THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

Examen obligatoire de la *Loi sur la faillite et l'insolvabilité* et de la *Loi sur les arrangements avec les créanciers des compagnies*

LA SECTION DU DROIT DE LA FAILLITE, DE L'INSOLVABILITÉ ET DE LA RESTRUCTURATION ET L'ASSOCIATION CANADIENNE DES CONSEILLERS ET CONSEILLÈRES JURIDIQUES D'ENTREPRISES DE L'ASSOCIATION DU BARREAU CANADIEN

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500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél: 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

AVANT-PROPOS

L'Association du Barreau canadien est une association nationale qui regroupe 37 500 juristes, dont des avocats, des notaires, des professeurs de droit et des étudiants en droit dans l'ensemble du Canada. Les principaux objectifs de l'Association comprennent l'amélioration du droit et de l'administration de la justice.

Le présent mémoire a été préparé par la Section nationale du droit de la faillite, de l'insolvabilité et de la restructuration et par l'Association canadienne des conseillers et conseillères juridiques d'entreprises de l'Association du Barreau canadien, avec l'aide de la Direction de la législation et de la réforme du droit du bureau national. Ce mémoire a été examiné par le Comité de la législation et de la réforme du droit et est approuvé à titre de déclaration publique de la Section du droit de la faillite, de l'insolvabilité et de la restructuration et de l'Association canadienne des conseillers et conseillères juridiques d'entreprises de l'Association du Barreau canadien.

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Examen de la LFI et de la LACC

I. SOMMAIRE

L'Association du Barreau canadien (ABC) est heureuse de formuler des observations sur l'Examen obligatoire par Industrie Canada de la *Loi sur la faillite et l'insolvabilité* (LFI) et de la *Loi sur les arrangements avec les créanciers des compagnies* (LACC) publié le 16 mai 2014. L'ABC est une association nationale qui regroupe plus de 37 500 juristes, dont des avocats, des notaires québécois, des professeurs de droit et des étudiants en droit dans l'ensemble du Canada. Ses principaux objectifs comprennent l'amélioration du droit et de l'administration de la justice.

Les présentes observations sont le fruit du travail collectif de la Section nationale du droit de la faillite, de l'insolvabilité et de la restructuration de l'ABC et de l'Association canadienne des conseillers et conseillères juridiques d'entreprises de l'ABC (les Sections de l'ABC). Les Sections de l'ABC contribuent depuis longtemps aux réformes gouvernementales du droit de l'insolvabilité. Tout récemment, nous avons formulé des observations sur les modifications découlant du dernier examen quinquennal obligatoire de la LFI et de la LACC, en sus de l'étude réalisée en 2008 par le Comité sénatorial des banques sur la législation en matière de faillite et d'insolvabilité.

Nos observations sont structurées selon les rubriques du document de consultation.

Partie 1 – Protection des intérêts des consommateurs

Les Sections de l'ABC ne recommandent pas que la LFI soit modifiée de manière à prévoir une sûreté ou un droit prioritaire en faveur des consommateurs qui versent un dépôt ou paient à l'avance. La création par la loi d'une sûreté ou d'un autre droit prioritaire pourrait restreindre l'accès au crédit des détaillants et imposer un fardeau administratif aux syndics et aux séquestres.

Nous doutons de l'efficacité d'une nouvelle catégorie de réclamations prioritaires. Les biens d'un débiteur sont généralement entièrement grevés et les créanciers privilégiés dans le cadre d'une faillite recouvrent généralement peu d'argent, voire rien du tout. Toutefois, nous ne nous opposons pas à la création d'une réclamation prioritaire pour les dépôts ou les paiements d'avance au motif que les réclamations prioritaires devraient être payées avant les réclamations des autres créanciers dans une restructuration du débiteur.

Les Sections de l'ABC n'approuvent pas que l'on sanctionne les créanciers en conférant au syndic ou au tribunal le pouvoir de rejeter les réclamations des créanciers qui ne respectent pas les obligations imposées relativement aux prêts consentis à un débiteur avant qu'il ne devienne insolvable.

Partie II – Le principe du « nouveau départ »

La réaffirmation des obligations antérieures à la faillite pourrait compromettre le principe du nouveau départ et l'objectif de traiter les créanciers de rang égal de façon équitable. Nous nous demandons s'il existe un principe sain sur lequel s'appuyer pour permettre la réaffirmation des obligations antérieures à la faillite, à l'exception des obligations garanties, par un failli (libéré).

Les Sections de l'ABC estiment qu'il n'est pas nécessaire qu'un failli réaffirme ou adopte les ententes antérieures à la faillite car elles demeurent en vigueur après la faillite, sous réserve de leur résiliation par l'autre partie. Si on permet la réaffirmation des obligations libérées, nous estimons que cela devrait être fait au moyen d'une entente expresse.

Partie III – Exemptions pour les consommateurs

Nous appuyons généralement la modification de la LFI de manière à soustraire les sommes placées dans les régimes enregistrés d'épargne-études (REEE) des biens d'un débiteur susceptibles de distribution aux créanciers dans une faillite. Toutefois, des dispositions devraient prévoir que les fonds cotisés dans un REEE insaisissable sont appliqués à l'avantage du bénéficiaire du REEE et non pas versés au(x) souscripteur(s) (failli(s)).

De plus, nous recommandons que le capital investi dans un régime enregistré d'épargne-invalidité (REEI) ne fasse pas partie des biens d'un débiteur susceptibles de distribution aux créanciers dans une faillite de la même façon que les REEE et les fonds enregistrés de revenu de retraite (FERR).

Nous recommandons le maintien du système actuel de listes de biens insaisissables.

Partie IV – Traitement des prêts étudiants en cas de faillite

Bien que nous croyions qu'il convient de prévoir une période d'attente dans la LFI de manière à ce que les étudiants ne puissent pas immédiatement recourir au processus de faillite pour se libérer des prêts étudiants, la période d'attente actuelle impose un fardeau trop lourd à de nombreux débiteurs. Cinq ans suffisent pour dissuader les étudiants n'éprouvant pas de difficultés financières de se servir de la faillite comme moyen de libération. La période ouvrant droit à la

libération devrait être calculée à compter de la date à laquelle le débiteur a étudié pour la dernière fois dans le programme pour lequel la libération relative au prêt étudiant financé par l'État a été accordée.

Nous recommandons cependant l'élimination de la période d'attente pour la libération des prêts étudiants financés par l'État pour cause de préjudice. À tout le moins, cette période devrait être réduite à un ou deux ans.

Nous recommandons également que le par. 178(1.1) soit modifié de manière à permettre au tribunal d'ordonner la libération du prêt étudiant, en tout ou partie, suivant les conditions qu'il impose.

Partie V – Enjeux commerciaux

Droits de propriété intellectuelle

Nous recommandons que la LFI et la LACC soient modifiées de manière à prévoir une définition de propriété intellectuelle (PI) et que la PI soit définie largement de façon à viser toutes les formes de PI, enregistrées ou non, susceptibles de licences.

Nous recommandons que le tribunal soit tenu de tenir compte expressément des droits de l'autre partie ou des autres parties, y compris le propriétaire de toute PI licenciée.

En ce qui concerne les droits des titulaires de licences dans d'autres instances, nous recommandons ce qui suit : a) la LFI et la LACC devraient être modifiées de façon à prévoir que les droits de licence ne peuvent pas être « purgés » lors d'une vente de PI par un débiteur; b) la LFI devrait permettre au séquestre au sens du par. 243(2) ou au syndic de faillite de s'abstenir d'exécuter/rejeter les conventions de licence et prévoir l'effet de l'inexécution ou du rejet sur le titulaire de licence; c) la LFI devrait prévoir la vente de biens par un séquestre au sens du par. 243(2) ainsi que la compétence de la cour de purger les droits de licence.

Nous soutenons l'application de la LFI, concernant la vente par un syndic de biens assujettis à des droits de PI, aux ventes par un séquestre au sens du par. 243(2) de la LFI.

Promouvoir les restructurations

Les Sections de l'ABC approuvent le regroupement de la LFI, de la LACC et de la *Loi sur les liquidations et les restructurations* (LLR) en une seule loi sur l'insolvabilité applicable à toutes les procédures de liquidation pour insolvabilité (faillite ou liquidation) et de restructuration.

Dans le cadre des instances actuelles en vertu de la LACC, nous ne nous opposons pas à ce que le contrôleur joue un rôle plus actif, mais nous n'appuyons pas l'expansion de son rôle allant jusqu'à la résolution des différends de fond entre les parties prenantes dans le processus de restructuration. Il faut souligner que les honoraires professionnels du contrôleur et de ses conseillers constituent une partie importante des frais de litige.

Nous sommes d'avis qu'il n'est pas nécessaire d'obliger la nomination d'un comité des créanciers financé par le débiteur. Les Sections de l'ABC recommandent que l'on détermine si la nomination du contrôleur ou du syndic chargé de la proposition concordataire devrait être soumise à l'approbation des créanciers au début de la procédure de restructuration.

Nous recommandons qu'en plus des honoraires de l'administrateur de l'insolvabilité et de ses avocats, les honoraires professionnels de toutes les parties prenantes payés par le débiteur soient assujettis à l'approbation du tribunal.

Les Sections de l'ABC recommandent que les procédures prévues par la LACC empruntent la forme d'un dépôt réglementaire équivalant à un avis d'intention de faire une proposition. Cela éliminerait la nécessité d'un rapport préalable au dépôt. Subsidiairement, les renseignements figurant dans un tel rapport devraient être prescrits en fonction de la réparation sollicitée par le débiteur dans la demande initiale.

En ce qui concerne les arrangements fondés sur la LCSA, quoiqu'ils puissent constituer une solution de rechange souhaitable, nous estimons que la LACC confère une protection plus solide aux créanciers. Il n'est pas nécessaire que les procédures fondées sur la LACC soient plus coûteuses qu'un arrangement fondé sur la LCSA qui est conçu pour accomplir le même objectif, particulièrement si des dispositions sont ajoutées à la procédure d'arrangement en vertu de la LCSA afin de protéger les intérêts des créanciers.

Nous recommandons la modification de la partie III de la LFI de manière à ce qu'elle comprenne une section III, qui s'appliquerait à une personne insolvable ou en faillite qui n'est pas une personne physique lorsque les réclamations contre elle n'excèdent pas 500 000 $.

Les Sections de l'ABC appuient la modification de la LFI de manière à conférer à la cour le pouvoir, dans les cas qui s'y prêtent, d'accorder au débiteur visé par des procédures fondées sur la section I plus de six mois pour déposer une proposition concordataire.

Les Sections de l'ABC sont préoccupées par le coût des comparutions nécessaires pour solliciter la prolongation du délai dans lequel un débiteur doit faire une proposition concordataire en vertu

de la section I de la LFI. Nous recommandons que l'on envisage de modifier la LFI afin de faire passer la prolongation maximale de 45 jours à 60 jours et d'exiger qu'après la prolongation initiale, le débiteur sollicite une prolongation seulement si X créanciers représentant Y pour cent des réclamations le demandent par écrit au moins Z jours avant l'expiration du délai, à défaut de quoi le délai de présentation d'une proposition serait automatiquement prolongé d'une période additionnelle de 60 jours.

Dans le cas d'une liquidation fondée sur la LACC, nous recommandons la modification de l'obligation, dans le cadre des fonctions du contrôleur, de rendre compte au tribunal si le contrôleur estime qu'il serait plus avantageux pour les créanciers si les procédures étaient entreprises en vertu de la LFI.

Améliorer l'équité

Nous recommandons que la LFI et la LACC soient modifiées de manière à ce que les dispositions relatives à la cession d'ententes correspondent aux dispositions relatives à la vente d'actifs et exigent que le tribunal soit convaincu que les réclamations des employés et les réclamations relatives aux pensions peuvent être payées et le seront.

Il n'est pas nécessaire de prévoir expressément le pouvoir d'autoriser le débiteur à effectuer des paiements pour cause de préjudice aux créanciers (ou aux employés) ni d'imposer des limites au pouvoir du tribunal de rendre une ordonnance autorisant (ou enjoignant) un paiement pour cause de préjudice dans la LACC ou la LFI.

Nous recommandons que les libérations de tiers soient possibles seulement dans les cas suivants :

- les parties à libérer sont essentielles à la restructuration;
- les réclamations à libérer sont raisonnablement liées à l'objet du plan et y sont nécessaires;
- le plan ne peut pas réussir sans les libérations;
- les parties visées par les réclamations faisant l'objet d'une libération offrent une contribution tangible et réelle au plan;
- le plan est à l'avantage du débiteur et des créanciers en général.

La LFI et la LACC devraient interdire l'octroi de primes, notamment de primes de rétention d'employés clés, aux administrateurs, aux dirigeants et aux employés apparentés au débiteur (ou aux administrateurs ou dirigeants du débiteur), sauf sur autorisation du tribunal. De plus, la LFI et la LACC ne devraient pas rendre les dirigeants et les administrateurs personnellement responsables de la rémunération des employés, y compris toute prime.

Les Sections de l'ABC s'opposent à toute modification qui restreindrait la capacité des créanciers de tirer profit d'un droit conféré par la loi à leur avantage. À notre avis, rien ne justifie que l'on restreigne ou élimine le droit des créanciers ou d'un syndic de faillite de solliciter un redressement pour abus.

Prévenir la fraude et les abus

Nous ne croyons pas qu'il soit approprié que la législation fédérale sur l'insolvabilité détermine si une personne peut siéger comme administrateur d'une société solvable.

Il ne convient pas à notre avis de priver une personne ayant une réclamation légitime ou un droit de compensation de la possibilité de réaliser cette réclamation ou d'exercer ce droit pour la seule raison que le créancier est apparenté au débiteur.

Insolvabilités transfrontalières

On devrait envisager de modifier la LFI et la LACC de manière à conférer à la cour le pouvoir de déterminer si les réclamations contre un débiteur prenant naissance en vertu d'une loi étrangère et n'étant pas liées à une obligation du débiteur devraient être reconnues.

Nous recommandons que le Canada attende les résultats du Groupe de travail de la CNUDCI sur le traitement des groupes d'entreprises dans un contexte d'insolvabilité transfrontalière avant d'apporter des modifications à la LFI ou à la LACC en la matière.

Nous estimons que lorsque des créanciers canadiens reçoivent un préavis de la reconnaissance d'un ressort étranger comme centre d'intérêts principaux (CIP) d'un débiteur canadien, toutes les parties prenantes devraient avoir la possibilité de présenter des observations sur la reconnaissance d'une instance étrangère et sur la réparation sollicitée.

Nous sommes d'avis qu'il ne conviendrait pas d'adopter les principes généraux et les critères régissant la reconnaissance des comités de créanciers non garantis (CCNG) étrangers dans les instances d'insolvabilité canadiennes ou de définir la portée de la participation de ces comités dans les instances d'insolvabilité canadiennes. Le tribunal dispose de suffisamment d'outils pour

faire en sorte que la participation des CCNG dans les instances d'insolvabilité canadiennes ne soit pas perturbatrice ni n'entraîne des frais inutiles pour d'autres parties prenantes. Nous n'appuyons pas d'interdiction législative aux CCNG de participer aux instances d'insolvabilité canadiennes.

Partie VI – Questions administratives

Les Sections de l'ABC ne s'opposent pas à ce que la LFI soit rebaptisée la Loi sur l'insolvabilité. Le changement du titre de la loi serait particulièrement approprié pour une seule loi unifiée en matière d'insolvabilité ou pour codifier l'état du droit concernant les séquestres chargés de s'occuper des débiteurs insolvables.

Bien que nous soyons en faveur d'une loi sur l'insolvabilité unifiée, certaines dispositions de la LACC visent à faciliter la restructuration d'entreprises plus grandes et plus complexes. Il faut veiller à ce que les distinctions nécessaires quant aux mesures dont peuvent se prévaloir les débiteurs en fonction de leur taille puissent être établies dans une loi sur l'insolvabilité consolidée.

La fusion de la LFI et de la LACC donnerait au législateur l'occasion de s'attaquer aux coûts sans cesse croissants du régime d'insolvabilité prévu par la LACC en éliminant l'obligation pour le débiteur de solliciter auprès du tribunal l'autorisation d'intenter des procédures de restructuration en vertu de la LACC.

Dans le cadre d'une proposition concordataire visée par la section II, nous n'estimons pas qu'il y ait des raisons convaincantes empêchant l'accommodement des dettes commerciales.

Nous ne nous opposons pas à l'application large de la LFI et de la LACC aux fiducies.

Les Sections de l'ABC appuient les modifications codifiant les pouvoirs d'un séquestre au sens du par. 243(2) de la LFI. Nous appuyons également la modification à l'art. 215 de la LFI de manière à inclure les séquestres au sens du par. 243(2) de la LFI.

Les Sections de l'ABC ne s'opposent pas en principe à la modification de la LFI de façon à prévoir l'application de l'ordonnancement en faveur du syndic afin de permettre au tribunal, sur demande du syndic, d'obliger un créancier garanti ayant à sa disposition plusieurs actifs à recourir à ces actifs d'une manière qui maximise les biens à la disposition des créanciers. La question qui se pose en matière de faillite consiste à savoir si l'ordonnancement peut s'appliquer en faveur des créanciers non garantis ou du syndic.

Nous appuyons la modification de l'art. 244 de la LFI de manière à prescrire un préavis par toute personne désirant exécuter un droit sur la totalité ou la quasi-totalité des biens d'un débiteur insolvable afin de satisfaire à une réclamation pour dette.

Nous n'appuyons pas la réaffectation des comptes à un débiteur sur dépôt d'un avis d'intention de faire une proposition ou d'une proposition dans les cas où l'ARC a fait tout ce qui était requis pour effectuer le transfert du titre de propriété des comptes. Les Sections de l'ABC appuieraient toutefois la modification de la LFI de manière à prévoir que le transfert involontaire du titre de propriété peut constituer une préférence ou un transfert à une valeur inférieure à sa valeur réelle.

Partie VII – Questions techniques

Il n'est pas nécessaire de prévoir la compétence précise d'adjuger les frais contre un débiteur dans le cadre d'une audience de libération car les tribunaux possèdent déjà cette compétence en vertu du par. 197(1) de la LFI.

Les Sections de l'ABC appuient la modification du par. 204.3(1) de la LFI afin de préciser le pouvoir du tribunal de rendre une ordonnance d'indemnisation d'une victime d'infraction en matière de faillite ou de sa succession pour tout dommage ou toute perte.

Nous ne nous opposons pas à la modification du par. 135(4) de manière à supprimer l'obligation, par la personne dont la réclamation a été acceptée ou rejetée par le syndic en vertu du par. 135(1.1) ou (2), de solliciter la prolongation du délai d'appel dans les 30 jours.

Les Sections de l'ABC ne s'opposent pas à la modification de la LFI de manière à permettre aux organismes de réglementation en valeurs mobilières ou aux organismes d'indemnisation des clients de présenter une demande en vertu de l'art. 43 à l'égard des coutiers en valeurs mobilières assujettis à la partie XII.

Partie VIII – Autres questions

Nous ne croyons pas qu'il existe un principe sain justifiant l'application d'un délai de prescription provincial aux procédures d'évitement par un syndic de faillite en vertu de la LFI. L'application de délais de prescription provinciaux pourrait entraîner l'interdiction législative des procédures en matière d'évitement prévues à l'avantage des créanciers lors de longues instances fondées sur la LACC au moment du dépôt d'un plan permettant que de telles procédures soient intentées.

Nous recommandons que l'art. 135 de la LFI soit modifié de manière à prévoir la détermination des réclamations produites contre un débiteur lorsqu'un séquestre au sens du par. 243(2) est

chargé de s'occuper des biens du débiteur. Nous recommandons que les art. 81.5 et 81.6 soient modifiés de manière à prévoir que les réclamations au titre de la sûreté pour pension soient établies au moyen du dépôt d'une preuve de réclamation suivant la formule prescrite et que le formulaire 31 soit modifié en conséquence.

Nous recommandons que la LFI soit modifiée de manière à prévoir que la nomination d'un séquestre au sens du par. 243(2) constitue un cas initial de faillite.

Les Sections de l'ABC recommandent que les dispositions de la LFI applicables aux ententes avec les particuliers faillis s'appliquent à tous les faillis.

Nous recommandons l'abrogation du par. 47.2(2) de la LFI.

Les dispositions relatives au rang des créanciers de la LFI devraient s'appliquer aux créanciers en général, et les critères prévus dans la LFI et dans la LACC devraient être élargis de manière à englober les facteurs que le tribunal estime pertinents pour la classification des créanciers en fonction des intérêts communs.

II. INTRODUCTION

L'Association du Barreau canadien (ABC) est heureuse de formuler des observations sur l'Examen obligatoire par Industrie Canada de la *Loi sur la faillite et l'insolvabilité* (LFI) et de la *Loi sur les arrangements avec les créanciers des compagnies* (LACC) publié le 16 mai 2014. L'ABC est une association nationale qui regroupe plus de 37 500 juristes, dont des avocat, des notaires québécois, des professeurs de droit et des étudiants en droit dans l'ensemble du Canada. Ses principaux objectifs comprennent l'amélioration du droit et de l'administration de la justice.

Les présentes observations sont le fruit du travail collectif de la Section nationale du droit de la faillite, de l'insolvabilité et de la restructuration de l'ABC et de l'Association canadienne des conseillers et conseillères juridiques d'entreprises de l'ABC (les Sections de l'ABC). Les Sections de l'ABC contribuent depuis longtemps aux réformes gouvernementales du droit de l'insolvabilité. Tout récemment, nous avons formulé des observations sur les modifications découlant du dernier examen quinquennal obligatoire de la LFI et de la LACC, en sus de l'étude réalisée en 2008 par le Comité sénatorial des banques sur la législation en matière de faillite et d'insolvabilité.

Nos observations sont structurées selon les rubriques du document de consultation.

III. PROTECTION OF CONSUMER INTERESTS

2.1 Consumer Deposits

The discussion paper notes that a retailer may receive payment, in whole or in part, before providing the contracted goods or services to a customer. However, if that same retailer becomes bankrupt or a receiver is appointed over the retailer's assets before those goods or services are delivered, the customer is an unsecured creditor for the prepaid amount. The issue of customer pre-payments or deposits can also arise in reorganization proceedings[1] and may extend beyond the retail sector of the economy.

Two options are available to protect the interests of customers who provide deposits or pre-payments in an insolvency proceeding: (1) a consumer charge or other statutory priority interest in the debtor's property akin to that provided for environmental, employee remuneration, pension and some supplier-related claims; or (2) amending s. 136 of the BIA to provide for a preferred claim in a bankruptcy.

The CBA Sections do not recommend amending the BIA to provide a priority charge or interest in favour of consumers who provide deposits or pre-payments. Creating a statutory charge or other priority interest may restrict retailers' access to credit and impose an administrative burden on trustees and receivers. There is not sufficient data to suggest that a priority charge or interest is necessary. Customers often already have recourse where a deposit or prepayment is made by credit card (these credit card charges can often be reversed), and the court has jurisdiction to impose a constructive trust as a remedy for unjust enrichment.[2]

We echo the discussion paper in questioning the effectiveness of a new category of preferred claim. The property of a debtor is typically fully encumbered and there are often little or no recoveries for preferred creditors in a bankruptcy. However, we do not oppose the creation of a preferred claim for deposits or pre-payments on the basis that preferred claims would have to be paid in priority to other creditors in a reorganization of the debtor.[3]

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1 See, for example, *Livent Inc. (Re),* 1998 CanLII 14718 (ON SC) aff'd, 1999 CanLII 3800 (ON CA).

2 See *Barnabe v. Touhey*, 1994 CanLII 7264 (ON SC). The imposition of a constructive trust was overturned on appeal, but the Court of Appeal found that a constructive trust could be imposed in a bankruptcy: 1995 CanLII 1672 (ON CA)

3 See BIA, s. 60(1).

In proceedings under the CCAA and receiverships, it is possible for the court to authorize a debtor company to honour obligations such as deposits and pre-payments.[4]

2.2 Responsible Lending

The CBA Sections do not support sanctioning creditors by giving the trustee or the court jurisdiction to disallow the claims of creditors who do not meet duties imposed in connection with pre-insolvency loans to a debtor. Disallowing a claim against an insolvent consumer debtor is unlikely to provide a strong incentive to alter lending practices.

There does not appear to be any empirical evidence of a direct link between the behaviour of lenders and consumer insolvency. As noted in the discussion paper, the Consumer Insolvency Rate peaked during the economic downturn in 2009 and has been trending down in subsequent years, indicating that the rates of consumer insolvency may be more directly linked to economic conditions than the behaviour of lenders in extending credit.[5]

While the CBA Sections appreciate the policy underlying the imposition of a responsible lending regime, we believe that imposition on creditors is beyond the scope of the BIA. The main focus of the BIA vis-à-vis consumer debtors ought to be their rehabilitation. Banks, credit unions and other lenders are held to strict provincial, territorial and federal regulations that include detailed disclosure of the cost of borrowing and advice on other possible perils of excessive borrowing.

IV. THE "FRESH START" PRINCIPLE

3.1 Licence Denial Regimes

There are disparate viewpoints among the CBA Sections on License Denial Regimes. The Canadian Corporate Counsel Association of the CBA does not support the following.

The Bankruptcy, Insolvency and Restructuring Law Section of the CBA recommends that the BIA be amended to expressly prohibit the denial, revocation, suspension or refusal to renew a licence based solely on non-payment of a debt that is subject to discharge or compromise. Fresh starts should not be limited to driver's licences or vehicle registrations, but should extend to all licences, including to practice a profession.

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4 See *The Futura Loyalty Group Inc. (Re),* 2012 ONSC 6403 (CanLII)

5 Other factors such as marriage breakdown, gambling, etc. also contribute to consumer insolvency.

Licence denial regimes may be used to enforce collection of monetary obligations, even though the debts are stayed and then discharged or compromised through an insolvency process. These regimes may, for example, permit a creditor to deny a driver's licence or vehicle registration to a debtor unless they pay an obligation that is discharged. A fresh start for the honest but unfortunate debtor and fair treatment of creditors of the same class or rank are fundamental policy objectives of the BIA.[6] Licence denial regimes thwart these policy objectives.

If the government wishes to ensure that the debtor pays certain debts post-bankruptcy, s.178 of the BIA should be amended to include any such debts.

3.2 Affirmation Agreements

The affirmation of pre-bankruptcy obligations may undermine the fresh start principle and the objective of treating creditors of equal rank on an equitable basis. However, there are situations where it is desirable for a bankrupt to voluntarily agree to continue to pay an obligation that would otherwise be discharged, for example, a car lease or the mortgage on a principal residence. In 2009, the BIA was amended to restrict the ability of a person to terminate an agreement, including a security agreement or lease, with a bankrupt individual.[7] A secured lender is prohibited from terminating a security agreement on the basis that an individual is insolvent or has become bankrupt and a lessor is prohibited from terminating a lease on the basis of failure to pay pre-bankruptcy obligations.

Section 84.2 of the BIA does not prevent the termination of security agreements on the basis of non-payment of the secured debt. The issue with the affirmation of security agreements is whether the bankrupt ought to be liable for the deficiency between the value of the collateral as at date of bankruptcy and the debt secured.[8] For secured creditors in a bankruptcy, the policy appears to permit them to require the payment by the bankrupt of the entire secured debt as a condition of retaining the collateral.

The CBA Sections question whether there is a sound policy basis to permit the affirmation of pre-bankruptcy obligations, other than secured obligations, by a (discharged) bankrupt. In 2009, the decision was made to restrict the ability of parties to contracts with an individual bankrupt to

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6 See, for example, *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited,* 2013 ONCA 769 (CanLII).

7 See BIA, s. 84.2.

8 See *CIBC Mortgage Corp. v. Coleski*, 1999 CanLII 3116 (NS SC)

exercise their contractual remedies. The policy objective underlying s. 84.2 of the BIA appears to permit individual bankrupts to maintain leased property without having to pay pre-bankruptcy obligations. It appears that if the debtor wishes to retain the use of property pledged as collateral to a secured creditor, arrangements must be made with the secured creditor and may include the payment of pre-bankruptcy obligations. The CBA Sections believe there is no need for a bankrupt to affirm or adopt pre-bankruptcy agreements as they continue in force post-bankruptcy subject to being terminated by the other party.

If the affirmation of discharged obligations is permitted, we suggest it be done by way of an express agreement. No debtor should be required, as a condition of affirming an obligation, to pay a debt that is discharged. If the BIA is amended to permit the affirmation of obligations, we recommend that the BIA: (a) require any affirmation to be in writing and made within a fixed period after the bankrupt is discharged; and (b) prohibit the other party to an affirmed obligation from recovering debts which are discharged.

Given the policy underlying the BIA that secured creditors are able to enforce their security notwithstanding a bankruptcy on the basis of non-payment of the secured debt, we recommend that these conditions on affirmation of agreements not apply to security agreements.

There is a gap in the leases and utilities provisions of the BIA for post-bankruptcy payments. Section 84.2 prohibits the termination of agreements based on the non-payment of pre-bankruptcy payments and permits the lessor or utility to require payment post-bankruptcy. However, the claims against a bankrupt that are discharged include claims arising during the period between the date of bankruptcy and discharge.[9] Where a bankrupt retains the use of leased property or utilities post-bankruptcy, claims for post-bankruptcy use should not be discharged. We recommend amending s. 178 accordingly.

V. CONSUMER EXEMPTIONS

4.1 Registered Savings Products

In 2009, Registered Retirement Savings Plans (RRSPs) and RRIFs were exempted from the property of the debtor available for distribution to creditors in a bankruptcy, subject to a claw-back of any contributions made in the 12 months prior to bankruptcy. The goal was to protect

[9] BIA, s. 121(1).

retirement savings in the same manner as registered pension plans are exempt. A number of provinces have since made RESPs exempt.

In the last review of the BIA and CCAA, the Senate Committee on Banking, Trade and Commerce recommended the BIA be amended to exclude amounts in RESPs from the property of a debtor subject to distribution to creditors in a bankruptcy.[10] The CBA Sections generally supports this recommendation. However, provisions should be included to ensure that funds contributed to an exempt RESP are applied for the benefit of the beneficiary of the RESP and not paid out to the (bankrupt) subscriber(s).

In addition, we recommend that the capital in an RDSP be excluded from the property of a debtor available for distribution to creditors in a bankruptcy on the same terms as RESPs and RRIFs. Any payments made to insolvent persons out of an RDSP for their benefit, should be treated as income for purposes of calculating surplus income obligations.

4.2 Federal Exemption Lists

Although the adoption of a federal exemption list would promote uniformity across Canada, it may not take into account the diversity that exists across the provinces. We recommend that the current system be maintained. While not ideal, it has operated effectively and ensures that every debtor within a province is treated fairly, consistently and predictably.

The BIA exempts certain property of the bankrupt from distribution to creditors. The policy recognizes that a bankrupt requires essentials such as clothing, household goods and property necessary to earn a living. The BIA does not establish a comprehensive list of property that is exempt for distribution among creditors. The BIA does provide, however, that property that is exempt from execution or seizure under provincial law is excluded from the property of the bankrupt. Provincial laws governing exempt property from execution vary across Canada.[11]

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10 Senate Committee on Banking, Trade and Commerce, Debtors and Creditors Sharing the Burden: *A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003).

11 See Alysia Davies, *Federal Exemptions in Bankruptcy: Canada and Three Other Countries,* Library of Parliament (2008).

VI. TREATMENT OF STUDENT LOANS IN BANKRUPTCY

6.1 Discharge of Student Loan Provisions

The CBA Sections believe it is appropriate to have a waiting period in the BIA so that students cannot immediately use the bankruptcy process to discharge student loans, and then proceed to good paying jobs. The difficulty is in determining the length of the waiting period. In 1997, the BIA was amended to create a two-year waiting period from the time a student ceased to be a full or part-time student. In 1998, the waiting period was increased to ten years, which proved to be unduly lengthy. In 2009, the BIA was further amended to reduce the waiting period from ten to seven years or, in the case of significant financial hardship, from ten to five years. It is our view that these waiting periods impose too high of a burden on many debtors.

Students currently have access to interest relief on their student loans for at least five years after they end their studies. In all Canadian provinces, a debtor with government-funded student loans may obtain at least five years of relief from paying interest on their government-funded student loans. All provinces except Quebec provide a longer period of interest relief (up to 15 years) and the possibility to fully extinguish the debt at the end of the relief period. Reducing the waiting period under the BIA from seven years to five years would help to integrate these two systems. Five years is sufficient to deter students who do not have financial difficulty from using bankruptcy as a way to discharge. It should also be made clear in the BIA that the time periods for relief should be calculated from the date the debtor was last a student in the program for which the government-funded student loan relief was granted.

6.2 Hardship Discharge

The CBA Sections recommend that a waiting period for a release of government-funded student loans on the grounds of hardship be eliminated, or at least reduced to a shorter period such as one or two years. However, the court should have explicit jurisdiction to make any discharge of student debt on the grounds of hardship subject to any conditions the court may deem appropriate.

Under the BIA, a release from government-funded student loans can be granted on grounds of hardship if the debtor satisfies the court that they acted in good faith in connection with the student loan debt and will continue to experience financial difficulties rendering them unable to pay the debt. The decision to grant relief on the grounds of hardship is in the discretion of the court on a case-by-case basis. There is currently a waiting period of 5 years before an application

for relief on the grounds of hardship can be made. The CBA Sections question whether there is a valid policy basis to impose a waiting period on a hardship discharge. In granting a hardship discharge, the court must determine that the bankrupt is experiencing such financial difficulty that repayment of the student debt will be impossible. The waiting period seems somewhat arbitrary.

6.3 Partial Release of Debts

The CBA Sections recommend that s. 178(1.1) be amended to allow the court to order that student debt is discharged, in whole or in part, on terms or subject to conditions the court may impose.

Until now, courts have held that they do not have the authority to order a release of part of the student loan debt. The relief is either all or nothing. As any relief from a student loan obligation is left to the discretion of the court, it would be equitable and reasonable to permit a court, in appropriate circumstances, to order that part but not all of a particular student loan is released or that the discharge is subject to terms imposed by the court.

We do not believe it is necessary to list the factors the court should consider in a hardship application. While it may provide some guidance, the court's discretion and its analysis of whether the bankrupt has acted in good faith in connection with the student loan debt is sufficient.

VII. COMMERCIAL ISSUES

1. Encouraging Innovation through Intellectual Property Rights

The CBA Sections believe that the following amendments should be considered to improve the provisions of the BIA and CCAA that deal with intellectual property (IP) rights:

> **Definition of "Intellectual Property"**: The CCAA and BIA allow for the ongoing use of licensed IP where the license is disclaimed, but there is no definition of IP in either statute. We recommend that the BIA and CCAA be amended to include a definition of IP and that IP be broadly defined to include all forms of IP, registered or otherwise, that may be subject to a license.
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> **Assignment of IP License**: We recommend that the court be required to specifically consider the interests of the other party(ies), including the owner of any licensed IP. The provisions of the CCAA and BIA that permit the forced assignment of rights and obligations arising under agreements apply to IP licenses. It is generally accepted that the court is not restricted by any prohibitions on assignment contained in the agreement. In the IP context, this could give rise to issues if a license is granted on

terms that permit the owner of the IP to control who has rights to its IP. A debtor/licensee could, for example, assign a license to manufacture a product containing a prohibition or restriction on assignment to a competitor of the owner of the IP without the owner's consent. In considering whether to authorize the assignment, the court is required to consider whether it would be appropriate to assign the rights and obligation arising under the agreement to the proposed assignee.

Rights of Licensee in Other Proceedings: There have been cases where the court has found that IP can be vested in a purchaser free and clear of a licensee's contractual rights. This has the practical effect of terminating the licensee's rights to use the IP. Given the 2007 amendments, there does not seem to be a sound policy reason why a party to a license to use IP should be subject to the possibility that this right could summarily be terminated by the insolvency of the licensor depending on the insolvency proceeding to which the debtor is subject.

The CBA Sections recommend:

a) the BIA and CCAA be amended to provide that license rights cannot be "vested out" in any sale of IP by a debtor;

b) the BIA should include the ability of a receiver within the meaning of s. 243(2) or a Bankruptcy Trustee to not perform/disclaim license agreements and the effect of non-performance/disclaimer on the licensee;

c) the BIA should contemplate the sale of property by a Receiver within the meaning of s. 243(2) and the jurisdiction of the Court to vest out license rights.

Receivership: We support the application of the BIA on the sale by a Trustee of property subject to IP rights to sales by a Receiver within the meaning of s. 243(2) of the BIA. There is no compelling reason why the owners of IP should not to be afforded the same protection in a receivership as they are afforded in a bankruptcy.

Other Intellectual Property Rights: The CBA Sections endorse the adoption of protections similar to those afforded to the holders of copyright and patent rights to the holders of other intellectual property rights.

2. Encouraging Restructuring

2.1 Streamlining Companies' Creditors Arrangement Act Proceedings

2.1.1 Initial Orders

The Initial Order granted in CCAA proceedings has become "standardized" and Model or Template Initial CCAA Orders have been adopted in many provinces. The CBA Sections endorse the consolidation of the BIA, CCAA and the *Winding-up and Restructuring Act* (WURA) into a single

Insolvency Act applicable to all insolvent liquidation (bankruptcy or liquidation/winding-up) and reorganization proceedings.

To streamline CCAA proceedings, we recommend proceedings under the consolidated act (or the CCAA if there is no consolidation) be commenced by an administrative filing akin to the Notice of Intention to Make a Proposal under Part III, Division I of the BIA. There is no demonstrated need for costly applications to a court for an initial order under the CCAA. We also recommend that the consolidated act (or the CCAA) specify the relief that would automatically arise on the commencement of CCAA proceedings with any additional relief being available only on application to the court after the CCAA proceeding is commenced.

2.1.2 Claims Process

We share the concerns on the cost of CCAA proceedings. For determination of claims, the CCAA provides that: the quantum of a creditor's claim is determined by reference to the BIA or WURA; and, if a claim is disputed by the debtor, the quantum of a claim is determined by the court. While procedures to determine disputed claims vary in practice, the basic process tends to be consistent and provides for: filing proofs of claim; review and initial determination of claims by the monitor or a claims officer; and appeals to the court from the decision of the monitor or claims officer.

The CBA Sections support the consolidation of the BIA, the CCAA and WURA into a single Insolvency Act. A consolidated Act would include a procedure to determine disputed claims. Consideration should be given to a claims process for the debtor to identify the claims and the quantum it will accept, and for creditors to be required to take steps only where they are not identified by the debtor as a creditor or they disagree with the quantum of their claim identified by the debtor.

2.1.3 Court Applications

The CCAA reorganization regime should not be based on a few high-profile CCAA proceedings. The amount of litigation in certain CCAA proceedings is often the result of the complexity of the proceeding and the issues involved, rather than the reorganization simply proceeding under the CCAA. Complex insolvency proceedings, whether under the CCAA or BIA, will often be litigation-intensive and, for that reason, expensive.

The CBA Sections do not oppose the monitor taking on a more active role in the CCAA proceedings. However, professional fees of the monitor and its advisors are a significant part of

the cost of litigation. In many CCAA proceedings the role of the monitor has evolved and expanded to the point that the monitor is involved in the debtor's day-to-day business.

We do not support the role of the monitor expanding to include the resolution of substantive disputes between stakeholders in the reorganization process. The function of the monitor is to be the eyes and ears of the court, oversee the CCAA process, and provide information to the court and creditors.

Authorizing steps to be taken by the debtor with the consent of the monitor will not necessarily reduce the frequency of court attendance in complex reorganization proceedings. Even where summary procedures are available, stakeholders often seek the court's stamp of approval. We believe, however, that certain matters should not necessarily require seek court approval. For example, where other parties to an agreement do not object to the assignment of the agreement, there should be no need for an order authorizing the assignment.[12]

2.2 Balancing Competing Interests

2.2.1 Role of Unsecured Creditors

Given the role played by the monitor and the proposal trustee, we do not believe it is necessary to mandate the appointment of a committee of creditors funded by the debtor. Every effort must be made to ensure that monitors and proposal trustees are and appear to be independent to ensure all stakeholders have confidence in the reorganization regime. The CBA Sections recommend considering whether the appointment of the monitor or proposal trustee should be subject to approval by creditors early in the reorganization proceeding.

2.2.2 Acting in Good Faith

The CBA Sections do not support including in the CCAA (or the BIA) an obligation on parties to act in good faith. An obligation on stakeholders, particularly creditors, to act in good faith will give rise to more litigation and increase the cost of CCAA proceedings.

In any negotiation, a party taking a position they know may have little chance of success may not necessarily be acting in bad faith. Courts also maintain jurisdiction to sanction creditors who are seen to act in bad faith.

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12 See BIA, ss. 84.1 and 66, and CCAA, s. 11.3

2.3 Professional Fees in CCAA Proceedings

The CBA Sections are concerned with the escalating cost of insolvency proceedings and have identified a number of options to control their cost. While high professional fees are not restricted to the CCAA, the situation appears particularly acute in proceedings under the CCAA where they have become a major deterrent. The high cost of reorganizing under the CCAA not only erodes creditor recoveries, but calls into question whether a reorganization will provide higher recoveries than a liquidation, particularly where the reorganization is premised on the sale of the debtor's assets and business.

One solution may be a mandatory review process conducted by a referee or specially appointed court officer who would have to review and approve all professional fees. Alternatively, a tariff or guideline could be adopted. In addition, eliminating the requirement for a court application to commence CCAA proceedings and restricting the need to apply to the court for extensions of the time for filing a proposal in proceedings under Part III, Division I of the BIA will reduce the cost of reorganization proceedings under the BIA and the CCAA.

We recommend that, in addition to the fees of the insolvency administrator and its counsel, professional fees of all stakeholders paid by the debtor be subject to approval by the court.

2.4 Enhancing Transparency

2.4.1 Creditor Lists

The CCAA requires that the monitor prepare a list of creditors and make that list publicly available.[13] It is also common practice for the monitor (or the debtor) to maintain and publish a service list identifying stakeholders actively participating in the CCAA proceeding. The Sarra Report[14] indicates that some stakeholders suggested maintaining a list of creditors that would show, at any time, what the economic interests were underlying the claims against the debtor.

The CBA Sections do not believe that any increase in transparency that would result from maintaining a list of creditors would justify the cost of maintaining the list. Consideration should also be given to the cost in maintaining a creditor list in the context of larger CCAA proceedings involving perhaps thousands of creditors.

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13 CCAA, s. 23(1)(a).

14 Dr. Janis Sarra, *Examining the Insolvency Toolkit: Report of the Public Meetings on the Canadian Commercial Insolvency Law System*, 2012 [Sarra Report]. Available online at: www.insolvency.ca/en/iicresources/resources/Examining_the_Insolvency_Toolkit_Dr._J_Sarra_2012.pdf

2.4.2 Empty Voting and Disclosure of Economic Interests

The theory underlying class voting is that creditors should be classified based on commonality of interest to consult together and, absent bad faith, to freely vote based on commonality. Where creditors with different interests vis-à-vis the debtor are combined in a class, the majority having common interest) may potentially impose their views on the minority. Care must be taken to ensure that the classification of creditors does not provide creditor(s) with a veto and prejudice an otherwise viable plan or proposal.

A person who acquires or subrogates to a claim may not necessarily have the same interests vis-à-vis the debtor as the original creditor. How this impacts the dynamics of the reorganization depends largely on the classification of creditors for the purpose of voting on the plan (or proposal). Where, for example, a person who acquires the claim of a supplier at a discount with the hope of making a profit is included in a class comprised of creditors whose primary interest is the continued relationship with the debtor, the person will likely be unable to realize the intended objective unless placed in a separate class of creditors.

2.5 Role of the Monitor

2.5.1 Pre-Filing Reports

The CCAA does not specifically contemplate the monitor preparing a pre-filing report to the court. In Ontario, however, that has become practice for the proposed monitor. In many cases, the debtor's application for an Initial Order under the CCAA is brought on limited notice to stakeholders. We question the need for a pre-filing report. Applications under the CCAA are generally supported by affidavit evidence and must include a cash flow statement that has been reviewed by the monitor and the debtor's most recent financial statements. In our view, the utility of pre-filing reports must be balanced against the cost incurred to prepare them.

We recommend that the BIA, CCAA and WURA be consolidated into a single Insolvency Act and that proceedings under the CCAA be by way of a regulatory filing akin to a Notice of Intention to make a Proposal. This would eliminate the need for a pre-filing report. If these recommendations are not adopted, we believe that the information in a pre-filing report should be prescribed based on the relief being sought by the debtor on the initial application.

2.5.2 Conflict of Interest

The existence and extent of any pre-filing relationship(s) with the debtor or key stakeholders should be required to be disclosed by the monitor.

2.6 Asset Sales

2.6.1 Credit Bidding

A secured creditor should be permitted to bid its debt to acquire the property subject to its security. Any issues about the imbalance of power in favour of secured creditors will not be addressed by restricting credit bidding.

The Court has jurisdiction to impose conditions on credit bidding that can address any imbalance of power that may exist in a particular situation to ensure that the sales process is fair and transparent.

2.6.2 Stalking Horse Bids

We believe that stalking horse sales processes are, in certain circumstances, an appropriate way for assets to be sold in an insolvency. However, the CBA Sections do not believe that it is necessary or desirable for the CCAA or the BIA to expressly authorize any particular form of sales process. The CCAA and BIA establish the criteria to be applied by the court in determining whether to approve a sale rather than specify what type of sales process may be employed.

2.6.3 Applicability of Asset Sale Test

The CCAA and BIA require the debtor to obtain court approval for all out-of-the-ordinary course property sales, no matter what the value of the property. In some cases, the cost of seeking approval may exceed the value of the property. The CBA Sections do not oppose a rule that the sale of property to third parties with an aggregate appraised value less than a given amount does not require court approval, provided the transaction is approved by the monitor or proposal trustee.

2.7 CBCA Arrangements

The *Canada Business Corporations Act* (CBCA) arrangement provisions are employed by debtors due to streamlined nature of the process compared to a CCAA proceeding.

The CBCA arrangement provisions should be used to affect balance sheet restructurings of insolvent corporations. CBCA balance sheet restructurings are perceived by the marketplace as an attractive alternative to the CCAA and BIA. The CBCA restructuring process has advantages over a CCAA or BIA restructuring process in that it is generally cheaper (no court appointed officer, shorter process), faster (as little as 30 days), and does not involve all the creditors (just debt and

equity). In addition, equity holders have a greater chance of preserving some value. The CBCA is used to implement a strictly financial restructuring.

Case law has evolved to explicitly recognize the legitimacy of using s. 192 as a means for insolvent companies to restructure debt. The cases are limited to securities that are debt obligations, not generally trade debt or other liabilities. Courts have conclusively determined that s. 192 is an appropriate way to restructure debt and have allowed insolvent companies to avail themselves of s. 192 where one or more parties applying for court approval were solvent or where the insolvent applicant would be solvent after completing the arrangement. Finally, courts have shown the same level of pragmatic flexibility in applying discretion similar to the exercise of CCAA discretion to enable companies to obtain CCAA-like remedies, such as a stay of proceedings, no default orders and continued supply orders.

Though CBCA arrangements may provide a desirable alternative, in our view the CCAA affords more robust protections to creditors. CCAA proceedings need not be more expensive than a CBCA arrangement designed to accomplish the same objective, particularly if provisions are added to the CBCA arrangement proceedings to protect the interests of creditors.

2.8 Streamlined Small Business Proposal Proceeding

We recommend amending Part III of the BIA to include a Division III, which would apply to an insolvent person or bankrupt, other than individuals, where the claims against the person do not exceed $500,000. The CBA Sections recommend that the Division III process provide strict timelines for the filing of a proposal, and provisions similar to Division II for the meeting of creditors to consider the proposal and court approval of a proposal that has been accepted (or deemed accepted) by creditors.

2.9 Division I Proposals Extension

The CBA Sections support amending the BIA to give the court jurisdiction, in appropriate circumstances, to provide a debtor subject to proceedings under Division I more than six months to file a proposal. However, in practice, it is rare for the Court to allow a debtor subject to proceedings under Division I with the full six months to file a proposal. In addition, where a debtor requires additional time to obtain creditor approval, it is possible for the debtor to seek to have the proceeding taken up and continued under the CCAA or, as noted in the Sarra Report, file what is often referred to as a "holding" proposal.

A significant issue with the extension of the time for filing a proposal under Part III, Division I relates to the test that must be satisfied for an extension to be granted. In 2009, the BIA was amended to give the Court jurisdiction to approve interim sales of property by a debtor subject to proceedings under Division I.

The jurisdiction to permit a debtor more than six months to file a proposal would be limited to complex commercial proceedings. The ability of the Court to grant longer extensions in complex restructurings could be addressed in a consolidated Insolvency Act.

The CBA Sections share the concerns identified in the Sarra Report on the cost of attendances to extend the time for a debtor to make a proposal under Division I. We recommend considering amending the BIA to extend the maximum 45 day extension to 60 days, and require that, after the initial extension, the debtor apply for an extension only if required to do so by X creditors representing Y percentage of the claims in writing no less than Z days prior to the expiry of the period, failing which the time for making a proposal would be automatically extended for an additional 60 days. To ensure that creditors are kept apprised of the debtor's financial circumstances, we recommend that the proposal trustee be required to post a comparison of the debtor's actual and projected cash flow on a monthly basis.

2.10 Liquidating CCAA Proceedings

The 2009 amendments to the CCAA (and BIA) gave the court jurisdiction to approve out-of-the-ordinary-course sales of property by the debtor prior to a plan or proposal being put to creditors. We do not believe the CCAA (or BIA) needs to prescribe criteria to be considered by the court in authorizing a debtor to engage in a process to market its property for sale.

The debtor is currently not required by the CCAA (or BIA) to obtain approval in advance of marketing its property for sale, but only the actual sale of property.

There continues to be some concern among stakeholders about the use of the CCAA (or the BIA) as a means to liquidate the debtor's property for the benefit of secured creditors, particularly given the cost of CCAA proceedings. The duties of the monitor in a CCAA proceeding include the obligation to report to the court if the monitor believes it would be more beneficial to the creditors if the proceedings were taken under the BIA. We recommend that this obligation be amended to include whether it would be in the interests of creditors that the proceeding be converted to a receivership. The same obligation should be imposed on proposal trustees.

3. Enhancing Equity

3.1 Employees' Claims

The CBA Sections do not have access to the data required to assess whether existing priority claims provide reasonable protections to employees or how any increase in the quantum of the priority claims would impact the ability of employers to secure financing or other credit.

3.2 Employees' Claims in Asset Sales

The current BIA and CCAA provide that the court can only approve a sale of property by the debtor if it is satisfied that the debtor can and will make the payments for employee remuneration and pension-related obligations that would have been required had the court approved a plan or proposal.

The assignment of agreements provisions of the BIA and CCAA do not include the payment of employee or pension-related claims. While in many cases the assignment of agreements will be part of a sale of other assets, in some circumstances it will be affected independent of the sale of other assets. We recommend that the BIA and CCAA be amended so the assignment of agreements parallel the sale of assets provisions and require the court be satisfied that employee and pension-related claims can and will be paid.

3.3 Hardship Funds

It is not necessary to include specific jurisdiction to authorize the debtor to make hardship payments to creditors (or employees) or impose limits on the court's jurisdiction to make an order authorizing (or directing) a hardship payment in the CCAA or BIA. The matter should be left to the court to determine on a case-by-case basis. Neither the BIA nor CCAA prevent or restrict a debtor from making payments to a creditor.

The ability to pay an interim dividend under the BIA is limited to bankruptcy proceedings. In proposal proceedings any payments made to creditors will be determined by the terms of the proposal and the court has no explicit jurisdiction to order the debtor to pay a creditor. A proposal (or plan) may be structured so that creditors in a class receive no cash distribution. A proposal (or plan) can, for example, provide for the distribution of shares in full and final satisfaction of a creditor's claim.

3.4 Third Party Releases

The jurisdiction of the court to grant releases to third parties should be codified. We recommend that third-party releases be available only where:

- the parties to be released are necessary and essential to the restructuring;
- the claims to be released are rationally related to the purpose of the plan and necessary for it;
- the plan cannot succeed without the releases;
- the parties having the claims against them released were contributing in a tangible and realistic way to the plan; and
- the plan benefits the debtor and creditors generally.

We also recommend that the court be required to consider those creditors whose claims are being released: (a) in connection with the classification of creditors for the purpose of voting on a plan; and (b) when approved a plan.

3.5 Key Employee Retention Bonuses

The CBA Sections recommend that the BIA and CCAA prohibit awarding bonuses or key employee retention payments to directors, officers or employees who are related to the debtor (or directors or officers of the debtor) except with court approval. The court should be empowered to authorize bonuses to those individuals only where it is established that the payments to be made are reasonable and necessary for the reorganization. The monitor or proposal trustee should be required to prepare a report on the proposed bonuses and the motion seeking approval for any bonuses should be on notice to all creditors. We do not believe, however, that bonuses or adjustments to an employee's salary during a restructuring that raise the employee's compensation up to 25% of their ordinary pay should require court approval.

The BIA or CCAA should not make officers and directors personally liable for employee remuneration, including any bonuses. The BIA and CCAA do not currently impose personal liability for employee remuneration on directors or officers. We recommend, however, that the court be given jurisdiction to grant a priority charge to secure any authorized bonuses.

3.6 Oppression Remedy

The CBA Sections are opposed to any amendments that would limit the ability of creditors to take advantage of a statutory right provided for their benefit. In our view, there is no justification for

limiting or removing the right of creditors or a bankruptcy trustee from seeking an oppression remedy. Both the BIA and CCAA state that stakeholders will have access to the oppression remedy provisions of any applicable corporate legislation. The BIA and CCAA prohibit the compromise of oppression claims against the directors of a reorganizing corporation.

3.7 Interest Claims

The BIA provides that where a surplus is available after the principal amounts of the unsecured claims against a bankrupt are paid in full, that surplus should be applied to pay interest to creditors at a rate of 5%. We believe there should be consistent treatment of interest claims in all insolvency proceedings under the BIA and CCAA.

3.8 Unpaid suppliers

Section 81.1 does not provide effective protection to suppliers who supply goods to a debtor immediately prior to the commencement of reorganization under the BIA or CCAA. There continues to be concern with respect to the debtor building up inventory levels in advance of the commencement of reorganization proceedings. We believe that the BIA and CCAA should be amended to ensure that suppliers who provide goods to a debtor within a certain period prior to the commencement of a reorganization proceeding receive payment on a priority basis.

The application of s. 81.1 to circumstances where an Interim Receiver has taken possession of the debtor's property should be clarified. While the intention of the 2009 amendments was to limit the appointment of Interim Receivers, in practice the situation still exists where interim receivers are being appointed to take possession of and to liquidate assets. S. 81.1 should be applicable in those circumstances.

3.9 Fruit and Vegetable Suppliers

The CBA Sections believe that Canada should comply with any international obligations, but there is no obligation to enact provisions that parallel the US *Perishable Agricultural Commodities Act* (PACA).[15] The provisions of the BIA dealing with unpaid farmers, fishers and aquaculturists fairly balance the interest of stakeholders and appear to provide treatment that is comparable to the PACA.

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15 7 U.S. Code Chapter 20A – Perishable Agricultural Commodities. Online at: www.gpo.gov/fdsys/pkg/USCODE-2011-title7/pdf/USCODE-2011-title7-chap20A.pdf

4. Deterring Fraud and Abuse

4.1 Director Disqualification

The ability of individuals to sit as directors of corporations is a matter for corporate and securities legislation. The CBA Sections do not believe it is appropriate for federal insolvency legislation to address whether an individual can sit as a director of a solvent corporation.

4.2 Related Party Subordination and Set-Off

The objective of the claims process in an insolvency proceeding is to determine whether a person has a legitimate claim against the debtor.

In our view, it is not appropriate to deny a person who has a legitimate claim or set-off right the ability to recover that claim (or exercise the set-off right) on the basis only that the creditor is related to the debtor. The BIA and CCAA restrict the ability of related creditors to vote in favour of a proposal or reorganization plan,[16] but do not address the ability of a related person to recover a claim against the debtor or to exercise set-off rights to reduce amounts otherwise payable to the debtor.

The creditors of an insolvent debtor can, as a result of claims made or set-off rights exercised by related persons, find their recoveries against the debtor reduced. However, denying a related person the ability to make a legitimate claim or exercise legitimate set-off rights against a debtor can have an adverse impact on the ability of the creditors of that related person to recover against the related person.

5. Cross-Border Insolvencies

5.1 Foreign Claims under Long-Arm Legislation

While there is potential unfairness to stakeholders in recognizing a claim against a Canadian debtor based on pension-related obligations to employees of a related foreign corporation, we question whether the BIA and CCAA should impose a blanket prohibition on the recognition of any claims based on long-arm pension or other legislation. This prohibition may have unintended consequences in the context of a cross-border insolvency involving a globally integrated group of companies.

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16 BIA, s. 54(3) and CCAA, s. 22(3).

Consideration should be given to amending the BIA and CCAA to give the court jurisdiction to determine whether claims against a debtor arising under a foreign law and not related to any obligations of the debtor ought to be recognized. The court could then consider a claim in its factual context and determine whether it is appropriate to recognize the claim against the debtor in the Canadian proceeding.

5.2 Set-Off for Claims in Multiple Jurisdictions

Some stakeholders have suggested that in situations where a creditor has claims in multiple jurisdictions where the debtor has commenced insolvency proceeding for the same debt, and that creditor has successfully recovered amounts for post-filing interest in any foreign jurisdiction, these amounts should be deducted from the principal amount of the creditor's claim under the BIA or CCAA.

We question how pressing or significant an issue this is in cross-border insolvencies and whether specific amendments to the BIA and CCAA are needed to address the matter.

5.3 Allocation of Proceeds

In our view, the allocation of proceeds must be addressed on a case-by-case basis and it is not necessary or possible for the BIA to provide guidance to insolvency practitioners on how to address specific factual scenarios they may encounter in administering a cross-border insolvency.

5.4 Treatment of Enterprise Groups

The CBA Sections recommend that Canada wait for the results of the UNCITRAL group working on the treatment of enterprise groups in cross-border insolvency prior to making any amendments to the BIA or CCAA.

5.5 Centre of Main Interests

It is not clear how the recognition of a foreign jurisdiction as a Canadian debtor's centre of main interest (COMI) could reduce the ability of smaller creditors to participate in an insolvency proceeding involving the debtor. The ability of creditors to participate in insolvency proceedings are external to the issue of COMI. In a cross-border insolvency involving a Canadian debtor where proceedings are pending in a foreign jurisdiction, the key issues relate to what proceedings are (or may be) commenced in Canada in respect of the debtor, and the cooperation between and the coordination of proceedings. The ability of creditors to participate in that process is not necessarily linked to what jurisdiction is the debtor's COMI.

A debtor's COMI is legally relevant only to determine whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. The only issue that turns on COMI is whether there is an automatic or mandatory stay imposed. Even where a proceeding is recognized as a foreign non-main proceeding, a stay of proceedings will generally be imposed by the court on recognition. The key impact for creditors is the restriction on the ability to commence plenary proceedings in Canada where a foreign proceeding is recognized under the CCAA. The fact that a proceeding has been identified as a foreign main proceeding does not impact the ability of Canadian creditors to participate in the Canadian or foreign proceeding.

Where Canadian creditors receive notice in advance of the recognition of a foreign jurisdiction as the COMI of a Canadian debtor, the CBA Sections believe that all stakeholders should have the opportunity to make submissions on the recognition of a foreign proceeding and the relief being sought. Amendments to the UNCITRAL Model Law[17] made by Canada in 2009 removed the provision contemplating interim relief in connection with the recognition of a foreign proceeding pending a full hearing on notice to stakeholders.

5.6 Unsecured Creditors' Committees

The discussion paper does not identify any specific instances where an unsecured creditors' committee (UCC) has improperly participated in a Canadian insolvency proceeding or where the participation of a UCC in a Canadian insolvency proceeding has improperly increased costs as a result of litigation by the UCC. The CBA Sections are concerned about a policy decision based on anecdotal evidence or broad assumptions.

There are three possible scenarios where the recognition and participation of a UCC must be considered: the recognition in Canada of the foreign proceeding in which the UCC was appointed; Canadian proceedings under the BIA or CCAA in respect of a debtor that are parallel to foreign proceedings in which the UCC was appointed; and the Canadian proceedings under the BIA or CCAA involving a debtor where the debtor in respect of which the UCC has been appointed is a stakeholder, a creditor or shareholder.

UCCs play an important statutory role in the insolvency process in the US. It would not, in our view, be appropriate to adopt general principles and criteria for the recognition of foreign UCCs in

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17 Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, United Nations Commission on International Trade Law (UNCITRAL), 2014. Available at: www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf.

Canadian insolvency proceedings or to define the scope of UCC participation in Canadian insolvency proceedings. The court has adequate tools to ensure that the participation of UCCs in Canadian insolvency proceedings does not become disruptive or result in other stakeholders incurring unnecessary costs. We do not support legislative barriers on the ability of UCCs to participate in Canadian insolvency proceedings.

VIII. ADMINISTRATIVE ISSUES

1. Renaming the Bankruptcy and Insolvency Act

The CBA Sections do not object to the BIA being renamed the Insolvency Act. Amending the name would be particularly appropriate for a single unified insolvency statute or to codify the law on receivers appointed over insolvent debtors. The CBA Sections do not support the removal of the reference to "bankruptcy" from the BIA. The social stigma associated with the term bankruptcy is an important aspect of the insolvency process and provides incentive for debtors to attempt to resolve their financial issues through other means, such as proposals under Part III of the BIA.

In addition, the title "trustee in bankruptcy" is not used in the BIA. The general term used by the BIA is simply "trustee". When acting as trustee of a bankruptcy estate, the trustee's title is "trustee of the estate of X, a bankrupt".

2. A Unified Insolvency Law

The CBA Sections support the unification of the BIA, CCAA and WURA into a single insolvency statute. There is no compelling reason to maintain multiple insolvency laws. After the 2009 amendments to the BIA and CCAA, the practical differences between their reorganization regimes are limited.

Some provisions of the CCAA, however, are intended to facilitate the reorganization of larger, more complex businesses. The six month limitation on the ability to make a proposal may not be appropriate where the debtor has a large number of stakeholders. We believe that any necessary distinctions on the relief available to debtors based on size can be accomplished in a consolidated Insolvency Act by differentiating where the total claims against the debtor and any affiliated companies exceed $5M.

There is no reason to restrict the exercise of broad discretion or inherent jurisdiction to reorganizations involving corporations or trusts with large debts. The amount of debt owing is not indicative of the complexity of the debtor's business or operations. In some cases CCAA

proceedings have commenced where debtor companies have very few creditors and no business operations.

Merging the BIA and CCAA would present an opportunity to address the ever-increasing cost of the CCAA insolvency regime by eliminating the requirement for the debtor to apply to the court seeking to commence CCAA reorganization proceedings. We do not believe it is necessary for the debtor to apply to the court to obtain a stay of proceedings and the benefit of the CCAA reorganization regime.

3. Restricting Consumer Proposals

We do not believe there is any compelling reason why business debt cannot be accommodated in a Division II proposal. Attempting to differentiate between "consumer debt" and "business debt" would give rise to unnecessary and expensive litigation and would make it more difficult for individuals to reorganize, forcing more individuals into bankruptcy.

4. Special Purpose Entities – Trust

We do not oppose the broad application of the BIA and CCAA to trusts. However, the liquidation or reorganization of business structures such as trusts and partnerships can be more complex than that of an individual or corporation. The application of the BIA and CCAA to trusts and partnerships should be reviewed to ensure that any necessary modifications to the legislation are made.

5. Receiverships

5.1 Codification of Receiverships

The CBA Sections support the amendments to codify the powers of a receiver defined by s. 243(2) of the BIA. A unified Insolvency Act should address the appointment of receivers over the property of an insolvency debtor as well as the powers and responsibilities of a receiver appointed over the property of an insolvent debtor.

5.2 No Action against Receivers without Leave of Court

We support the amendment of s. 215 of the BIA to include receivers within the meaning of s.243(2) of the BIA.

6. Marshalling Charges

The CBA Sections do not, in theory, oppose amending the BIA to provide for the application of marshalling in favour of the trustee to permit the court, on the application of the trustee, to require a secured creditor with recourse of multiple pools of assets resort to those pools in a manner that maximizes the property available to creditors.

The BIA does not expressly provide for marshalling among secured creditors. However, marshalling may be applied between secured creditors. The BIA provides for the property of the bankrupt to vest in the trustee[18] and for the proceeds from the realization of the property of the bankrupt to be distributed by the trustee[19] subject to the rights of secured creditors. Generally, secured creditors take steps to realize on their collateral outside of the bankruptcy. The doctrine of marshalling does not cease to apply between secured creditors where the debtor is bankrupt and will be applied between secured creditors notwithstanding that the debtor is bankrupt.[20]

The issue that arises in a bankruptcy is whether marshalling can apply in favour of unsecured creditors or the trustee. For example, can marshalling be applied to require a secured creditor with recourse to another debtor to recover against that debtor before proceeding against the property of the bankrupt? Marshalling is not applied in favour of a creditor that does not have an interest in the debtor's property, i.e. an unsecured creditor.[21]

In *Ledco Limited (Re),*[22] the Ontario Court had jurisdiction to apply the doctrine of marshalling, but determined that marshalling did not apply in favour of the unsecured creditors of the bankruptcy estate and suggested that an amendment to the BIA was required. The case involved a request by creditors for a determination that the doctrine of marshalling was not applicable among secured creditors in a bankruptcy and that they were third parties whose interests would be adversely impacted. The court found that marshalling did apply among secured creditors in a bankruptcy and that creditors were not third parties for the purposes of the application of marshalling.

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18 BIA, s. 71

19 BIA, s. 136(1)

20 See *Ledco Limited (Re),* 2008 CanLII 53857 (ON SC).

21 See *Allison (Re),* 1995 CanLII 7146 (ON SC) aff'd, 1998 CanLII 3766 (ON CA), (1998). Note that in *Governor and Company of the Bank of Scotland v. Nel (The)*, [1998] 4 FC 388 the court took a broader view of marshalling and indicated that it was applicable to at least the holders of in rem interests in the debtor's property.

22 2008 CanLII 53857 (ON SC)

The application of other equitable remedies can mitigate against the fact that marshalling is not available in favour of the trustee. Where, for example, the trustee pays a debt where the bankrupt is co-liable, equity will act to subrogate the trustee to the creditor's rights against the co-debtor permitting the trustee to recover against the co-debtor for the benefit of creditors. In those circumstances, the application of marshalling would apply to permit the court to effect the same result without requiring the trustee to take proceedings against the co-debtor.

7. Tax Issues

Our comments respond to the questions in the consultation paper.

a) Whether a restructured tax debtor with prior tax obligations should be allowed "fresh start accounting" for tax purposes – specifically those resulting from debt forgiveness – being dealt with as "pre-filing claims".

We are of the view that tax debt arises as a result of the compromise of claims against a debtor should be subject to compromise in a plan or proposal.

b) Whether tax authorities should be required to send a notice in accordance with section 244 of the BIA before issuing enhanced requirements to pay.

We support amending s. 244 of the BIA to require advance notice by any person who wishes to enforce any right over all or substantially all of the specific property of an insolvent debtor to satisfy a debt claim. The primary purpose of requiring secured creditors to provide notice pursuant to s. 244 of the BIA is to ensure that an insolvent debtor has time to take steps to protect its interests and those of its other stakeholders before a secured creditor takes steps to enforce its security over all or substantially all of the debtor's accounts. In our view, there is no practical difference between issuing an enhanced garnishment, which effects a transfer of the ownership of all or substantially all of a debtor's accounts, and enforcing a security interest over all or substantially all of a debtor's accounts.

c) Whether account receivables that are the object of pre-filing enhanced requirements to pay should "re-vest" in the estate

We do not support re-vesting accounts in a debtor on filing a Notice of Intention to Make a Proposal or a Proposal in circumstances where CRA has done everything required to effect the transfer of title to the account(s). This would be akin to returning property to the debtor subject to a security interest where the secured creditor had taken all necessary steps to enforce its security prior to filing a Notice of Intention to Make a Proposal or a Proposal. The BIA should not reverse valid steps taken by a creditor with an interest in the debtor's property.

The CBA Sections would, however, support amending the BIA to provide that an involuntary transfer of title may be a preference or transfer at undervalue.

IX. TECHNICAL ISSUES

1. Section 197 - Costs Against the Debtor

Courts already have jurisdiction under s. 197(1) of the BIA to award costs against a debtor in connection with a discharge hearing. It provides that the costs of and incidental to any proceedings are in the discretion of the court. There is no need to provide specific jurisdiction to award costs against a debtor in connection with a discharge hearing.

2. Section 204.3 – Losses Due to Bankruptcy Offences

The CBA Sections support an amendment to s. 204.3(1) of the BIA to clarify that the court has jurisdiction to make an order compensating a person who is the victim of a bankruptcy offence or the estate for any damage or loss. The *Criminal Code* imposes restrictions on the restitution orders that may be made in connection with an offence under that Act and consideration should be given to whether the provisions of the BIA should parallel the *Criminal Code*.[23]

3. Disallowance of Claims

We do not oppose amending s. 135(4) to remove the requirement that a person whose claim has been determined or disallowed by the trustee pursuant to s. 135(1.1) or (2) seek to extend the 30 day appeal period. Courts have generally adopted a flexible approach to extensions of time, with a focus on prejudice.

4. Securities Firms Bankruptcies

The CBA Sections do not oppose amending the BIA to permit securities regulators or customer compensation bodies to bring an application under s. 43 in respect of securities firms subject to Part XII. The BIA provisions on bankruptcy applications will have to be modified to account for securities regulators. Provisions on customer compensation bodies will have to be developed. The requirement that the debtor owe $1,000 and have committed one of the acts of bankruptcies in s. 42 may have to be modified to reflect the policy basis for permitting securities regulators and customer compensation bodies to bring bankruptcy applications against a securities firm.

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[23] See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 738 – 741.

5. Preview of Proposals by the Trustee

We are concerned about legislative changes being driven by anecdotal reports. There are no restrictions on the ability of a trustee to conduct investigations or inquiries on a debtor's financial situation prior to accepting to act as trustee under a proposal or Notice of Intention to Make a Proposal. It is unclear what legislative changes could be made to address the fact that some trustees may not undertake sufficient due diligence prior to accepting an engagement or not ensuring that they are properly protected in terms of recovery of professional fees.

6. Section 173 - Facts for which Discharge will be Suspended

The purpose of s. 173 of the BIA is to identify circumstances where the court is not able to grant an absolute discharge. Where a fact listed in s. 173 is proven, the court's jurisdiction is limited to refusing to discharge the bankrupt, or granting a suspended or conditional discharge. Section 173(1) is intended to identify pre-bankruptcy conduct worthy of sanction. In our view, the facts in s. 173(1) should be reviewed to ensure that they reflect the type of conduct that ought to deny an absolute discharge.

Section 173 is also relevant in proposal proceedings under the BIA. Where any of the facts in s.173 are proven against a debtor who has made a proposal, the court cannot approve the proposal unless it provides reasonable security for the payment of not less than 50 per cent of the unsecured creditors or another percentage the court may direct.[24] When determining whether to approve a proposal, we believe the court should consider the ability of the debtor to perform a proposal, the recoveries to creditors, and the assurances that creditors have that any payments required by a proposal will be made by the debtor. However, we question the linkage between those considerations and the facts listed in s. 173(1).

Where a bankruptcy is opposed based on two of the grounds listed in s. 173(1) –failure to pay surplus income or the fact that the debtor could have made a viable proposal – the requirement for mandatory mediation is triggered. We question whether this ought to trigger mandatory mediation.

7. Secured Creditors Calling Proposal Meetings

The CBA Sections believe that if creditors who have proven unsecured claims representing an aggregate value of at least 25% of the value of the proven unsecured (or secured) claims request a

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[24] BIA, s. 59(3).

meeting, the administrator should be required to call a meeting to consider the Consumer Proposal.

We believe that calling a meeting under s. 66.15(2) should be based on the creditors to whom the proposal is being made, so the creditors whose claims will be compromised can, if a sufficient number desire, have a meeting to formally vote on the proposed compromise. While Part III, Division II proposals are made to creditors generally, the form of Consumer Proposal (Form 47) provides for different treatment for secured and unsecured creditors. It is our understanding that Consumer Proposals are not generally made to secured creditors as their claims tend not to be compromised by the Consumer Proposal and are generally paid outside it.

X. OTHER ISSUES

1. Tolling of Limitation Periods

The BIA does not contain a limitation period. However, in *Edwards Estate v. Food Family Credit Union,*[25] the Ontario Court of Appeal found that the general limitation periods in provincial statutes apply to bankruptcy proceedings and proceedings by bankruptcy trustees to set aside transactions. In Ontario, for example, avoidance proceedings by a bankruptcy trustee are subject to a two year general limitation period that runs from the date of the bankruptcy.

A limitation period can have a significant impact on creditors in a bankruptcy. In *msi Spergel Inc. v. I.F. Propco Holdings (Ontario) 36 Ltd.*,[26] the Ontario Court of Appeal considered whether the stay that arises where a Bankruptcy Order is appealed has the effect of suspending the two year limitation period. The court found that it did not because the BIA did not provide for any extension or suspension of the limitation period during the time that the Bankruptcy Order was stayed. As a result, the avoidance proceeding, which had not been commenced until the appeal of the Bankruptcy Order was dismissed, was statute barred and creditors were denied the ability to challenge a $1.18 million payment by the bankrupt.

We do not believe there is a sound policy basis for applying a provincial limitation period to avoidance proceedings by a bankruptcy trustee under the BIA. The application of provincial limitation periods could result in avoidance proceedings available for the benefit of creditors in

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[25] 2011 ONCA 497 (CanLII)

[26] 2013 ONCA 550 (CanLII)

lengthy CCAA proceedings being statute barred by the time a plan that permits the avoidance proceedings to be pursued is filed.

The United States Bankruptcy Code (USBC) provides for a suspension of otherwise-applicable limitation periods on the commencement of insolvency proceedings. Section 108(a) of the USBC extends the period to commence an action that the debtor could have taken before the filing of the bankruptcy petition for two years after the date of the bankruptcy filing, unless it would expire later under applicable non-bankruptcy law.

We recommend that both the BIA and CCAA be amended to make suspension of any limitation period applicable in avoidance proceedings available.

2. Claims Procedures – Employee Remuneration Charge and Pension Charge

The statutory charge in favour of employees to secure unpaid remuneration arising when a receiver is appointed allows claims to be established by filing a proof of claim in the prescribed form.[27] The Proof of Claim (Form 31) provides for filing claims where a Receiver is appointed and for claims by employees under the employee remuneration charge. Section 135 of the BIA does not provide for the determination of claims by a Receiver. We recommend that s. 135 of the BIA be amended to provide for the determination of claims filed against a debtor where a Receiver within the meaning of s. 243(2) is appointed over the debtor's property.

Similar provisions to secure pension-related obligations do not indicate how such claims are to be proven. The parallel provisions for employee remuneration claims require claims to be proven by way of a Proof of Claim in the prescribed form. We recommend that ss. 81.5 and 81.6 be amended to provide that claims under the pension charge will be established by filing Proof of Claim in the prescribed form and that Form 31 be amended accordingly.

3. Receivership as Initial Bankruptcy Event

In 2009, the definition of initial bankruptcy event (IBE) was expanded to include the commencement of proceedings under the CCAA. Transactions by the debtor during prescribed periods prior to the IBE may be attacked in a subsequent bankruptcy. Prior to 2009, the IBE was defined by reference to the commencement of proceedings under the BIA. The 2009 amendment was intended to eliminate the need for creditors to seek to have the stay imposed on the

[27] BIA, s. 81.4(8).

commencement of the CCAA proceeding in order to issue a bankruptcy application to trigger an IBE.

We recommend that the BIA be amended to provide that the appointment of a receiver in the meaning of s. 243(2) is an IBE. In many cases, the appointment of a receiver in the meaning of s. 243(2) represents the initiation of insolvency proceedings against the debtor and creditors should not be required to take steps to issue a bankruptcy application to trigger the avoidance provisions of the BIA where a receiver within the meaning of s. 243(2) is appointed.

4. Avoidance Proceedings in Reorganizations

The avoidance provisions of the BIA may apply in proposal proceedings under the BIA and CCAA reorganizations, unless the plan or proposal provides otherwise. However, these provisions may not operate as intended. The CCAA, for example, provides for transactions to be void against the monitor rather than the debtor.[28] We recommend reviewing the practical operation of these provisions and making any necessary amendments.

5. Restriction on the Exercise of Contractual Remedies in Bankruptcy

The BIA was amended in 2009 to restrict the exercise of contractual rights by parties to agreements with a bankrupt individual. These provisions do not, however, apply to contracts with a bankrupt corporation. At that time, the BIA was also amended to permit a bankruptcy trustee to assign the contractual rights and obligation of the bankrupt. The right to assign contractual rights and obligations is only of practical value to a trustee where there are restrictions on the ability of the other party to the contract to exercise contractual termination rights. The CBA Sections recommend that the BIA provisions applicable to agreements with bankrupt individuals be extended to apply to all bankrupts.

6. National Receiver – Charge for Operating Expenses

Section 47.2(2) of the BIA prohibits the court from granting a charge in favour of a national receiver to secure disbursements incurred by the receiver in operating the debtor's business. We see no rationale for this restriction. Where the receiver is empowered to operate the debtor's business, it should have a charge for any disbursements incurred. It is common practice, notwithstanding s. 47.2(2), to give a national receiver the ability to borrow money to operate the

[28] CCAA, s. 36.1.

debtor's business and to issue certificates secured by a priority charge over the debtor's property. We recommend that s. 47.2(2) be repealed.

7. Administration of Estate without Inspectors

Section 30 of the BIA was amended in 2009 to permit a bankruptcy trustee to perform the functions listed in s. 30(1) without inspectors where no inspectors are appointed. The CBA Sections recommend that the BIA be amended to give the trustee general authority to administer an estate without inspector approval where no inspectors are appointed.

8. Classification of Creditors

The CCAA was amended in 2009 to include criteria applicable to the classification of secured and unsecured creditors. Those criteria do not appear to be based on the same principles that have been developed by the court. Rather, they appear to be borrowed from s. 50(1.4) of the BIA. Section 50(1.4) relates to the classification of secured creditors only and the BIA does not prescribe any criteria for the classification of unsecured creditors, although it is possible for a proposal to divide unsecured creditors into classes.

Two fundamental concerns underlie the classification of claims for the purpose of voting on a plan or proposal. First, the rights of creditors should not be confiscated by the plan or proposal where the creditors are unfairly forced to accept an unreasonable compromise of their claims against the debtor. Second, creditors do not unfairly block the approval of a reasonable plan. The criteria specified in the BIA and CCAA address the first concern, but not the second.

The CBA Sections recommend that the classification of creditors provisions in the BIA apply to creditors generally, and the criteria in the BIA and CCAA be expanded to include factors identified by the court as relevant to the classification of creditors based on commonality of interest.

XI. CONCLUSION

The CBA Sections appreciate the opportunity to comment on Industry Canada's statutory review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*. We encourage further consultations with the public and interested stakeholders on specific proposed changes to the BIA and CCAA. We hope our comments will assist Industry Canada in amending and updating the legislation. We would welcome the opportunity to be of further assistance through future consultations, reviews or development of proposed legislation.