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1 Issues Arising When a Company is in Financial Difficulties

1.1 How does a creditor take security over assets in Canada?

In all provinces and territories other than Québec, a creditor may take security over personal property pursuant to the grant of a security interest contained in a written security agreement between the debtor and the creditor. If a security agreement provides for a security interest, a creditor must file a financing statement against the debtor indicating the nature of the secured collateral under the applicable provincial personal property security registration system to perfect such security interest. Depending on the type of security interest, a creditor may be required to provide notice to other secured parties of the creditor's intent to take a security interest in such collateral. While certain types of collateral may be perfected by possession, perfection by registration is usually superior and, as such, a creditor would typically obtain possession of the collateral and register a financing statement in respect of such collateral. With respect to real property, a creditor may obtain a charge over such property pursuant to a written mortgage agreement. The charge must be registered in the applicable land registry system.

In Québec, a creditor may take security over personal property pursuant to a movable hypothec with delivery or a written moveable hypothec without delivery. To make a moveable hypothec without delivery opposable to third parties, a creditor must file a certified statement of registration in the Provincial Register of Personal and Moveable Real Rights. A moveable hypothec with delivery is made opposable through possession, with simultaneous registration being possible in some cases. A creditor may take security over real property in Québec pursuant to a written hypothec entered into before a notary. The hypothec would then be registered in the applicable land registry system.

In addition, a Canadian chartered bank may take personal property security from certain types of debtors, including wholesale or retail purchasers, shippers and dealers, manufacturers, farmers, fishermen, aquaculturists and forestry producers, pursuant to the provisions of the federal *Bank Act*. The bank must enter into a written security agreement with the debtor and file a notice of intention to take security with the local Bank of Canada office in the debtor's jurisdiction. Typically, a financing statement indicating the secured collateral would also be registered under the relevant provincial personal property security registration system.

1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack and what remedies are available from the court?

A creditor may utilise remedies under both federal bankruptcy legislation and federal and provincial non-bankruptcy legislation to challenge questionable transactions.

When a debtor is in bankruptcy proceedings pursuant to the *Bankruptcy and Insolvency Act* ("BIA"), the trustee in bankruptcy is empowered to review transactions during certain statutory review periods. The applicable review period is longer for transactions between non-arm's length parties, which may be subject to greater scrutiny.

The first type of reviewable transaction is a fraudulent preference, which includes a transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person. Where a transaction between arm's-length parties has the effect of preferring one creditor over another, such transaction will be presumed (absent evidence to the contrary) to have been undertaken with a view to giving such creditor a preference and will, therefore, be void. In contrast, non-arm's length transactions that have the effect of preferring one creditor over another are void regardless of intent.

The second type of reviewable transaction is a transfer at undervalue ("TUV"), which is a disposition of property or provision of services for which no consideration was received by the debtor, or for which the consideration received by the debtor was conspicuously less than fair market value. Where parties are acting at arm's length during the applicable review period, the debtor was insolvent or rendered insolvent by the transaction and the debtor intended to defeat, defraud or delay a creditor, the court may declare that the TUV is void, or order that a party to the transfer or any person "privy" to the transfer pay the difference between the consideration received and fair market value. In contrast, the court may make such an order in respect of non-arm's length transactions within one year of the date of bankruptcy regardless of the debtor's solvency or intent, or within the preceding five-year period if either insolvency or intent are proven.

Where the trustee chooses not to pursue a potential fraudulent preference or TUV, the BIA permits any interested creditor to pursue a potential recovery in respect of such transaction at its own expense. The foregoing remedies are also available to a court-appointed monitor in the context of a restructuring under the *Companies' Creditors Arrangement Act* ("CCAA").

Various Canadian provinces and territories have enacted fraudulent preference and fraudulent conveyance legislation that may apply regardless of the debtor's solvency. Unlike the BIA, such provincial legislation may not prescribe a time period during which transactions may be voided. Furthermore, transactions may be challenged under the debtor's governing corporate statute using the "oppression remedy", whereby a debtor may obtain judgment for conduct which is oppressive, unfairly prejudicial to, or which unfairly disregards, the interests of the creditor. If a court finds oppression, it may make any order it considers appropriate to remedy an oppressive or unfair situation.

1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Canada?

The directors of a company in distressed circumstances face potential civil liability under corporate statutes for employee wage arrears, source deductions, termination and severance pay, worker's compensation premiums and various tax obligations. The directors may also be liable for declaring dividends when the corporation is insolvent. In addition, corporate statutes and common law impose on directors a fiduciary duty to act honestly and in good faith with a view to the best interests of the corporation, and a duty of care to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, although courts generally defer to the business judgment of the directors. Finally, corporate statutes also contain a broad "oppression remedy" that prohibits directors from acting in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, stakeholders. As noted above, if a court finds oppression, it may make any order it considers appropriate to remedy the oppressive or unfair situation.

Directors may mitigate their potential exposure through various means, including by way of indemnities in the company's constating documents or contractual indemnities, and directors' and officers' liability insurance. As most statutory liabilities are subject to a due diligence defence, directors may take steps to support such defences including obtaining expert advice from financial advisors, lawyers and other experts as appropriate.

2 Formal Procedures

2.1 What are the main types of formal procedures available for companies in financial difficulties in Canada and can any of these procedures be used in a restructuring?

A company may liquidate through bankruptcy or receivership proceedings under the BIA or liquidation proceedings under the Winding-up and Restructuring Act ("WURA"). A company may also restructure through proposal proceedings under the BIA, or proceedings under the CCAA or its governing corporate statute.

Bankruptcy proceedings may be voluntarily commenced by the debtor filing an assignment into bankruptcy or by a creditor obtaining a bankruptcy order against the debtor. In either case, a stay of proceedings is imposed and the debtor's assets automatically vest in a licensed trustee in bankruptcy for the benefit of the debtor's unsecured creditors. Once appointed, the trustee is tasked with selling or otherwise disposing of estate assets, calling for claims and distributing estate proceeds in accordance with the requirements of the BIA. The trustee's interest in the estate assets is subject to the rights of secured creditors who are not subject to the stay, and remain free to enforce their security against the debtor.

A creditor may seek to appoint a receiver, either privately under the terms of its security or by court order under provincial legislation or the BIA. Privately appointed receivers are primarily accountable to the appointing secured creditor and are only secondarily accountable to other creditors and the debtor to the extent that they must act honestly and in good faith, use reasonable care in the administration and disposition of assets and act in a commercially reasonable manner. A court-appointed receiver must be a licensed trustee in bankruptcy, is a court officer and as such is accountable to the court and all stakeholders.

While more costly and time-consuming than private receiverships due to court oversight, court-appointed receiverships under the BIA are often the norm as the scope of the receiver's authority and protections are governed by court order and the provisions of the BIA. The receivership order typically contains a stay of proceedings in favour of the debtor and its property, and the receiver, permitting the receiver to liquidate the debtor's assets and distribute proceeds free from interference. A creditor may seek to lift the stay on demonstration of prejudice. In addition, as a court-appointed receiver is able to sell assets to a purchaser free and clear of existing encumbrances pursuant to a vesting order, the creditor is often able to realise a higher price in respect of such assets. Once the receiver has liquidated the debtor's assets and distributed the proceeds thereof to the appointing creditor subject to payment of prior-ranking claims, the receiver is typically discharged and the company either enters into bankruptcy proceedings or, where no assets remain at the end of the receivership, is eventually struck from the applicable corporate registry.

Banks, trust companies, insurance companies, loan companies and trading companies may be also liquidated under the WURA. As this statute is seldom used, we will not discuss it further in this chapter.

A corporation may commence proposal proceedings under the BIA, pursuant to which a licensed trustee will be appointed as proposal trustee and will work with the debtor to formulate a restructuring proposal. The proposal must be put before creditors for their consideration at a creditors' meeting at which at least 51 per cent of creditors holding at least 66 2/3 per cent (the "Required Majority") of voting claims must approve the proposal. The proposal must also be approved by the court. While in proposal proceedings, no action may be taken in respect of the debtor or its property, or against its directors and officers. However, this stay of proceedings may only be extended for a maximum period of six months. If the debtor does not present a proposal to its creditors within this time period, or if the proposal is not approved by the Required Majority of creditors or the court, the debtor will automatically be deemed to have made an assignment in bankruptcy.

Debtors with assets of at least $5 million may also commence restructuring proceedings under the CCAA, which is a much more flexible and less rules-based statute than the BIA. As in the case of a BIA proposal, a CCAA restructuring plan must be approved by the Required Majority of creditors and the court. There is no automatic deemed assignment into bankruptcy if the plan is not approved, but the stay of proceedings will be lifted and creditors become free to exercise their legal rights and remedies. The likely outcome is a receivership in respect of the secured assets and possibly a bankruptcy. The CCAA is also increasingly being used as a vehicle for court-supervised liquidations.

Finally, a debtor could seek to restructure its balance sheet under the arrangement provisions of its governing statute. While corporate statutes mandate that a debtor must be solvent to take advantage of these arrangement provisions, there have been cases where an insolvent debtor seeks an arrangement with one or more solvent affiliates. This type of restructuring proceeding is not common, as it is not certain that a court will impose a stay of proceedings in all cases and many debts cannot be compromised. Accordingly, we will not discuss this procedure in this chapter.

2.2 What are the tests for insolvency in Canada?

The BIA defines an "insolvent person" as one who is not bankrupt and who resides, carries on business, or has property in Canada, whose liabilities to creditors provable as claims under the BIA amount to $1,000 and:

(a) who is, for any reason, unable to meet his obligations as they generally become due;

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

The CCAA does not contain a definition of "insolvency", although it is generally accepted that the above definition also applies in the context of a CCAA application. In addition, jurisprudence has broadened the test for insolvency in a CCAA context to include circumstances where a debtor is reasonably expected to run out of liquidity within a reasonable proximity of time absent the protection of a CCAA stay of proceedings.

2.3 On what grounds can the company be placed into each procedure?

A voluntary bankruptcy proceeding may be commenced by a debtor company that meets the definition of an insolvent person under the BIA. In contrast, an involuntary bankruptcy proceeding may be commenced by one or more creditors where: (a) the debt owing to the applicant creditor or creditors amounts to at least $1,000, and in the case of a secured creditor, it must also have an unsecured debt exceeding $1,000 or it must give up its security; and (b) where the debtor has committed a prescribed act of bankruptcy within the six-month period preceding the filing of the application. Creditors most often rely on one particular act of bankruptcy – the debtor ceasing to meet its liabilities as they generally become due.

With respect to a receivership, the creditor's contractual right to appoint a receiver is usually triggered by a default under the relevant security documentation. Alternatively a creditor may seek a court-appointed receiver on the basis that such appointment is just or convenient.

A BIA proposal proceeding or a CCAA proceeding may be commenced by any company that meets the definition of an insolvent person or debtor company, respectively, and whose debts amount to at least $1,000 or $5 million, respectively, as described above. Creditors may also bring an application for a CCAA proceeding in respect of a debtor company, although this is rarely done.

2.4 Please describe briefly how the company is placed into each procedure.

A debtor may voluntarily commence bankruptcy proceedings by filing an assignment for the general benefit of its creditors with the official receiver in its jurisdiction, together with a sworn statement setting out its assets and liabilities, the names and addresses of its creditors and their respective claims (a "Statement of Affairs"). In an involuntary bankruptcy, the applicant creditor must file an application for a bankruptcy order together with an affidavit of verification with the court in the "locality of the debtor" within the meaning of the BIA. Once filed, a notice indicating the time and place of the hearing of the application, together with a copy of the application and affidavit, must be served on the debtor, the bankruptcy trustee named in the application and the Division Office of the Office of the Superintendent of Bankruptcy ("OSB") at least ten days before the hearing. An affidavit of service and the original application and affidavit must also be filed with the court at least two days before the hearing. If the court is satisfied that the applicant has proven the facts alleged in the application and that a bankruptcy order should be made, the court may exercise its discretion to issue a bankruptcy order.

With respect to a receivership, whether private or court-appointed, a creditor must first make demand of its outstanding indebtedness prior to seeking to enforce its security and provide the debtor with a reasonable period of time in which to repay the indebtedness. Concurrently with delivery of the demand letter, the creditor must also deliver a notice of its intention to enforce security in accordance with the provisions of the BIA. The BIA provides that no action may be taken to enforce security within the ten-day period following delivery of the notice unless the debtor has provided its consent to early enforcement. Once the ten-day standstill period has expired or has been waived, the creditor is free to appoint a receiver pursuant to its security documents or by application to the court.

As described above, a secured creditor will typically seek a court order appointing a receiver.

A receiver may be appointed under provincial legislation or the BIA. Applications are most frequently brought under the BIA, as it is a federal statute and accordingly the receivership order should be recognised across Canada without the requirement for separate recognition proceedings in each province in which the debtor has assets. The BIA also provides express statutory protections for receivers. The receivership application would typically include: (a) an affidavit of a director or officer of the secured party describing the debtor and its operations, the outstanding indebtedness and related security held by the applicant creditor, as well as the reasons for seeking the receiver; (b) a draft receivership order; and (c) a blackline to the form of model receivership order in such jurisdiction. The court may exercise its discretion to appoint a receiver.

A BIA proposal may be commenced by an insolvent debtor by filing a proposal to its creditors with a licensed trustee, together with a Statement of Affairs. Alternatively, an insolvent debtor may file a notice of intention to make a proposal (a "NOI") with the official receiver in its locality, stating its intention to make a proposal, the name and address of the licensed trustee who will act as the proposal trustee and the names of creditors with claims amounting to $250 or more and the amount of their claims.

An insolvent debtor company with assets of at least $5 million may commence restructuring proceedings under the CCAA by way of an application accompanied by: (a) an affidavit of a director or officer of the debtor describing the debtor and its operations, its outstanding indebtedness and the reasons for seeking CCAA protection, and attaching (i) a projected thirteen-week cash-flow demonstrating sufficient liquidity during the initial stay period, (ii) a report containing the prescribed representations of the debtor regarding the preparation of the cash-flow statement, and (iii) copies of all financial statements prepared during the year before the application; (b) a draft initial CCAA order; and (c) a blackline to the form of the initial CCAA order in such jurisdiction. In some cases, the CCAA application is also accompanied by a pre-filing report of the licensed trustee that is being proposed to act as court-appointed monitor of the debtor. The court may exercise its discretion to issue the initial order upon satisfaction that such an order is appropriate in the circumstances.

2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

Once bankruptcy proceedings have commenced, the trustee must send a notice of the bankruptcy and of the first meeting of creditors to all creditors and to the OSB, together with a list of all creditors with claims greater than, or equal to, $250 and a proof of claim form and proxy. The creditors' meeting must be held within the twenty-one-day period following the trustee's appointment, at which time the creditors are asked to confirm the appointment of the trustee or substitute another in place thereof, and may appoint up to five estate inspectors to supervise the trustee's administration of the estate. The trustee may hold further meetings of creditors from time to time in its discretion, when directed by the inspectors, if appointed, or the court, or when requested by 25 per cent of creditors holding 25 per cent of approved claims. If inspectors are appointed, the first inspectors' meeting is typically held immediately following the conclusion of the first creditors' meeting. The trustee may call further inspectors' meetings in its sole discretion or upon the direction of a majority of the inspectors.

Upon the appointment of a receiver by the court, the receiver must send notice of its appointment within ten days to the OSB. In addition, the receiver must give notice of its appointment to all known creditors, and must prepare a statement relating to the receivership forthwith after taking possession or control of the debtor's property, and provide a copy of such report to the OSB, the debtor and any creditor who requests a copy of such report.

Where a debtor has filed a proposal, the proposal trustee must file a copy of the proposal with the official receiver and a Statement of Affairs, together with a projected cash-flow statement, a report on the reasonableness of the cash-flow statement and a report containing prescribed representations by the debtor regarding the preparation of the cash-flow statement.

Where a debtor has filed a NOI, the proposal trustee must send a copy of the NOI to every known creditor within five days. In addition, the debtor must file with the official receiver, within ten days, a projected cash-flow statement, a report on the reasonableness of the cash-flow statement and a report containing prescribed representations of the debtor regarding the preparation of the cash-flow statement. If the debtor fails to file the projected cash-flow statement and related reports within such ten-day period, it will be deemed to have made an assignment into bankruptcy.

Once a proposal has been filed, the proposal trustee must call a meeting of creditors within twenty-one days by sending meeting materials to all known creditors and the official receiver at least ten days before the meeting. The meeting materials must include a notice of the meeting, a condensed statement of assets and liabilities, a list of creditors with claims of at least $250 and the amount of their claims, a copy of the proposal, and proof of claim form, proxy form and voting letter. If the proposal is approved by the Required Majority, the proposal trustee must apply to court within five days for a court hearing to sanction the proposal, and send a notice to the debtor, all creditors and the official receiver of the date and time of the hearing at least fifteen days before the date of such hearing. The proposal trustee must also forward a report on the proposal to the official receiver at least ten days before the hearing and file a copy of such report with the court at least two days before the hearing. Failure of either the creditors or the court to approve the proposal will result in the bankruptcy of the debtor.

The CCAA does not prescribe required actions after an application for an initial CCAA order is granted. The initial order will appoint a monitor to oversee the debtor's restructuring and report to court from time to time. A CCAA debtor may seek to liquidate assets and/or propose a plan of compromise or arrangement to its creditors. Any such plan must be presented to creditors for consideration at a creditors' meeting and must be approved by the Required Majority as described above. If the plan is approved, the debtor will bring an application before the court for an order sanctioning the plan. Also as noted above, there is no deemed assignment into bankruptcy if either the creditors or the court do not approve the plan.

2.6 Are "pre-packaged" sales possible?

There has been a recent trend towards "pre-pack" transactions in Canada given the speed at which such transactions may be implemented. A debtor may run a fulsome sales process outside of a formal insolvency proceeding as well as a truncated sales process inside of the proceeding using the superior offer selected in the pre-insolvency sales process as the "stalking horse" offer. Inside the proceeding, this truncated sales process would include formal bid requirements that would be approved by the court. Typically, the debtor would conduct the sales process under the supervision of the CCAA monitor or BIA proposal trustee. In a receivership the receiver will conduct the sales process. If qualified offers are received by the bid deadline, an auction would be conducted at which a winning bidder would finally be selected. If the stalking horse is not selected as the final winning bidder, it would typically receive a break fee to compensate it for its time and expenses in negotiating the stalking horse offer.

3 Creditors

3.1 Are unsecured creditors free to enforce their rights in each procedure?

In a BIA proposal or CCAA restructuring, a statutory stay of proceedings is imposed in respect of the debtor and its assets. A receivership order will also stay actions against the debtor and its assets. There is no stay of proceedings in the context of a private receivership.

A creditor may seek to lift the stay of proceedings by court order on a demonstration of material prejudice. Such orders are not frequently granted.

3.2 Can secured creditors enforce their security in each procedure?

As noted above, there is a stay of proceedings in all contexts other than a private receivership. However, there is a carve-out from the statutory stay of proceedings in a BIA proposal or CCAA restructuring in respect of enforcement of security over certain aircraft objects and prescribed eligible financial collateral. In a bankruptcy, secured creditors are free to realise on their security subject to the requirement that they prove their secured claim with the trustee prior to taking any enforcement action.

3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

The BIA and the CCAA statutorily preserve rights of set-off, subject to certain exceptions. Typically pre-filing claims cannot be set-off against post-filing claims in the context of a bankruptcy, a receivership or a BIA proposal.

4 Continuing the Business

4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

On a bankruptcy, a trustee is appointed in respect of the debtor and its property and becomes vested with all of the debtor's assets subject to the rights of secured creditors. While a receiver is not vested with the debtor's assets, it assumes control of such assets and of the debtor's operations upon its appointment. The bankruptcy or receivership does not destroy the corporate entity or interfere with its powers to function as a corporation. Directors and officers no longer have any authority over the debtor's assets, nor does any shareholder of the debtor. In a CCAA or BIA proposal, the debtor remains in control of its assets and operations subject to the oversight of the monitor or proposal trustee.

4.2 How does the company finance these procedures?

Bankruptcy proceedings are financed by the assets in the debtor's estate. Receiverships are typically financed through the debtor's operating cash-flow, which may be supplemented in a court-appointed receivership by the receiver's borrowings under its court-ordered super-priority borrowings charge. BIA proposal proceedings and CCAA proceedings are also typically financed through a debtor's operating cash-flow, and the debtor is required throughout the course of these proceedings to file rolling 13-week cash-flows demonstrating its ability to continue operations while under CCAA or BIA protection. A CCAA or BIA proposal debtor may obtain additional financing to supplement its operating cash-flow through third-party financing in the form of a "DIP" loan. DIP loans are approved by court order granting the DIP lender a super-priority charge over all of the debtor's assets.

4.3 What is the effect of each procedure on employees?

In a bankruptcy, employees are deemed to be terminated. A receiver typically terminates all employees, and re-hires those it needs to operate the business on a short-term, independent contractor basis. Staffing reductions may also be implemented in a BIA proposal or a CCAA proceeding.

The BIA provides that employees have a super-priority charge against the debtor's assets for employee wages (excluding termination and severance pay) earned during the six-month period prior to the bankruptcy up to a maximum of $2,000 per employee and for the disbursements of travelling salespersons incurred during such a period up to an additional $1,000 per employee. The federal government has also enacted the Wage Earner Protection Program Act for certain eligible employees pursuant to which the federal government will make payments to individuals in respect of wages (including termination and severance pay) owed to them on the bankruptcy or receivership of their employers up to a specified maximum amount per employee. Upon payment of such amounts, the federal government becomes subrogated to the employees for the purposes of recovering amounts under the BIA.

The BIA also provides for a super-priority charge against the debtor's assets for certain deducted but unremitted employee pension contributions and certain employer contributions in respect of prescribed pension plans.

In a BIA proposal or CCAA restructuring context, the court may not approve a proposal or plan unless it provides for payment of the above-noted amounts.

4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

On a bankruptcy, creditors whose contracts provide for a termination upon bankruptcy are free to terminate their contracts with the debtor. Bankruptcy itself does not terminate a contract (other than a contract of employment) and a trustee in bankruptcy is entitled to perform the contract. If the trustee does not call for the contract's completion within a reasonable period of time, the contractual counterparty is entitled to treat the contract as broken.

In a receivership, the receiver is not obligated under the debtor's contracts unless such contracts are expressly assumed by the receiver. The receiver may terminate contracts if so empowered by court order.

Counterparties are prohibited from terminating a contract with a debtor under a BIA proposal or CCAA proceeding solely for a non-payment default or by virtue of the fact that the debtor filed for relief. A debtor may generally disclaim contracts at any time during the proceedings on notice to the counterparty with the prior approval of the proposal trustee or monitor. The counterparty may apply to court for an order that the contract not be disclaimed or, if the proposal trustee or monitor does not approve of the disclaimer, the debtor may apply to court for an order that the contract be disclaimed. The foregoing disclaimer rights do not apply in respect of eligible financial contracts, collective agreements, financing agreements where the debtor is a borrower and leases of real property where the debtor is the lessor.

5 Claims

5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

In a bankruptcy, the method for proving claims is codified in the BIA. Each creditor with a known claim will receive a proof of claim from the trustee prior to the first meeting of creditors. Creditors who complete such proof of claim form prior to the creditors' meeting are eligible to vote at such a meeting. Proofs of claim may be delivered to the trustee at any time during the bankruptcy proceedings. Only creditors with proven claims will be entitled to receive distributions from the debtor's estate in accordance with their respective priority entitlements.

In a receivership proceeding, BIA proposal proceeding or CCAA proceeding, the receiver or the debtor, as applicable, may call for claims pursuant to a court-ordered claims process. The types of claims affected by such claims procedure and the method for proving such claims will be determined by the court.

5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

Claims against the debtor are ranked as follows: (1) priority claims; (2) secured claims; (3) preferred claims; and (4) unsecured claims.

In a receivership, BIA proposal proceeding or CCAA proceeding, priority claims include those imposed by court order such as super-priority charges for administrative professionals, DIP lenders, and directors and officers of the debtor. The ranking of such priority claims is prescribed by court order. There are no priority claims in a bankruptcy. Secured claims are created in accordance with federal and provincial law, and will rank in accordance with their respective priority entitlements. Preferred claims (including claims for the employee wage arrears described above and landlord claims for accelerated rent) are stipulated in the BIA and rank in the order prescribed by the BIA. All other unsecured claims against the debtor rank *pari passu*.

Notwithstanding the foregoing, the BIA provides a limited right in the context of bankruptcy or receivership proceedings to creditors that supply goods to the debtor within thirty days of the date of bankruptcy or receivership to repossess such goods on written notice to the trustee or receiver within fifteen days of the date of bankruptcy or receivership.

5.3 Are tax liabilities incurred during each procedure?

Tax liabilities may be incurred if a company operates while in a proceeding, or to the extent that the company or any trustee, monitor or receiver sells assets during the proceeding. Tax liabilities also may be imposed by virtue of the transactions undertaken in connection with a CCAA plan or a BIA proposal. Such post-filing liabilities may not be compromised.

6 Ending the Formal Procedure

6.1 What happens at the end of each procedure?

On realising all of the debtor's property and settling all claims, the bankruptcy trustee must prepare a final statement of receipts and disbursements ("R&D") and a dividend sheet providing an accounting of all estate assets and the proposed dividend to all creditors with proven claims. The trustee will submit such documents to the inspectors for approval. After such approval, if applicable, the OSB has a right to comment on the documents. Thereafter, the trustee must proceed to have its accounts taxed by the bankruptcy registrar. Following taxation, the trustee must prepare a final R&D and dividend sheet and must send a copy of such documents to all creditors with proven claims, together with a notice of its intention to pay a final dividend and to apply for a discharge. Creditors may object to the final R&D and dividend sheet by filing an objection with the registrar and serving a copy of such objection with the trustee. If no objection is received, the trustee will proceed to distribute the final dividend and apply to the court for its discharge.

Typically, a receiver will realise on all the debtor's property and will seek court authority to distribute the proceeds of realisation to creditors in accordance with their respective priority entitlements. Once all claims to the proceeds have been settled and all distributions have been made, the receiver will apply to the court for its discharge.

Once a BIA proposal has received approval of the Required Majority of creditors and the court, the proposal trustee will oversee the administration of the BIA proposal. Where (i) there is a default in the performance of the proposal, (ii) it appears that the proposal cannot continue without injustice or undue delay, (iii) the approval of the proposal was obtained by fraud, or (iv) the debtor is convicted of any bankruptcy offence, the court may, on application, annul the proposal. If a proposal is annulled, the debtor will be deemed to have made an assignment into bankruptcy. Alternatively, once the proposal is performed, all affected claims against the debtor are fully and finally compromised, discharged and released and the proposal trustee must deliver a certificate to the debtor and the official receiver stating that the proposal has been performed. The proposal trustee is then required to prepare a final R&D in a similar procedure to that described above, and thereafter will proceed to apply to court for its discharge.

A debtor may discontinue CCAA proceedings at any time by failing to obtain an extension of the court-ordered stay of proceedings. Generally, however, a CCAA proceeding will terminate once a plan has received the approval of the Required Majority of creditors, and the court, and thereafter the plan has been implemented. Upon plan implementation, all affected claims against the debtor will be fully and finally compromised, discharged and released. The Sanction Order may provide for automatic discharge of the monitor; otherwise, the monitor will apply to the court for its discharge upon plan completion.

7 Restructuring

7.1 Is a formal statutory procedure available to achieve a restructuring of the company's debts in Canada and, if so, to what extent is it supervised by the court?

As described above, a debtor may restructure its debts through a BIA proposal proceeding, a CCAA proceeding or an arrangement transaction under its governing statute. Proceedings under the BIA and CCAA are subject to ongoing court-supervision from the outset of the proceedings, and court orders are required for various significant matters in the proceeding such as extensions to the stay of proceedings, approval of sales transactions outside of the ordinary course of business, forced assignment or disclaimer of contracts over creditor objections and approval of restructuring plans. In addition, the debtor is subject to the added oversight of a BIA proposal trustee or CCAA monitor, as applicable, which acts as the "eyes and ears" of the court and reports regularly to the court and stakeholders as to the progress of the restructuring proceedings. A restructuring under a debtor's corporate statute is also subject to court oversight, although the proceedings are typically concluded more quickly and there is no statutory mandate for an independent third party to report to the court or creditors.

7.2 If such a procedure is available, is a debt for equity swap possible and how are existing shareholders dealt with?

The provisions of any restructuring plan will vary depending on the facts of a particular case. It is possible for a debtor to issue equity to holders of affected claims. The BIA and the CCAA provide that no holders of existing equity claims may receive any distributions under a proposal or a plan unless all other claims against the debtor are satisfied in full. The claims of equity holders are typically compromised, discharged and released without any compensation and all outstanding equity securities are cancelled.

7.3 Is a moratorium available as part of the restructuring process?

As noted above, a company may restructure through proposal proceedings under the BIA, or proceedings under the CCAA or its governing corporate statute. A broad statutory stay of proceedings against the debtor and its assets automatically arises upon the commencement of BIA proposal or CCAA proceedings. In contrast, there is no statutory stay of proceedings in a restructuring under the arrangement provisions of a company's governing corporate statute. While in some instances courts have used their inherent jurisdiction to extend a stay of proceedings, the stay is typically narrower than a CCAA or BIA stay.

7.4 Can dissenting creditors be crammed down?

There is no "cram down" concept in Canada. In a CCAA proceeding, the Required Majority of each class of creditors must approve a plan. This threshold applies in a BIA proposal proceeding. However, while a CCAA plan may be made to selected classes of creditors, a BIA proposal will not be effective unless the Required Majority of unsecured creditors vote in favour of a proposal. Where a BIA proposal is made to a class of secured creditors who do not vote in favour of such proposal by the Required Majority, such proposal will not be binding on such class of secured creditors.

7.5 Is consent needed from other stakeholders for a restructuring?

As described above, a BIA proposal must be approved by the Required Majority of unsecured creditors in order to be effective, and will not be effective against any classes of secured creditors unless such class also voted in favour of the proposal by the Required Majority. Similarly, a CCAA plan will not be effective unless approved by the Required Majority of each class of affected creditors. As equity holders are prohibited from receiving distributions unless all other claims are paid in full, they often will not receive any distributions under a proposal or plan and will not be permitted to vote in respect of such proposal or plan. Support is often sought by unions and communities, and governmental authorities may also need to provide consent.

8 International

8.1 What would be the approach in Canada to recognising a procedure started in another jurisdiction?

The BIA and the CCAA expressly provide for the recognition of foreign proceedings based on the UNCITRAL Model Law on Cross-Border Insolvencies. A "foreign representative" may apply to court for recognition of a foreign proceeding in respect of which he or she is a representative.

The scope of recognition will depend on whether the foreign proceeding is designated as a "foreign main proceeding" or a "foreign non-main proceeding". To qualify as a foreign main proceeding, the proceeding must be located in a jurisdiction where the debtor has its centre of main interests ("COMI"). In the absence of proof to the contrary, a debtor's registered office (or ordinary place of residence in the context of an individual) will be deemed to be its COMI. A foreign non-main proceeding is any foreign proceeding other than a foreign main proceeding.

Where a proceeding constitutes a foreign main proceeding, an automatic stay of proceedings will be imposed in respect of the debtor and its assets, and the debtor will be prohibited from selling or otherwise disposing of any Canadian assets outside of the ordinary course of business. In contrast, the court has the discretion to implement a stay of proceedings in the case of a foreign non-main proceeding. In either case, the court also has the discretion to make any additional orders it considers appropriate. The court may refuse to issue any order that would be contrary to Canadian public policy.

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