

A close-up photograph of a compass rose. The scale is marked with numbers 330, 340, 350, N, 10, and 20. A red bar chart is overlaid on the scale, with bars of varying heights. A black compass needle is visible in the lower-left corner, pointing towards the 350-degree mark.

# insolvency proceedings in Canada



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## overview of insolvency proceedings in Canada

### Introduction

This document provides a brief overview of insolvency proceedings in Canada. It outlines the Canadian legislative framework and briefly describes the receivership process, the bankruptcy regime and the formal restructuring alternatives available to debtors.

### Legislative Framework

Canada has two levels of legislation which deal with creditors' rights. The federal government has exclusive constitutional authority to legislate with respect to "bankruptcy and insolvency" and provincial governments have exclusive constitutional authority to legislate with respect to "property and civil rights in the province", including the rights of secured creditors. Where a debtor is insolvent and federal legislation is invoked, that legislation is paramount. It should be noted, however, that much of the federal legislation is, by its own terms, subject to the rights of secured creditors. If the debtor is not insolvent, or if federal insolvency legislation is not invoked, the rights of creditors and debtors are governed by provincial legislation.

The three main federal statutes which deal with insolvencies are:

- (i) the **Bankruptcy and Insolvency Act** ("BIA"), a detailed statute which includes Canada's bankruptcy regime and a proposal regime, pursuant to which insolvent debtors can achieve compromises with their creditors;
- (ii) the **Companies' Creditors Arrangement Act** ("CCAA") which permits the reorganization of insolvent companies with debts, including debtors affiliates, over \$5,000,000 and compromise of creditors' claims through a plan of arrangement; and
- (iii) the **Winding-up and Restructuring Act** which governs the liquidation and restructuring of certain types of companies, including banks, insurance companies and trust companies.

A number of provincial statutes also deal with creditors' rights. This document will discuss only the laws of Ontario applicable in an insolvency context. All provinces in Canada have separate regimes for the taking and enforcement of security over real and personal property. While the rights and remedies of secured creditors may be stayed under the federal insolvency statutes and even compromised in certain circumstances, secured creditors are generally able to enforce their rights whether or not insolvency proceedings have occurred. Such enforcement is governed by the terms of the relevant security agreements and provincial law and will often be effected through the appointment of a receiver.

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### Receivership

#### Private Appointment

A private receivership is initiated when a secured creditor with a contractual right to appoint a receiver pursuant to a security agreement exercises that right by executing an appointment authorizing and instructing the receiver to exercise the secured creditor's contractual rights and remedies.

The BIA requires a ten day notice to the debtor before a secured creditor can enforce security (by any method including the appointment of a receiver) over all or substantially all the inventory, accounts receivable or other property of the debtor acquired for or used in relation to the debtor's business. Absent a dispute with the debtor or other stakeholders, a receiver can generally wind up the debtor's business fairly quickly. Private receivership is usually the quickest and least expensive alternative for secured creditors, provided no substantial opposition is encountered from the debtor or other stakeholders.

However, the use of private receiverships has become increasingly rare in recent years due to concerns regarding potential liabilities on the part of the receiver for employee claims, environmental clean-up costs and other operating risks.

#### Court Appointment

If a secured creditor is encountering opposition from a debtor or other stakeholders or there are other factors requiring intervention by a court, a secured creditor may make application for a court-appointed receiver. A court-appointed receiver derives its powers and authority from the order of the court. The appointment of a receiver by the Court is a useful alternative where the debtor or a third party will not allow a secured creditor or private receiver access to the collateral or where there is concern regarding potential liabilities (see above). Also, it is useful if the secured creditor wants to have the disposition of the collateral approved by the court, as the court can establish sale procedures and approve the terms of the sale. This approval can protect the secured creditor from liability which could attach if the debtor or another interested party were to challenge the secured creditor's

methods of selling the assets on the basis that the secured creditor made an improvident sale or if other disputes arise in respect of the disposition of the collateral.

The primary disadvantages of a court-appointed receivership are the costs and loss of control by the secured creditor. Costs are usually significantly higher in a court-appointed receivership because the secured creditor must initiate a court proceeding in order to obtain the appointment of the receiver and that proceeding may be challenged by the debtor or other interested parties. In addition, a court-appointed receiver is usually required to report to the court and seek the court's approval for significant actions, such as a sale of all or substantially all of the debtor's assets. In terms of control, the court-appointed receiver acts as an officer of the court and must take direction from the court. While the views of the secured creditor will usually carry significant weight, the secured creditor will not be able to control the process to the same degree as in the case of a private appointment.

#### Operating the Debtor's Business

In either a private or court appointment, a receiver can be authorized to operate the business of a debtor where it is necessary or advisable; for example to complete a key contract, convert work-in-process and/or to maximize value by selling the business as a going concern.

### Bankruptcy

Creditors may commence bankruptcy proceedings in Canada by filing an application seeking a bankruptcy order against the debtor company. The creditor must be owed at least \$1000 (on an unsecured basis) by the debtor and must allege in the application that the debtor has committed an act of bankruptcy within the six months preceding the date of the application. The most common act of bankruptcy cited is that the debtor has ceased to meet its liabilities as they become due. A bankruptcy application may be initiated by a secured creditor provided that it can establish that it is unsecured for at least \$1000 and that an act of bankruptcy has occurred.

If the application is not opposed by the debtor, a bankruptcy order may be obtained ten days after the

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service on the debtor of the application. The debtor is bankrupt once a bankruptcy order is made against it and the debtor's assets will vest in the trustee in bankruptcy, subject to the right of secured creditors. The trustee would then realize on the assets and the proceeds distributed according to the scheme in the BIA.

If the application is opposed by the debtor, the debtor must file a notice of dispute with the court. In such a case, a bankruptcy order will be made only after a trial at which the allegations set out in the application have been proven.

The BIA also permits a debtor to initiate bankruptcy proceedings. An insolvent debtor may make a voluntary assignment for the general benefit of its creditors. The debtor becomes bankrupt when the assignment is filed with the Official Receiver. A debtor who has made a voluntary assignment is in the same position as a debtor who has been adjudged bankrupt pursuant to a receiving order.

### Benefits to Secured Creditors

There are many reasons why a bankruptcy can be advantageous to a secured creditor, some of which relate to the interplay between federal and provincial legislation and the paramountcy of the federal legislation. For instance, under provincial law a landlord who has distrained for arrears of rent has an interest in the distrained goods which would rank prior to the interests of most secured creditors. Once the BIA is invoked, the scheme of priorities set out in the BIA governs, and the landlord loses priority. The landlord also loses the ability to terminate the debtor's lease. The bankruptcy trustee acquires the right to occupy leased premises and the right to assign leases, subject to certain conditions, in the three month period from the date of bankruptcy.

In addition, provisions of various provincial and federal statutes which create priorities for certain types of claims, such as claims for unremitted sales taxes and unpaid vacation pay, become ineffective upon bankruptcy. Secured creditors therefore sometimes invoke bankruptcy proceedings in conjunction with a receivership or other enforcement proceedings in order to "reverse" these priorities and maximize the recovery from the collateral.

Bankruptcy proceedings are sometimes also used by a creditor when the creditor wishes to investigate a debtor's affairs. The trustee has a statutory right to obtain possession of the bankrupt's books and records, to examine under oath any person reasonably thought to have knowledge of the bankrupt's affairs, and to require such a person to produce any documents in his or her possession or power relating to the bankrupt, the bankrupt's dealings or property. These powers may be important if there are concerns that the debtor has attempted to conceal certain assets or to conceal the transfer of certain assets.

Finally, bankruptcy proceedings can also be invoked to allow the trustee to attempt to reverse certain transactions entered into within prescribed periods prior to the bankruptcy, such as preferential payments to creditors or transactions entered into in order to defeat the claims of creditors.

### Restructuring

The proposal procedure under the BIA and proceedings initiated under the CCAA are primarily debtor-driven and are somewhat analogous to proceedings under Chapter 11 of the United States Bankruptcy Code.

Generally, the proposal procedure under the BIA is less costly and takes less time to complete than a proceeding under the CCAA. The rules and deadlines for BIA proposals are more rigid and the courts have less discretion than under the CCAA, which has very few procedural requirements. The CCAA is more commonly used for large corporate restructurings primarily due to the greater flexibility of the CCAA. The lack of rules under the CCAA allows for the exercise of considerable judicial discretion, especially with respect to the stay of proceedings. In contrast, the scope of the stay of proceedings under the BIA is prescribed by the statute. While the expense, duration and discretionary element of CCAA proceedings can be disadvantageous to secured creditors, CCAA proceedings may be attractive when there is a need for a more extensive stay of proceedings or greater judicial intervention in fashioning a restructuring solution.

### BIA

Part III of the BIA contains provisions allowing a debtor to make a proposal to its creditors. A proposal may be made by an insolvent person (which includes a partnership or corporation), a receiver in respect of an insolvent person's property, a bankrupt or a trustee of the estate of a bankrupt. Most frequently, it is an insolvent person who makes the proposal, in an effort to reach a compromise with its creditors and avoid bankruptcy. A proposal made in respect of a corporation may, in addition to compromising that corporation's debts, include compromises of claims against directors of the corporation, which relate to the obligations of the corporation for which the directors are by law liable in their capacity as directors (as opposed to claims relating to contractual rights of creditors arising from contracts with a director, claims based on allegations of misrepresentations made by directors to creditors or claims of wrongful or oppressive conduct by directors).

A proposal must be made to all unsecured creditors and may also be made to secured creditors. To initiate the proposal process, the insolvent person either files a notice of intention to make a proposal or files the proposal itself. The filing of a notice of intention effects a 30 day stay of proceedings against all creditors (including secured creditors), without the necessity of a court order, during which time the debtor can continue to operate its business and negotiate with its creditors in order to prepare a proposal acceptable to all parties. In addition, during the stay period no person is permitted to terminate, amend or accelerate any payment under any contract with the debtor by reason only that the debtor is insolvent or has filed a notice of intention. Also, any provision of a security agreement that provides that the debtor ceases to have rights to use or deal with the collateral on the debtor's insolvency, default or filing of a notice of intention will not have any force or effect until the proposal has been fully performed or the debtor becomes bankrupt. Notwithstanding the stay, however, a secured lender is not thereby obligated to continue to extend additional credit or make fresh advances to the debtor.

In certain circumstances, the remedies of secured

creditors will not be stayed. Secured creditors who have delivered to the debtor a notice of intention to enforce security more than ten days prior to the debtor's filing of the notice of intention to file a proposal or the proposal itself will not be stayed, nor will secured creditors who have taken possession of their collateral for the purpose of realization. Secured creditors to whom a proposal has not been made will also not be stayed.

Within ten days after filing the notice of intention, the debtor must file with the Official Receiver a cash flow statement, together with a statement with respect thereto signed by the trustee. If no notice of intention is filed, these statements are filed simultaneously with the proposal. Failure to comply with these requirements will cause the debtor to be deemed to have made an assignment in bankruptcy.

At the insolvent company's request, extensions to the initial 30 day stay period may be granted by the court in increments of up to 45 days, to a maximum of five months after the initial 30 day period. If a proposal is not filed prior to the expiration of the stay period, the debtor is deemed to have made an assignment in bankruptcy. Extensions are allowed only in circumstances where the debtor convinces the court that the extra time is necessary and that the debtor will be able to produce a viable proposal within that time. In addition, the debtor must demonstrate that it is acting in good faith and with due diligence and that no creditor would be significantly prejudiced by the extension.

Creditors have a right to apply for an order lifting the stay if, among other things, a debtor has not acted in good faith or with due diligence, if the debtor is not likely to be able to make a viable proposal or if the creditors as a whole would be significantly prejudiced by the continuation of the stay. A creditor is also entitled to apply for an order that the stay does not apply in respect of that creditor if it is likely to be materially prejudiced by the operation of the stay or there are other equitable grounds to lift the stay.

Filing a proposal extends the stay period, as against all unsecured creditors and those secured creditors to whom the proposal has been made, for at least

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an additional 21 days. Within this 21 day period, the proposal trustee must call a meeting of the debtor's creditors. The creditors vote by class on the proposal. Specific guidelines for the classification of secured creditors are contained in the BIA. Under the BIA, each class of unsecured creditors must vote for acceptance of the proposal by a majority in number and two-thirds in value, for the proposal to be deemed accepted by the creditors. Dissenting creditors within a class that votes to accept the proposal are bound by the proposal. Where a proposal has been accepted by unsecured creditors but a class of secured creditors does not approve the proposal by the statutory majority, the creditors in that class are not bound by the proposal and are free to exercise their remedies.

A debtor whose unsecured creditors refuse to approve its proposal is deemed to be bankrupt. If the proposal is accepted by the unsecured creditors, the trustee must apply to the court for approval of the accepted proposal. At this hearing, the court will hear submissions from interested parties, including any dissenting creditor. The court must refuse to approve the proposal if it is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors. If the court refuses to approve the proposal, the debtor is automatically deemed to be bankrupt.

### CCAA

The CCAA is a depression era statute which was enacted to provide an insolvent company a means of rearranging its affairs with both its secured and unsecured creditors by making a compromise or arrangement with some or all of them, and continuing to operate, as an alternative to liquidation. Even though enacted during the 1930s, the CCAA had rarely been invoked by debtor companies until the mid 1980s. Since that time, it has become the most important Canadian statute in the reorganization of large corporate debtors, and it has remained as such notwithstanding the existence of the revised BIA proposal provisions which were introduced in 1992. The popularity of the CCAA is due to, among other

things, the following:

- i) As a result of the generally liberal judicial approach to interpretation of the CCAA and the almost complete absence of statutory rules of procedure, proceedings under the CCAA offer significantly more flexibility to a debtor company than proceedings under the BIA.
- ii) There is no statutory time limit prescribed by the CCAA for the stay of proceedings, although the initial stay cannot exceed 30 days. There is, however, no limit on the length of an extension. On an application for an initial stay or an extension, the debtor must satisfy the court it is acting with due diligence and in good faith and that circumstances exist that make the granting of the order imposing the stay appropriate.
- iii) A court under the CCAA has the discretion to make certain third parties, who are not creditors of the debtor, subject to the stay of proceedings. However, the CCAA does prohibit orders staying proceedings against a debtor company's guarantors or obligors under letters of credit. Even with this constraint, there is more flexibility with respect to a stay than under the BIA.
- iv) If a debtor's unsecured creditors reject a proposal under the BIA or the court refuses to approve it, the debtor will be automatically adjudged bankrupt. Rejection of a plan of compromise or arrangement under the CCAA does not have this effect although, as a practical matter, a bankruptcy will frequently result.

The CCAA is not a lengthy statute and much is left to judicial discretion. There has been a tendency for the courts to be sensitive to the interests of the debtor company and other stakeholders, such as employees. For this reason, the CCAA can be a formidable tool for debtors. Several years ago, the CCAA was amended to narrow the discretion of the court and to bring the stay provisions more into line with those under the BIA. For instance, an order made under the CCAA cannot prohibit a person from requiring immediate payment for goods and services provided after the order is made or require a person to advance further money or credit to the debtor. Nonetheless, a CCAA stay of proceedings remains a

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more flexible tool than the BIA stay of proceedings.

The first step in invoking the CCAA is for the debtor company to make an application to the court for an order declaring that the debtor company is a company to which the CCAA applies and protecting the company from its creditors while it formulates its plan. Although technically possible, it is uncommon for CCAA proceedings in respect of a debtor company to be initiated by a creditor. The CCAA will apply only if the debtor company is incorporated in Canada or if the debtor company, wherever incorporated, has assets or does business in Canada and if the total claims against the debtor company (and its affiliates) exceed \$5,000,000.

In the initial application, the debtor company will generally request that all proceedings against it be stayed until the holding of the meeting of creditors to consider the plan of arrangement. While the debtor may, in situations of extreme urgency, be permitted to make the application without notice or on very short notice, in most cases notice is required to be given to the major secured creditors and, possibly, to other key stakeholders. Where the debtor does not give notice, it is obligated to disclose fully and accurately to the court all relevant circumstances and satisfy the court that there are adequate safeguards for creditors and stakeholders to ensure that their positions will not be inordinately prejudiced.

The court has discretion as to whether or not to grant the debtor company protection and order a stay of proceedings. In deciding whether to grant a stay, the court will generally have regard to the following factors: (i) the likelihood that principal creditors will support the plan; (ii) prejudice to the debtor in not granting a stay; (iii) details of the proposed restructuring, to extent then known; (iv) public policy considerations, including the effect on employees and other stakeholders if the debtor is liquidated; and (v) the ability of the debtor to maintain its business and operations.

The CCAA permits the court to lift any stay imposed. In addition, the court order will usually reserve to the creditors the right to apply to vary any term in the initial stay order. Generally, the court will be unsympathetic to

an application to lift a stay if it has already decided that the debtor ought to be granted protection. An exception is usually made where it is necessary to protect a right which would otherwise be lost by the passage of time, such as the filing of an application for a bankruptcy order to prevent the loss of a right of action available only in a bankruptcy. Further, if the secured creditors can show that their position is being unduly prejudiced by the terms of the order, the court may modify the original order to take these concerns into account. The court, in making its determination, will generally consider, among other things, the effect on the ongoing viability of the debtor, and the fact that permitting a creditor to realize on its security might negate the intention of the CCAA and prevent the debtor company from carrying out the compromise or arrangement.

When a stay order is made, the court must also appoint a monitor to monitor the business and financial affairs of the company during the stay period, and to report to the court and creditors.

The CCAA requires that the plan of compromise or arrangement be approved by a majority in number of the creditors (or each class of creditors) voting, representing two-thirds in value of the claims of the creditors (or each class of creditors) voting. Although the CCAA had always been interpreted as requiring approval of the plan by all the classes of creditors affected by the plan, thereby giving any one class of creditors the right to veto any proposed arrangement in its entirety, it is possible to have the plan structured so that it would be binding only on the approving classes, even if other classes did not approve the plan.

Classification of creditors in a CCAA proceeding is of critical importance. The more classes of creditors there are, the more difficult it will be from the debtor's perspective to obtain creditor approval. The CCAA does not contain specific rules on how to determine the appropriate creditor classification; however, guidelines have been established by the courts over the years. In the first instance, the debtor will generally prescribe the various classes of creditors in its plan. The creditors affected have the right to challenge the debtor's classification.

Once approved by the creditors the plan of

arrangement must be sanctioned by the court. The court has a duty to ascertain not only that all "legal" requirements of the CCAA have been satisfied, but also that the creditors have acted on sufficient information, with time to consider the plan, and that the plan is fair and reasonable. Once approved and sanctioned the plan is binding on all the creditors included in the plan.

The CCAA does not specifically provide for the "cram down" of a plan against the wishes of a secured creditor, and instances where this has occurred are rare. A secured creditor can effectively be crammed down only if it is included in a class of creditors where it does not have a veto, that class approves the plan despite the creditor's negative vote and the court sanctions the plan at the hearing required to approve the plan following its acceptance by the required majority of creditors.

### Cross-border Insolvencies

Both the BIA and the CCAA contain provisions allowing for the recognition of foreign insolvency proceedings. To be effective against creditors and property in Canada, a foreign order must be recognised by a Canadian court. A "foreign representative", such as a bankruptcy trustee, liquidator, administrator or receiver, can institute proceedings in Canada for recognition of foreign insolvency proceedings. Court recognition is discretionary and the principles of international comity are usually applied, unless Canadian public policy would be offended. For matters instituted in Canada, it is equally typical for a Canadian court to request the assistance and recognition of its stay of proceedings and ancillary orders from foreign courts.

The BIA and CCAA give significant discretion to Canadian courts to craft orders that facilitate the coordination of Canadian and foreign proceedings. Some of the principles applied include:

- all stakeholders are to be treated equitably, and to the extent possible, similarly-situated creditors are to be treated equally regardless of their domicile;
- enterprises should be permitted to craft restructuring plans that recognise their nature as a global unit and one jurisdiction should be permitted to assume administration of such restructuring;
- there should be adequate communication between

courts, as well as to stakeholders to permit their reasonable access to the primary jurisdiction dealing with the restructuring.

Courts in Canada and their counterparts in the US have established cross-border guidelines and protocols to facilitate procedural matters including court-to-court communications.

### Amendments to Canada's Insolvency Legislation

In November 2005, Parliament passed Bill C-55 which contained significant, detailed amendments to the BIA and the CCAA. The process to enact the legislation was rushed, giving rise to a significant number of substantive and procedural concerns. Parliament passed further legislation which addresses some of the problematic parts of Bill C-55 and introduces further changes. These amendments are coming into force gradually.

On July 7, 2008 specific provisions of the amending legislation were proclaimed into force by Order in Council. As a result, the Wage Earner Protection Program Act (the "WEPPA") and certain related amendments to the BIA have come into immediate effect. The remaining parts of the legislation are expected to come into force in late 2008 or early 2009.

### Wage Earner Protection

Under the WEPPA, an employee whose employer has become bankrupt or subject to receivership on or after July 7, 2008 is entitled to receive payments from a federal Wage Earner Protection Program on account of any outstanding wages that were earned in the six months immediately prior to bankruptcy or the first day of receivership in an amount not to exceed the greater of \$3,000 and four times the maximum weekly insurable earnings under the Employment Insurance Act.

Corresponding amendments to the BIA are now in force that provide an employee of an employer which is bankrupt or in receivership, with a priority charge on the employer's "current assets" for unpaid wages and vacation pay (but not for severance or termination pay). This charge will secure unpaid wages and vacation pay for the six month period prior to bankruptcy or receivership to a maximum of \$2,000 per employee (plus up to \$1,000 for expenses

for “traveling salespersons”). The priority charge ranks ahead of all other claims, including secured claims, except unpaid supplier rights.

### Pension Plan Contributions Lien

The BIA now also grants a priority charge in bankruptcies and receiverships for outstanding current service pension plan contributions, ranking behind the wage earners priority but otherwise with the same priority as is accorded to that lien. The pension contribution priority extends to all assets, not just current assets, and is unlimited in amount.

The pension charge secures (1) amounts deducted as pension contributions from employee wages but not contributed to the plan prior to a bankruptcy or receivership and (2) amounts required to be contributed by the employer to a pension plan, for “normal costs”. The priority does not extend to unfunded deficits arising upon a wind-up of a defined benefit plan and should not include scheduled catch-up or special payments required to be made by an employer because of the existence of a solvency deficiency.

The existence of this lien underscores the importance of effective reporting and monitoring of pension contributions by the borrower, as well as other employee obligations such as vacation pay.

### Other Pending Legislative Changes

#### Cross-Border Insolvencies

The insolvency reform legislation introduces a regime for recognising foreign orders and regulating concurrent proceedings modelled on the United Nations Commission on International Trade Law (UNCITRAL) model law. The stated goals of the Insolvency Reform Act in respect of cross-border insolvencies are similar to those of Chapter 15 of the recently amended US Bankruptcy Code, which also adopted much of the UNCITRAL model law.

#### DIP Financing

The legislative amendments will codify existing insolvency practice regarding debtor in possession (“DIP”) financing, and will make DIP financing available in both CCAA and BIA proceedings. Even though DIP financing has been a feature of Canadian CCAA-based

restructuring practice for a number of years, it had no clear statutory basis. It was not common in BIA proceedings. The amendments will authorize the court to grant fresh security over a debtor’s assets to DIP lenders in priority to existing security interests.

To ensure that DIP financing is authorized judiciously and does not unduly prejudice parties, the amendments will require the courts to consider several enumerated criteria before authorizing a DIP financing. However, there is no concept closely analogous to the United States Bankruptcy Code requirement of “adequate protection”.

#### Other priority charges that may be ordered by the Court

In addition to the charges for DIP financing and directors’ post-filing liabilities ordered by the court and the statutory charge for unpaid employee wages, the legislative amendments codify special court-ordered restructuring priority charges. For example, courts will have discretion to order charges to secure the costs of:

- the debtor’s financial, legal and other experts;
- court-appointed officials such as trustees, interim receivers and receiver-managers; and
- any “interested party” to the extent that is necessary for their effective participation in the proceedings.

Court-ordered charges securing these costs are already commonplace in CCAA proceedings; however, the amendments will provide an explicit statutory basis for courts to make these orders. The amendments also permit the courts to determine the relative rank of these charges – both among each other and vis-à-vis existing, pre-filing security interests – and thereby establish an ad hoc yet binding priority scheme in respect of the debtor’s assets.

#### Disclaimer of Executory Contracts

Under Canadian restructuring practice there is no necessity for a reorganizing debtor to adopt executory contracts; they remain in force unless otherwise affected by an authorized disclaimer. The amendments will expressly authorize a debtor under BIA or CCAA protection to disclaim executory contracts, excluding collective bargaining agreements, financing agreements

where the debtor company is the borrower, real property leases where the debtor is the lessor as well as derivative and other “eligible financial contracts”. To a certain extent, the amendments will also affect a licensee’s ability to continue using the debtor’s intellectual property. In the past, leases of commercial real estate were the only executory contracts subject to disclaimer under the BIA, while, under the CCAA, the courts exercised wide discretion.

### Statutory Criteria for Approval of Asset Sales

Another notable innovation in the amendments is a requirement that courts approve any sale of the assets of a debtor made out of the ordinary course of its business, based on a number of criteria. Past practice, developed by the courts in the absence of explicit statutory direction, has been inconsistent. The criteria for approval of such sales are more onerous in the case of proposed transactions to non-arm’s length parties. The court may issue a “vesting order” authorizing the transfer of assets free and clear of security interests and other charges and directing that a security interest extends only to the proceeds of the sale.

### A Cautionary Note

This document provides an overview of insolvency proceedings in Canada and is not intended to communicate specific advice applicable to any particular fact situation. Readers are cautioned against making decisions based on this material alone. This document should not be used as a substitute for professional advice on the circumstances of any individual case.

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