make an electronic filing to obtain a skeletal stay of proceedings and then subsequently obtain "first day" relief. Instead, a debtor company seeks the granting of a single omnibus initial order that provides the debtor with a comprehensive stay of proceedings and other relief. Proceedings under the CCAA are commenced by an initial application to the superior court of the relevant province and not a federal bankruptcy court as in the U.S. In some jurisdictions like Ontario, there are specialized commercial branches of the provincial superior courts before which these applications may be brought. In some provinces, there are recognized model orders, which establish the accepted framework for an initial order, subject to the modifications appropriate to the case as may be granted by the court. In most instances, the application is made by the debtor company itself (creditors may initiate the process, but this is uncommon).

2.3 Where must the application be brought?

Applications for relief under the CCAA may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the debtor company in Canada is situated, or, if the debtor company has no business in Canada, in any province in which any assets of the company are located.

2.4 What must be included in the initial application?

All CCAA applications must include:

- weekly cash-flow projections for the weeks to which the stay of proceedings will apply;
- a report containing certain representations of the debtor regarding the preparation of cash-flow projections; and
- copies of all financial statements of the debtor, audited or unaudited, prepared during the year before the application.

2.5 What relief can the court provide?

The initial order granted by the court usually provides for the following key elements:

(a) Stay of Proceedings. Initial orders grant a comprehensive stay of proceedings that will apply to both secured and unsecured creditors, and a stay against termination of contracts with the debtor. The purpose of the stay is to prevent precipitous creditor action and prohibit any single creditor or group of creditors from achieving an unfair advantage over other creditors. The stay is designed to maintain the status quo and allow the debtor company sufficient breathing room to seek a solution to its financial difficulties. Stays may also be extended to directors of the debtor in order to encourage those individuals to remain in office and advance the restructuring process.

The stay is subject to certain prescribed limits. For example, (i) the stay cannot restrict the exercise of remedies under eligible financial contracts such as futures contracts, derivatives and hedging contracts. The stay cannot prevent public regulatory bodies from taking action against the debtor, although monetary fines can be stayed; (ii) there are restrictions on the length of stays for "aircraft objects" (airframes, aircraft engines and helicopters); (iii) no order granting a stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods and services, or the use of leased (pursuant to a true lease as opposed to financing lease) or licensed property, or require the further advance of money or credit; and (iv) as noted above, partnerships do not qualify to apply under the CCAA, although, there is case law that provides that the stay may be extended over partnerships, where the partners themselves have filed for CCAA protection and the protection is required to facilitate the restructuring.

Unlike Chapter 11, the stay is not automatic; however, the court will typically exercise its discretion to issue an initial stay for up to a maximum of 30 days. An application to the court is required for any extensions. Before an extension can be granted, the court must conclude that circumstances exist that make the extension appropriate and that the debtor is acting with due diligence and in good faith. Other than the initial 30-day stay, there is no statutory limit on the duration or length of extensions.

(b) The Monitor. As part of the initial order, the court appoints a monitor. The monitor's basic duties are set out in the CCAA, but can be expanded by court order. Generally, the monitor plays a supervisory and advisory role in the proceeding. In its supervisory role, the monitor oversees the steps taken by the company while in CCAA proceedings, on behalf of all creditors, as an officer of the court. Further, the monitor will file periodic reports with the court and creditors, including reports setting out the views of the monitor as required by the CCAA in connection with any proposed disposition of assets or in connection with any proposed DIP financing (discussed below in Section 2.5(c)).

Generally, the debtor's management will remain in control of the company throughout the proceedings, however, the monitor will assist management in dealing with the restructuring and other issues that arise. The initial order may approve the retention of a Chief Restructuring Officer ("CRO"). In certain cases – such as where the board of directors have resigned or creditors have otherwise lost confidence in management - the CRO may have a more extensive mandate or the monitor's powers can be expanded. By court order, the monitor can be authorized to sell assets, subject to court approval, and direct certain corporate functions. Monitors assuming this role are colloquially referred to as "super monitors".

There are no statutorily mandated creditor committees in Canada although they have sometimes been formed on an *ad hoc* basis. There is no equivalent in Canada to the U.S. Trustee, which provides government oversight in Chapter 11 cases. However, the monitor fulfils certain of the functions that the U.S. Trustee and creditor committees would fulfil in Chapter 11 cases. The 2009 amendments introduced certain general oversight powers for the Superintendent of Bankruptcy, including general oversight powers.

(c) DIP Financing and DIP Charge. DIP financing refers to the interim financing required by the debtor company to fund its working capital needs, while under CCAA protection. In many cases, the court will authorize DIP financing to the debtor and grant super priority charges over the assets of the debtor in favour of the DIP lender, if the court is of the view that additional financing during the restructuring is critical to the continued operations of the business. This may be done in the initial order at the time of the first application, or subsequently, often by way of amendment and restatement of the initial order.

The 2009 amendments to the CCAA codify the court's ability to grant DIP financing and corresponding priority charges. The amendments require courts to take into account, among other things:

- the expected duration of proceedings,
- how the debtor's business and financial affairs are to be managed during the proceedings,
- whether the debtor's management has the confidence of major creditors,
- whether the DIP loan would enhance prospects of a viable plan,
- the nature and value of the debtor's property,
- whether any creditor would be materially prejudiced as a result of the security; and,
- the monitor's report on the cash flow forecast.

The DIP charge ordered under the amendments cannot secure pre-filing obligations owed by the debtor. Notice must be given to all secured creditors that are likely to be affected by the priority DIP charge.

At the DIP approval hearing the debtor company will submit a DIP term sheet or credit agreement for approval, together with cash flows for the period of the DIP funding and the monitor's report on those cash flows. The monitor will also typically report on its view as to the appropriateness of the DIP.

Canada has not adopted the U.S. concept of "adequate protection", which is intended to protect existing lien holders who have become subject to super-priority charges, although Canadian courts may provide protective relief in orders to address prejudice to other creditors. Canadian courts also do not need to authorize "replacement liens" because a pre-filing secured creditor's security, if granted over after-acquired property (as typically would be the case), continues to apply and automatically extends to post-filing assets acquired by the debtor. As noted above, a CCAA filing does not create a new estate.

(d) Other Priority Charges. Initial orders also routinely include the authorization of priority charges, such as an administrative charge to secure payment of the fees and disbursements of the monitor and the monitor's and debtor's legal counsel, and a directors' and officers' charge to secure the debtor's indemnity to the directors and officers' against post-filing claims. The charge in favour of directors and officers is not available if these individuals already have adequate insurance to cover such liabilities. Along with the DIP charge, these priority charges will typically rank ahead of claims of pre-filing secured creditors, provided notice is given to any such secured creditors likely to be affected by the priority charges.

(e) Treatment of Contracts. Prior to the amendments, the debtors were typically granted the authority to repudiate (the functional equivalent of contract rejection under the Chapter 11) certain contracts and leases in the initial order. In considering whether to permit the repudiation, courts considered a balancing of interests between the affected parties. The 2009 amendments to the CCAA codify the practice for disclaimer or resiliation (the equivalent of disclaimer under Civil Law in Quebec) of agreements. The debtor is not required to elect to accept or reject certain "executory contracts" (other than aircraft leases) or real property leases, as is the case with Chapter 11. Further, a standard initial order provides, among other things, that no counterparty to a contract may terminate the contract, alter, fail to renew or cease to perform its obligations under the contract.

Generally, the debtor will fulfil its post-filing payment obligations under all agreements unless the debtor disclaims the agreement in accordance with the process now set out in the CCAA. If the debtor fails to perform other covenants, which failure to perform would be a basis for the counterparty to terminate the agreement absent the stay, the counterparty may seek to lift the stay in order to exercise its termination rights. Any steps by counterparties to assert damage claims in respect of agreements that are disclaimed by the debtor are stayed by the initial order. Counterparties to disclaimed agreements can assert a claim for damages on an unsecured basis and will be entitled to share in any distribution on a *pro rata* basis along with other unsecured creditors.

The 2009 amendments require the monitor or the court to approve such disclaimer after taking into account whether the disclaimer of the contract will cause the debtor's counterparty significant financial hardship. All disclaimers approved by the monitor are subject to review by the court if the counterparty objects. The 2009 amendments provide protections for licensees of intellectual property, analogous to s. 365(n) of the U.S. Code. The 2009 amendments also provide a process for the assignment of contracts, with court approval, despite contractual restrictions on assignment. As part of any such forced assignment, pre-filing monetary defaults must be cured.

(f) Post-filing Supply of Goods. The initial order typically stays a party to any contract or agreement for the supply of goods or services from terminating the agreement. The initial order and the terms of the CCAA protect these suppliers by providing that no party is required to continue to supply goods or services on credit, or to otherwise advance money or credit – that is, although a supplier cannot terminate its agreement as a result of the CCAA stay of proceedings, the supplier is not obligated to honour its obligations to supply post-filing unless it is paid for those post-filing obligations.

Unlike Chapter 11, which provides for an "administrative priority claim" for post-petition suppliers, if the supplier to a CCAA debtor elects to provide goods or services on credit and does not have the benefit of a critical supplier's charge (discussed below), there is no priority given under the CCAA for post-filing suppliers. Accordingly, it is important for post-filing suppliers to ensure that they receive COD payments or are otherwise fully protected by a court-ordered charge or some other form of security such as a deposit for payments or a letter of credit issued by a third party.

(g) Plans of Arrangement or Compromise. Initial orders in CCAA proceedings typically also authorize the debtor to file a plan of arrangement or compromise with its creditors. CCAA plans are discussed below in Section 2.5.

2.6 Can critical vendors be paid their pre-filing claims?

Historically, initial orders have sometimes included an authorization allowing the debtor to pay certain vendors some or all of their pre-filing claims (notwithstanding the general prohibition on payment of pre-filing claims) where such vendors were considered vital to the ongoing operation of the business, and where those vendors were in a position to discontinue supply or service if their pre-filing claims were not satisfied.

The 2009 amendments to the CCAA introduced a new approach to the treatment of critical suppliers. Where a vendor provides goods or services that are considered critical to the ongoing operation of the debtor, the court may declare the vendor a "critical supplier" and order the vendor to continue to provide goods or services on terms set by the court that are consistent with the existing supply relationship, or that are otherwise considered appropriate by the court. As part of the order, the court is required to grant a charge over all or any part of the debtor's property to secure the value of the goods or services supplied under the terms of the order, which charge can be given priority over any secured creditor of the debtor. Any creditors likely to be prejudiced by the court-ordered charge must be given notice of the application to declare a vendor a critical supplier.

A decision in Ontario held that the 2009 amendments have not displaced the court's authority to authorize pre-filing payments to critical suppliers when continued supply could not be guaranteed without such authorized payments.

2.7 What is a plan of arrangement?

Essentially, the plan of arrangement or compromise is a proposal to the debtor's creditors that is designed to provide creditors with greater value than they would receive in a bankruptcy and allow the debtor to compromise its obligations and continue to carry on business, although the nature and/or scope of the business might be altered dramatically. Plans can, among other things, provide for a conversion of debt into equity of the restructured debtor (which may require a concurrent plan of arrangement under the applicable business corporations statute) or a newly created corporate entity designed to be a successor to the debtor's business; the creation of a pool of funds to be distributed to the creditors of the debtor; a proposed payment scheme whereby some or all the outstanding debt will be paid over an extended period; or some combination of the three.

Plans may offer different distributions to different classes of creditors (discussed below in Section 2.7.4). However, the plan must treat members within a class equally.

2.7.1 Who may file a plan?

Plans may be filed by the debtor, any creditor, a trustee in bankruptcy or liquidator of the debtor. As a matter of practice, plans are almost always filed by a debtor, or filed by a creditor, with the consent of the debtor. The CCAA does not provide for an "exclusivity" period for the filing of a plan by the debtor only, as is the case under the U.S. Code.

2.7.2 Whose claims may be compromised?

The claims of both secured and unsecured creditors may be compromised in a plan. The CCAA requires Crown (the federal or applicable provincial government) approval of any plan that does not provide for the payment, within six months, of all amounts owed to the Crown in respect of employee source deductions. The 2009 amendments also provide that plans must provide for the payment of certain pension and wage claims, discussed in more detail below in Section 4.3.

The CCAA also provides that plans can compromise claims against directors, subject to certain limitations. For example, claims that relate to contractual rights of one or more creditors and claims based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by directors are not subject to compromise.

Courts have also held that CCAA plans can provide for releases in favour of parties, other than the CCAA debtor itself and its directors and officers, where, among other things, such third party releases are necessary and essential to the restructuring of the debtor, the claims to be released are rationally related to the purpose of the plan, the plan could not succeed without the releases and the parties that are the beneficiaries of the releases are contributing in a tangible and realistic way to the plan. However, there has been judicial caution expressed that third party releases are the exception, not the rule, and should not be granted as a matter of course. Also, in a number of cases, plans have been sanctioned containing releases from a broad category of claims, with limited exceptions from claims arising from fraud and wilful misconduct. Releases often purport to bind the applicable creditor as well as its officers, directors, shareholders, affiliates and other parties that may not have received notice of the proceedings. Courts have also expressed some reservation as to the scope of the releases.

2.7.3 How do creditors prove their claims?

There is no mandatory time-frame in the CCAA in which affected creditors must prove their claim. If it is anticipated that a distribution will be made to unsecured creditors in a plan or following a sale of assets, the debtor will typically seek the issuance of a claims procedure order which establishes a process to determine creditor claims and a "claims bar date", after which further claims may not be submitted. The claims procedure order also establishes a process to determine disputed claims, including the appointment of a claims officer, to address any disputes in a mediation style, summary process. The monitor typically administers the claims process.

2.7.4 How does the plan get approved by creditors?

Creditors are separated into different classes based on the principle of commonality of interest. Although unsecured creditors will typically be placed in a single class, certain unsecured creditors, such as landlords, may be classified in a separate class based on a different set of legal rights and entitlements to other unsecured creditors. The plan must be passed by a special resolution, supported by a double majority in each class of creditors: 50% plus one of the total number of creditors voting in the class and 66-2/3% of the total value of claims voting in each class. Note that, unlike under Chapter 11, there is no concept of "cram-down" in Canada. Cram-down allows for the passing of a plan of arrangement in certain circumstances, even though the plan has been rejected by a subordinate class of creditors. In Canada, each class of creditors to which the plan is proposed must approve the plan by the requisite majorities.

2.7.5 What if the plan is not approved by creditors?

If the plan is not approved by the creditors, the debtor does not automatically become bankrupt (i.e., have a trustee in bankruptcy appointed over its assets). It is possible for the debtor to submit a new or amended plan. In the event the plan is not accepted, however, it is likely that the debtor's significant secured creditors or unsecured creditors will seek to lift the stay to exercise the remedies against the debtor that are otherwise available to them.

2.7.6 How does the plan get approved by the court?

Once the plan is approved by the creditors, it must then be submitted to the court for approval. This proceeding is known as the sanction or the fairness hearing, and is the equivalent of the confirmation hearing under Chapter 11. The court is not required to sanction a plan even if it has been approved by the creditors. However, creditor approval will be a significant factor in determining whether the plan is “fair and reasonable”, and thus deserving of the court’s approval.

2.7.7 Who is bound by the plan and how is it implemented?

Once the court sanctions the plan, it is binding on all creditors whose claims are compromised by the plan. Although all necessary court approvals might have been obtained, the plan may not become effective until a number of subsequent conditions are met, such as the negotiation of definitive documentation, the completion of exit financing, the obtaining of regulatory approvals or the expiry of appeal periods. Once all conditions are satisfied, the plan can be implemented. The day on which the plan is implemented is commonly referred to as the “implementation date” and is evidenced by a certificate filed with the court by the monitor, confirming that all conditions to the implementation of the plan have been satisfied. At this point, the debtor officially emerges from the restructuring.

2.8 Can the debtor void certain pre-filing transactions?

Prior to the 2009 amendments, the CCAA contained no provisions for the avoidance of pre-filing transactions.

The 2009 amendments to the CCAA added a right to review transactions, including preferences and “transfers at under value” (as discussed below in Section 4.1.6), by importing into the CCAA avoidance concepts from the BIA that were previously only available in bankruptcies (i.e., in Chapter 7-type proceedings). In summary, the amendments enabled the monitor in CCAA proceedings to challenge preferential payments or dispositions of property by the debtor for conspicuously less consideration than fair market value, unless a plan of arrangement provides otherwise.

3. Reorganizations under the BIA

3.1 What is the difference between CCAA reorganizations and BIA reorganizations?

Insolvent debtors may also seek to restructure their affairs under the BIA’s proposal provisions. There a number of similarities between the two processes. The key elements of a proposal can be substantially the same as the key elements of a CCAA plan as both proposals and plans provide for the compromise and arrangement of claims against the debtor. The same basic restrictions and limitations that apply to CCAA plans, also apply to BIA proposals. Moreover, the 2009 amendments confirmed that DIP financing, DIP charges, the assignment of contracts, the disclaimer of contracts, the granting of other priority charges (including critical supplier charges) and the ability to sell assets, free and clear of liens and encumbrances, were all available in BIA proposal proceedings.

The essential difference between a restructuring under the CCAA and one conducted under the BIA is that a BIA proposal process has more procedural steps set out with strict timeframes, rules and guidelines. A CCAA proceeding is, relative to BIA proposal proceedings, more discretionary and judicially driven. The CCAA remains the statute of choice for restructurings of any complexity for debtors that exceed the minimum C$5-million debt threshold. Debtor companies and other key stakeholders that may support the restructuring process typically prefer the flexibility afforded by the CCAA over the more rigid regime of the BIA. A BIA proposal must be made to unsecured creditors whereas the CCAA can be used to compromise secured creditor claims, while leaving unsecured claims unaffected.

3.2 Who may make a proposal?

An insolvent person, a bankrupt, a receiver (in relation to an insolvent person), a liquidator of an insolvent person's property or a trustee of the estate of a bankrupt may make a proposal. An insolvent person is a person who is not a bankrupt and insolvent on a cash flow or balance sheet basis. Persons include corporations, partnerships and other legal entities.

3.3 How are proposal proceedings commenced?

The proposal proceedings may be commenced by filing a proposal or a notice of intention to make a proposal ("NOI") with the local office of the Official Receiver. Most debtors commence the proposal process with an NOI, which provides for an automatic stay for an initial 30 days (subject to extensions for additional periods of up to 45 days each, for an aggregate total of up to 6 months, on findings that the debtor is acting in good faith and with due diligence). Once the proposal is filed, the stay continues until the meeting of creditors to vote on the proposal.

The stay applies to both unsecured and secured creditors (unless the secured creditor has delivered a notice under Section 244 of the BIA of its notice of intention to enforce security and the notice period provided for thereunder has expired).

The purpose of the NOI is to allow the debtor a period of stability to negotiate a proposal with its creditors, with the assistance of a proposal trustee which is appointed at the time the NOI is filed. The NOI must also contain a list of creditors with claims of $250 or more. Once the NOI is filed, the trustee must send a copy of the NOI to every known creditor within 5 days. Within 10 days the debtor must prepare a projected cash-flow statement.

3.4 What is the scope of the stay under an NOI?

The stay of proceedings under an NOI stays creditor action against the debtor and provides that no person may terminate an agreement because of the insolvency of the debtor or the filing of the NOI. Landlords cannot terminate leases because of rental arrears. Creditors can apply to lift the stay on demonstration of material prejudice or can oppose an extension of the stay if they can demonstrate, among other things, the debtor is not acting in good faith or with due diligence. The stay is also subject to substantially the same limitations as those discussed above in connection with a stay under the CCAA.

3.5 What if the stay extension is not granted?

If a stay extension is not granted, the debtor is deemed to have made an automatic assignment in bankruptcy.

3.6 What is the role of the proposal trustee?

The proposal trustee, selected by the debtor, has a number of statutory duties. These duties include giving notice of the filing of the NOI or the proposal to all known creditors, filing a projected cash-flow statement accompanied by a report from the trustee on its reasonableness and calling a meeting of creditors. At the creditor meeting the trustee is required to report on the financial situation of the debtor and the cause of its financial difficulties. The trustee must also make the final application to the bankruptcy court for approval of the proposal if it is accepted by creditors.

In addition to its statutory obligations, the trustee plays a supervisory and advisor role and will assist the debtor in the development of the proposal and its negotiations with creditors and other key stakeholders.

3.7 How do creditors prove their claims?

Pursuant to the terms of the BIA, all creditors must complete a statutory proof of claim form in order to prove their claim. Although there is no predetermined bar date, a creditor is not entitled to vote at a meeting of creditors to approve the proposal, or participate in distributions provided for under the proposal, if they have not submitted a proof of claim by the meeting time or prior to distributions.

3.8 How does the proposal get approved by creditors?

Proposals are voted on at a meeting or meetings of the creditors called for that purpose. The meeting to consider the proposal must be called by the proposal trustee within 21 days of the filing of the proposal and at least 10 days' notice must be given to each of the creditors.

Like a CCAA plan, in order to be binding on creditors, a proposal must be approved by a double majority of creditors (50% plus one representing 66 2/3% of voting claims), in each class of creditors voting on a proposal; however, if the proposal is made to a class of secured creditors and rejected by that class, the proposal may still become effective provided that it is passed by the class or classes of unsecured creditors voting on the proposal. The proposal will not be binding on the dissenting class of secured creditors. These secured creditors would be entitled to enforce their security, if otherwise entitled to do so.

3.9 What if the proposal is not approved by unsecured creditors?

If the proposal is rejected by a class of unsecured creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy on the earliest of (i) the date the debtor filed the NOI, (ii) the date of the earliest outstanding application for a bankruptcy order, and (iii) the date the debtor filed its proposal.

3.10 How does the proposal get approved by the court?

In addition to creditor approval, the proposal must be approved by the court. Within 5 days of the acceptance of the proposal by the debtor's creditors, the proposal trustee must apply for a court hearing to have the proposal approved. The proposal trustee must give

15 days notice to the debtor, the Official Receiver and each creditor who has proven its claim against the debtor. The trustee must file a report regarding the terms of the proposal and the conduct of the debtor at least 2 days before the date of the hearing.

3.11 What if the proposal is not approved by the court?

If the proposal is not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy on the earliest of (i) the date the NOI was filed; (ii) the date the earliest application for a bankruptcy order was issued; and, (iii) the date the debtor filed its proposal.

3.12 Who is bound by the proposal and how is it implemented?

If the proposal is approved, it is binding on all unsecured creditors and on the secured creditors included in the proposal whose classes voted for the proposal in the requisite majorities. A proposal may be implemented in substantially the same manner in which a CCAA plan is implemented.

3.13 What if a debtor defaults under the proposal?

If a debtor defaults under the terms of its proposal, and such default is not waived by inspectors (creditor representatives that may be appointed by creditors in certain cases) or the creditors themselves (if there are no inspectors), the proposal trustee must inform the creditors and the Official Receiver. In these circumstances, a motion may be brought to the court to annul the proposal. If such order is granted, the debtor is automatically bankrupt.

4. Liquidations

The two most common ways to liquidate an insolvent company in Canada are either through a bankruptcy proceeding under the BIA, or by way of an appointment of a receiver. In recent years, the CCAA has also been used as a process for the self-liquidation of a debtor, without a plan being filed and, in most cases, with the support and co-operation of the debtor's main secured creditor(s).

4.1 Bankruptcy

4.1.1 How is a bankruptcy proceeding commenced?

The legal process of bankruptcy (generally analogous in effect to Chapter 7 of the U.S. Code) can be commenced in one of three ways:

1. Involuntarily, by the filing of a bankruptcy application by one or more of the debtor's creditors. To bring a bankruptcy application, a creditor must have in excess of $1000 of unsecured debt and allege the debtor has committed an "act of bankruptcy" within 6 months of the date of the filing of the application. The acts of bankruptcy are enumerated in the BIA, with the most commonly alleged act being that the debtor has ceased to meet its obligations generally as they become due - it is not sufficient that the creditor allege that the debtor has failed to pay the obligations owing to such debtor, only. The debtor has the right to object to the

application, in which case a determination will be made by the court as to whether the bankruptcy order should be issued.

2. Voluntarily, by the debtor making an assignment in bankruptcy for the general benefit of its creditors. To make a voluntary assignment, the debtor must be an "insolvent person" (i.e. insolvent on a cash flow or balance sheet basis). Companies, partnerships and income trusts are "persons" that may make an assignment if insolvent. To make an assignment a person must reside, carry on business or have property in Canada and have at least $1000 of debt. The assignment is filed with the Official Receiver in the "locality of the debtor," as defined in the BIA.

3. On the failure of a BIA proposal by the debtor to its creditors, as a result of the rejection of the proposal by creditors or the court, or default under the proposal. This is discussed above in Sections 3.9, 3.11, 3.12 and 3.13.

4.1.2 What is the effect of the commencement of the bankruptcy proceeding?

When a corporate debtor becomes bankrupt, the debtor ceases to have legal capacity to dispose of its assets or otherwise deal with its property, which vests in a trustee in bankruptcy (other than property held in trust). Such appointment is expressly subject to the rights of secured creditors. Trustees in bankruptcy are licensed insolvency professionals who, in almost all cases, are chartered accountants (unlike the U.S. where trustees are typically lawyers). They are not government officials but they are licensed and regulated by the Office of the Superintendent of Bankruptcy. In a voluntary proceeding, the debtor itself selects the trustee, however, the selection is subject to confirmation by unsecured creditors at the first meeting of creditors. In an involuntary proceeding, the applying creditor selects the trustee, also subject to confirmation at the first creditors meeting. Unsecured creditors are to be provided with notice of the first meeting of creditors promptly after the trustee's appointment.

4.1.3 What are the trustee's duties?

A trustee is an officer of the court and, accordingly, must represent the interests of creditors impartially. It is the trustee's duty to collect the debtor's property, realize upon it and distribute the proceeds of realization according to a priority scheme set out in the BIA (discussed below in Section 4.3). The trustee is required to give notice of the bankruptcy to all known creditors of the bankrupt. The trustee must also convene a first meeting of the creditors of the bankrupt within 30 days of appointment, unless extended or waived by the court.

At the first meeting of creditors, creditors with proven claims must confirm the trustee's appointment. Proven creditors may also elect "inspectors" from their ranks who will then act in a supervisory role and instruct the trustee. There are certain actions that a trustee cannot engage in without inspector approval, such as carrying on the business of the bankrupt or the sale or other disposition of any property of the bankrupt. A trustee must obtain court approval if it wishes to undertake these actions prior to or in the absence of the appointment of inspectors. At the first meeting, the creditors can vote to dispense with inspectors. If there are no inspections appointed at the first meeting of creditors, the trustee can exercise all of its power on its own accord, except dispose of assets to a party related to the bankrupt. This action can only be taken with court approval.

4.1.4 How does a creditor prove its claim?

Upon the commencement of bankruptcy proceedings, unsecured creditors are stayed from exercising any remedy against the bankrupt or the bankrupt's property and may not commence or continue any action or proceeding for the recovery of a claim (unless the creditor is granted special permission by the court). Secured creditors are not subject to this stay of proceedings (discussed below in Section 4.1.5).

A creditor can assert its claim against the debtor by completing a statutorily prescribed proof of claim and submitting it to the trustee in bankruptcy. A proof of claim form is attached to the notice of bankruptcy sent by the trustee to all known creditors. The creditor must submit the completed form before the first meeting of creditors if it wishes to vote on the motion to affirm the appointment of the trustee or vote for and/or act as an inspector in the bankruptcy. Otherwise, the creditor need only submit its proof of claim before the distribution of proceeds by the trustee (known creditors will be provided notice before distribution) unless otherwise ordered by the court.

A trustee can disallow the quantum of the amount set out in a proof of claim or the entire claim itself. Disputed claims may be resolved through a judicial process if the parties are not able to reach an agreement.

4.1.5 How does bankruptcy affect the rights of secured creditors?

The rights of a trustee in bankruptcy are expressly subject to the rights of secured creditors. Generally, a bankruptcy does not effect the rights of secured creditors except to the extent necessary to allow the trustee to realize on any value in the collateral subject to the security, above and beyond what is owed to the secured creditor. The BIA provides the trustee with a number of tools in this regard. The trustee can require the secured creditor to prove its security; cause the secured creditor to value its security; inspect the collateral subject to the security (generally for the purpose of valuing it); and, redeem the collateral subject to the security by paying the secured creditor the amount of the assessed value of the security. On redemption, the collateral subject to the security becomes an asset of the bankruptcy estate. In addition, the court may make an order staying a secured creditor from realizing on its security, but the maximum period of such stay is six months. Such stay orders are not commonly granted; they may, however, be made in situations where the trustee requires some time to value the collateral and determine if it should exercise its right of redemption.

To the extent that the amount of a secured creditor's debt exceeds the value of the collateral subject to its security, a secured creditor may participate in the bankruptcy process and file a proof of claim in respect of the unsecured deficiency portion of its claim.

4.1.6 Can the trustee void certain pre-bankruptcy transactions?

Provided the assets available to the trustee are sufficient to support the costs, the trustee is responsible for scrutinizing the actions of the bankrupt before the bankruptcy and for reporting to creditors on transactions that may be impugned as preferences, fraudulent conveyances, transfers at undervalue or on other grounds and, where appropriate, commencing proceedings to challenge such transactions. If a challenge is successful, depending on the remedy, the transaction is either voided and property transferred by the debtor before the bankruptcy must be returned to the bankrupt estate or, in the case of a "transfer at undervalue" (described below), the difference in value between the actual consideration given by the debtor (if any) and the fair market value as determined by the court must be paid to the bankrupt estate. To the extent assets are not available to the trustee to pursue such remedies, creditors can apply to the court for an order to pursue the trustee's remedies, for the benefit of those creditors that fund the proceedings.

The 2009 amendments to the BIA introduced the concept of "transfer at undervalue", which is defined as a transfer of property made by the bankrupt for little or no consideration within one year of the initial bankruptcy event, when the bankrupt is insolvent and where the bankrupt intends to defeat or defraud creditors. The "initial bankruptcy event" is the earliest of the filing of the following: an assignment, a proposal, a notice of intention to file a proposal, a CCAA filing or the first application for a bankruptcy order against a person. Moreover, where the bankrupt disposes of property for little or no consideration to a party that is not at arm's length, the relevant period of review is five years.

Another change introduced by the 2009 amendments is that in respect of transactions with non-arm's-length parties, it is no longer a defence for debtors to prove that they did not intend to make a preferential payment. The fact of a non-arm's-length creditor having received a preference is sufficient to void the transaction, irrespective of whether or not the debtor actually intended to give such preference.

Generally, Canadian trustees are much less aggressive in attacking pre-bankruptcy transactions than their U.S. counterparts and the technical requirements to void such transactions in Canada are more onerous than they are in the U.S.

4.1.7 What repossession rights do unpaid suppliers have?

Suppliers have a limited right to recover inventory supplied to a bankrupt debtor. Prior to the 2009 amendments, unpaid suppliers could repossess goods delivered 30 days <u>before</u> the issuance of the demand for the return of such goods following a bankruptcy or receivership of the customer. The amendments provide a modest change, allowing unpaid suppliers the right to repossess goods shipped 30 days <u>before</u> the date of bankruptcy or receivership, rather than having the time-frame tied to the date the demand was issued. In addition, the written demand must be sent within 15 days of the purchaser becoming bankrupt or subject to a receivership. The goods must be identifiable, in the same state as on delivery, still in the possession of the trustee or receiver, and not subject to an arm's-length sale. In practice, suppliers often find it difficult to satisfy these tracing requirements.

4.2 Receiverships

4.2.1 What is a receiver?

A receiver or receiver and manager, may be given the authority to deal with the debtor company's assets, including authority to operate and manage the business in place of the existing management, and to shut down the business if the receiver concludes the continued operations will likely erode the recoveries for creditors or there is insufficient funding to continue operations. The receiver does not become the owner of the debtor company's assets; however, the receiver may have the right (but not the obligation) in the instrument appointing it to take possession and custody of the assets and to sell them.

4.2.2 How is a receiver appointed?

A receiver may be appointed (i) privately by a secured creditor pursuant to the terms of a security agreement or (ii) by court order.

(a) Privately Appointed Receiver. A secured creditor may have the right to appoint a receiver under its security agreement. The receiver's duties are primarily to the secured creditor that appointed it. It also has a general duty to act honestly, in good faith and in a commercially reasonable manner, including the duty to attempt to maximize recoveries, and to obtain the best price for the debtor's assets in the circumstances.

The secured creditor is mandated by s. 244 of the BIA to provide a statutory 10 day notice of its intention to enforce its security and appoint a receiver, if such receiver is appointed over all or substantially all of the inventory, accounts receivables or other property of an insolvent debtor, to the extent acquired for, or used in the business carried on by the insolvent debtor. As a matter of practice, secured lenders typically issue a "Section 244 notice" whenever enforcing security, out of an abundance of caution. Also, a receiver appointed over all or substantially all of the assets in the categories set out in Section 244 of the BIA must be a licensed trustee in bankruptcy who, as noted above, is typically an accountant. As discussed below an interim receiver may be appointed prior to the expiry of the 10 day notice period.

(b) Court-Appointed Receiver. In the case of a court-appointed receiver, the receiver is appointed by a court order, typically on application by a secured creditor under the *Rules of Court* of the province where the debtor's business is based. Generally, the courts in the common law provinces (i.e., all provinces other than Quebec) have the authority to appoint a receiver when the court is satisfied that it is "just or convenient" to do so. As a result of the 2009 amendments, courts also have the authority to appoint receivers under the BIA, with authority across Canada (the BIA being a federal statute) as opposed to in a particular province, as is the case with receivers appointed under provincial *Rules of Court*. Court appointments usually occur in more complex cases, especially where there are disputes among creditors or between the creditor and the debtor or in cases where it appears likely from the outset that the assistance of the court will be required on an ongoing basis. For example, the court appointment of a receiver is typically accompanied by a comprehensive stay of proceedings restraining creditor action against the debtor and providing a more stable platform for the realization to occur (discussed below in Section 4.2.4).

A receiver appointed by the court derives its powers from the court order and any specific legislation governing its powers. The receiver is an officer of the court and has duties to all creditors of the debtor. It takes directions and instructions from the court, not the creditor that first sought its appointment. In most cases, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a privately appointed receiver under a security agreement, although certain actions, such as major asset sales, usually require specific court approval. The court-appointed receiver is also permitted to borrow on a super priority basis, akin to DIP financing in a CCAA case..

(c) Interim Receiver. Prior to the 2009 amendments to the BIA, it was quite common in cases where a debtor had assets in several provinces for an "interim receiver" to be appointed by the court pursuant to the provisions of the federal BIA. The advantage of the federal interim receiver was that its jurisdiction extended nationally by virtue of the federal scope of the BIA, while the jurisdiction of a receiver appointed under the *Rules of Court* is limited to the province in which it is appointed. While the title suggested a temporary role, interim receivers were often given a mandate similar to an ordinary court-appointed receiver, and were often appointed as both interim receiver under the BIA and as receiver under the applicable *Rules of Court*, in order to exercise authority across Canada.

The 2009 amendments restrict "interim receivers" to having a more temporary and restricted mandate then previous practice. The appointment of the interim receiver expires on the earlier of: (a) the taking of possession by a receiver or a trustee in bankruptcy of the debtor's property, and (b) the expiry of 30 days following the day on which the interim receiver was appointed or any period specified by the court, or in the case that an interim receivership coincides with a proposal, upon court approval of the proposal. This restriction on the duration of an interim receivership and the advent of the national receiver has triggered a decline in the use of interim receiverships.

The court may direct an interim receiver to take possession of all or part of the debtor's property mentioned in the appointment, exercise such control over the property and the debtor's business as the court considers advisable and summarily dispose of property. Interim receivers, however, are not authorized to borrow funds.

4.2.3 What reporting requirements does a receiver have?

Both privately and court appointed receivers have certain obligations mandated by their appointment. The "receiver" must provide notice of its appointment to all known creditors and, at various stages of administration of the receivership, prepare and distribute interim and final reports concerning the receivership. These reports are filed with the Office of the Superintendent of Bankruptcy and may be made available to all creditors. Court-appointed receivers must also report to the court itself, at such times and intervals as may be required, in carrying out its mandate.

4.2.4 How do creditors assert their claims in a receivership?

Where a receiver is court-appointed, the court will typically issue a stay of proceedings restricting creditors from exercising any rights or remedies without first obtaining permission from the court. This stay will be much broader than the statutory stay of proceedings that occurs when a company simply becomes bankrupt and is generally analogous to the comprehensive stay of proceedings found in CCAA proceedings.

Typically, once a receiver has realized on the assets of the debtor, it will seek to distribute proceeds to creditors in accordance with their entitlements and priority, following court approval. If the only recovery is to secured creditors, there may be no need for a claims process. If there are any surplus funds after satisfying all secured claims, the receiver may run a court-sanctioned claims process or seek the court's approval to assign the debtor into bankruptcy and have unsecured claims dealt with through bankruptcy proceedings (described in Section 4.1 above).

4.3 Priorities in Liquidation

4.3.1 What are the super-priority claims?

Secured creditors rank in priority to unsecured creditors in a liquidation; however, there are certain statutorily prescribed super-priority claims that will rank ahead of secured creditors.

The 2009 amendments to the BIA established a priority for certain workers (the priority does not apply to officers or directors of the debtor company), to a maximum of C$2,000 per employee, for unpaid wages (including vacation pay) earned up to six months before the appointment of a receiver or initial bankruptcy event. The priority is secured by a charge over the debtor company's current assets, which are essentially inventory and receivables. To the extent that a receiver or trustee pays the aggrieved worker, the secured claim is reduced accordingly.

The *Wage Earner Protection Program Act* establishes a program run by the federal government through which employees entitled to claim a priority for unpaid wages are compensated directly by the government, to a maximum of the greater of C$3,000 in actual unpaid wages or an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act* (which currently equals approximately C$3,300). The government is subrogated to the rights of the unpaid employee for amounts paid under this program, and receives a priority claim against the current assets of the debtor company in the amount of the compensation actually paid out, to a maximum amount of C$2,000 per employee. Any balance over such C$2,000 priority claim does not have priority over secured creditors.

The 2009 amendments to the BIA also established a priority for amounts deducted and not remitted and for unpaid regularly scheduled contributions (i.e., not special contributions or the underfunded liability itself) to a pension plan by creating a priority charge, equal to the amount owing, over all of the debtor company's assets.

The 2009 amendments to the CCAA effectively provided the same priorities for unpaid wages and unpaid pension contributions against proceeds realized in a CCAA sale, and also required that any plan of arrangement provide that such priority claims be satisfied.

Before distributions are made to unsecured creditors in an insolvency proceeding, certain statutorily mandated priority claims, such as employee deductions (i.e., income tax withholdings, unemployment insurance premiums and Canada Pension Plan premiums) must also be paid.

In addition to those listed above, there are a number of other federal and provincial statutory liens and deemed trusts that have priority over secured creditors outside of bankruptcy, but which are treated as ordinary unsecured claims following bankruptcy (e.g., liens for unremitted federal and provincial sales tax). CCAA liquidations and receivership proceedings are often converted into bankruptcy proceedings once the statutory super-priority claims and secured creditor claims are satisfied, in part to achieve a reversal of priorities.

4.3.2 What is the priority scheme after the super-priorities and secured creditors are satisfied?

The BIA sets out the priority scheme for distribution to unsecured creditors, primarily as follows:

1. The costs of administration of the bankruptcy;

2. A Superintendent of Bankruptcy's levy on all payments made by the trustee to creditors (which is currently 5% on the first C$1 million of distributions, and a sliding scale on amounts in excess of C$1 million);

3. Preferred claims, which include wage claims in excess of the statutory C$2,000 charge, secured creditors' claims in the amount equal to the difference between what they received and what they would have received but for the operation of the wage and pension super-priorities, and landlords' claims up to the maximum amounts prescribed by statute; and

4. Ordinary unsecured claims on a *pro rata* basis.

5. Going-Concern Sales

5.1 Can insolvent businesses be sold as a going-concern?

Although a going-concern sale can be affected by a trustee in bankruptcy or a privately-appointed receiver, a sale of an insolvent business on a going-concern basis will typically be conducted by a court-appointed receiver or through the CCAA or BIA proposal process.

5.2 What is involved in a receivership sales process?

To sell a business on a going-concern basis, a court-appointed receiver will typically request that the court approve a detailed marketing process for the assets of the company. The requirements for and timelines of the marketing process will vary depending on the nature of the business, the value of the assets, the rate at which the assets will depreciate in value through a sales process, and the realistic pool of potential purchasers. The court-appointed receiver will select the bidder with the best and highest offer, taking into account conditions of closing, timing of closing, the purchaser's ability to close and any potential purchase price adjustments, among other factors.

Unless specifically authorized by the court, the agreement of purchase and sale with the winning bidder will not be subject to overbids as is the case in the Chapter 11 stalking-horse process. While there is no statutory requirement for a stalking horse process in Canada, nonetheless, Canadian courts routinely establish a stalking horse process by court order and stalking horse sales are commonplace in Canada.

The receiver, on notice to interested persons, will then request that the court approve the agreement of purchase and sale and vest the assets in the purchaser free and clear of all liens and encumbrances. Liens and encumbrances that exist in the purchased assets will be preserved in the proceeds of sale with the same rank and priority as they had in the purchased assets. Net sale proceeds are typically held by the receiver pending the issuance of a "distribution order" of the court authorizing the receiver to disburse the funds to creditors in accordance with their entitlements. All interested parties are required to receive notice of the motion for the distribution order and disputes between creditors as to priority and allocation of funds are usually addressed at the distribution motion, rather than at the sale approval stage.

5.3 What is involved in a CCAA sales process?

Sales by the debtor while under CCAA protection have become a preferred method of realization in many cases. The debtor remains in possession of the assets, but approval and vesting orders are still available to give the purchaser the necessary comfort that it will acquire the purchased assets free and clear of any liens and encumbrances.

The CCAA sales process is similar to the receivership sales process, except the debtor itself controls the sales process, is the vendor, and is the party requesting the court's approval of a sales process and eventually the sale itself. Generally, the process is supported by the key stakeholders, who have significant influence over the debtor's sales process. The debtor will also require the support of its monitor if the sales process and sale are to be approved by the court. Courts also frequently approve the retainer of a financial adviser or investment bank to conduct the sales process on behalf of the debtor.

The proceeds of the sale may be held by the monitor. As is the case with sales by court-appointed receivers, a vesting order will provide that creditors will have the same priority against the proceeds that they had against the assets, prior to the sale. Following court approval and closing, the court will authorize the distribution of the proceeds to creditors in accordance with their priorities. If there are surplus funds available for unsecured creditors following payment to secured creditors, it is common to bankrupt the debtor and have any surplus proceeds distributed by a trustee in bankruptcy in accordance with the priorities set out in the BIA, discussed in Section 4.3 above. The debtor company may also elect to file a plan of arrangement or compromise that provides for the distribution of proceeds of sale to unsecured creditors. Plans such as those are commonly referred to as distribution plans.

5.4 Can you credit bid in Canada?

There is no equivalent in the CCAA to s. 363(k) of the U.S. Code, which expressly authorizes a secured creditor to credit bid its debt. However, courts have authorized credit bids in Canada. Unlike in the U.S., there is no case law in Canada addressing a collateral or administrative agent's contractual right to credit bid on behalf of a syndicate of lenders and bind dissenting lenders.

6. Cross-Border Insolvencies

Like Chapter 11, the CCAA provides for the coordination of cross-border insolvencies. Historically, Canadian courts have coordinated proceedings in Canada with related party proceedings in other jurisdictions, communicated with foreign courts in accordance with established guidelines and harmonized procedural matters pursuant to agreed upon and court approved cross-border protocols. Canadian courts have also recognized the orders of a foreign court in Canada, including a recognition of a foreign stay of proceedings or a foreign court order approving a plan of arrangement. This typically occurred where the principal business of the debtor was in a foreign jurisdiction but the debtor had some assets and/or creditors in Canada and thus needed the Canadian court's assistance in giving effect to the overall restructuring or liquidation. Canadian courts have recognized orders authorizing DIP financing, stalking horse going-concern sales and a host of other relief in foreign proceedings.

The 2009 amendments included comprehensive provisions for the recognition of foreign insolvency proceedings. These provisions, incorporated in both the CCAA and BIA, are based on the UNICITRAL Model Law on Cross-Border Insolvency, similar to Chapter 15 of the U.S. Code. The majority of coordinated cross-border proceedings for large commercial insolvencies are conducted under the cross-border provisions of the CCAA rather than the BIA. Accordingly, the CCAA provisions are summaries below.

6.1 What's the purpose of the Model Law?

The purpose of Model Law, as adopted in the CCAA and BIA, is to promote:

- cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

- greater legal certainty for trade and investment;

- the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

- the protection and maximization of the value of debtor company's property; and

- the rescue of financially troubled businesses to protect investment and preserve employment.

6.2 Who may commence a recognition proceeding?

A foreign representative may apply to a Canadian court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.

6.3 What is a foreign representative?

A foreign representative is a person or body (including one appointed on an interim basis) who is authorized, in a foreign proceeding in respect of a debtor company, to (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding.

As a result of the second criteria, a debtor company itself can be a foreign representative, provided it has been duly authorized to act as such by the supervising court in the foreign country. Among other things, a foreign representative is required to inform the Canadian court of any substantial change in the status of the recognized foreign proceeding and any substantial change in the foreign representative's authority to act.

6.4 What is a foreign proceeding?

A foreign proceeding is a judicial or an administrative proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

6.5 What evidence needs to be before the Canadian court in a recognition proceeding?

In connection with application for recognition, there are certain basic documentary requirements: (a) a certified copy of the instrument that commenced the foreign proceeding (typically a court order); (b) a certified copy of the instrument authorizing the foreign representative to act as foreign representative (typically a court order); and, (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative. In the absence of the evidence described above, the court has discretion to accept other evidence satisfactory to it.

6.6 What discretion does the Canadian court have in recognizing the foreign proceeding?

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and the applicant is a foreign representative in respect of that foreign proceeding, the court <u>shall</u> make an order recognizing the foreign proceeding. There is no discretion in this regard. However, the court does have discretion as to what relief is granted in connection with the recognized proceedings (discussed below in

Section 6.9). In addition, the order granting recognition will specify whether the proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".

6.7 What is a foreign main proceeding?

A foreign proceeding will be a "main" proceeding if it is taking place in the jurisdiction that is the centre of the debtor's main interests (the "COMI"). There is a presumption that the debtor company's registered office is its COMI. Provided there are no insolvency proceedings in Canada with respect to the debtor company the court "shall" make an order, subject to any terms and conditions it considers appropriate, granting a stay of proceedings until otherwise ordered by the court, and restraining the debtor company from selling assets outside the ordinary course of business. Such recognition orders must be "consistent" with any order that may be made under the CCAA.

6.8 What is a foreign non-main proceeding?

A foreign non-main proceeding is defined in the negative: a foreign non-main proceeding is a foreign proceeding that is not a foreign main proceeding. If the court recognizes the foreign proceeding as a "non-main" proceeding the stay is not automatic, but the court may, at its discretion, order a stay if it is necessary for the protection of the debtor's property or is in the interest of creditors. Chapter 15 takes a different approach to the recognition of foreign non-main proceedings, requiring that the debtor at least have an "establishment" in the foreign jurisdiction. Accordingly, under the analogous U.S. law a foreign proceeding could be neither a main proceeding or a non-main proceeding. Under Canadian law, it must be one or the other.

6.9 What obligations does the Canadian court have once recognition has been granted?

If an order recognizing a foreign proceeding is made, the court is to cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation include, among other things, the appointment of a person to act at the direction of the court (typically referred to as an "information officer" having similar reporting obligations as a monitor in a CCAA case); and the coordination of concurrent proceedings regarding the same debtor company.

6.10 What rules can the court apply?

Nothing in the CCAA prevents the court, on application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of the CCAA.

Also, nothing in the CCAA prevents the Canadian court from refusing to do something that would be contrary to public policy. Under Chapter 15 of the US Code, the analogous provision refers to anything that is "manifestly" contrary to public policy. This suggests that the US courts are directed to be even more accommodating than their Canadian counterparts, when called upon to determine what is contrary to public policy.