

Are Suppliers Who Provide Post Filing Credit Adequately Protected in Canadian Insolvency Law and Practice?

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Introduction

Recently there have been instances where creditors who supplied goods and services to debtors following the commencement of a *Companies' Creditors Arrangement Act* ("CCAA") proceeding have remained unpaid (or partially unpaid). The increase in filings under the CCAA as opposed to court appointed receiverships, has highlighted the inconsistent treatment of the priority given to payment of post filing creditors in the two regimes. In a CCAA, these post filing creditors have no priority, where as in a receivership, they would be protected by the receiver's charge over the assets.

As well, unlike in the United States where key stakeholders, such as the unsecured creditors' committee and the professionals involved have economic incentives to avoid 'administrative insolvency',¹ in a CCAA, there are no stakeholders at the table with a corresponding financial motivation to protect unsecured post filing creditors.

Overview

In a court appointed receivership, typically payment for the post filing supply of credit from suppliers of goods and services ("**Trade Credit Suppliers**") is assured. In a CCAA proceeding, however, such post filing Trade Credit Suppliers are not afforded similar protections as they are not supplying credit to a court appointed officer (who has a first charge for its expenses over the assets of the estate and possibly an indemnity as well), but, rather to the insolvent debtor corporation.

With the move away from court appointed receiverships, as a result of liability concerns by professionals and those who appoint them, the CCAA is increasingly being used to conduct asset sales that would traditionally have been conducted by a receiver. The move to

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these liquidating CCAAs is highlighting the precarious position of post filing Trade Credit Suppliers.

The majority of Trade Credit Suppliers are not well versed in the various insolvency regimes and do not understand the differences between receiverships and CCAA proceedings or their rights/risks in either regime. Further, Trade Credit Suppliers are typically not within the ‘inner circle’ of CCAA proceedings, do not have the same information about the debtor company as other ‘key’ stakeholders, including the secured lenders or debtor in possession lenders (“**DIP Lenders**”) and are often induced to supply goods and services on credit to CCAA debtors.

In certain instances, obtaining post filing credit from Trade Credit Suppliers could be characterised as taking advantage of vulnerable, under-represented and uninformed parties. Judges and court appointed monitors are cognizant of, and becoming increasingly sensitive to, the issue of reporting to the court as to whether or not post filing Trade Credit Suppliers are, or will likely be, paid in full. Traditionally, for reputational reasons, banks as the senior secured lenders and monitors, have also taken steps to ensure such post filing creditors do not remain unpaid. Despite this, there have been a number of situations where these post filing Trade Credit Suppliers have not been paid in full and the concern is that the number of these situations will only increase given the increase in liquidating CCAAs and in the diversity of secured creditors (i.e. the move away from traditional banks to private funds where reputational issues may not be as important).

Post filing credit supplied by Trade Credit Suppliers is often a very economical form of credit and as a practical reality is often a virtual necessity. To date, the instances where post filing debts have remained unpaid have not been large (relatively) and have not attracted significant attention from the insolvency community or from Trade Credit Suppliers. That said, if the current situation does not change, it may only be a matter of time before there is a “disaster” where a large number of post filing Trade Credit Suppliers are left unpaid in a situation which garners a good deal of press. Not only does this cause concern if one object of the courts and its officers is to protect those Trade Credit Suppliers which are a vulnerable,

under-represented and under-informed, but if Trade Credit Suppliers are left unpaid, they will be less likely to supply post filing trade credit in the future.

What, if anything, should be done to address the current situation? There are three primary options that should be considered. Each is summarized below but discussed in more detail in the remainder of the paper:

- (i) **Inform Trade Credit Suppliers:** Most Trade Credit Suppliers lack information about (i) what it means to deal with a court appointed receiver as opposed to dealing with a debtor in CCAA protection; (ii) the fact that the CCAA prevents any creditor from being forced to supply credit (i.e. they can demand COD); (iii) the true financial position of a CCAA debtor, including the status of debtor in possession financing (“**DIP Financing**”), (i.e. often highly conditional, subject to margining formulas and can be terminated on short notice) and pre filing secured creditors (often not subject to the stay of proceedings); and (iv) the likelihood of a reorganization occurring rather than a liquidation of assets, i.e. that the CCAA is most often just a receivership in disguise.

The attempt would be to put Trade Credit Suppliers into a position where they are making an informed decision about whether or not to extend post filing credit. It may be that some basic provision of information to Trade Creditor Suppliers should be required in order to ensure Trade Credit Suppliers are being provided the basics of this information, however, it is impractical to think that the majority of Trade Credit Suppliers will ever be in a position to make a truly informed decision. Not only is the dissemination of information a practical difficulty, but it is equally impractical to expect that Trade Credit Suppliers will expend the amount of time and resources necessary to digest this information properly.

- (ii) **Ensure New Money Comes Out First:** Theoretically, the only reason to incur credit post filing is because one hopes that such financing will support efforts designed to increase the recovery for pre filing creditors.

In order to ensure that this credit risk is born by the appropriate party (i.e. the party “on the bubble” that will be the beneficiary of incremental recovery), this post filing credit needs to be repaid prior to pre filing creditors. This is what happens in a receivership where the post filing credit supplied by trade creditors are expenses of the receiver covered by the receiver’s charge over the assets and in priority to the receiver’s borrowing charge. As discussed below, there seems to be no rational basis for treating post filing Trade Credit Suppliers differently in a court appointed receivership than in a CCAA proceeding. This would mean, however, ensuring that post filing Trade Credit Suppliers are granted a charge over the debtor’s assets in the initial CCAA order or that the DIP Financing commitment will ensure payment of these post filing amounts. Although there is some precedent for this, it is not currently a common practice (and arguably one made more difficult by the new insolvency law amendments). If the charge were to be granted at the same level as in a receivership (i.e. in priority to the DIP Financing charge) a number of issues need to be considered, including the effect on the availability/pricing of DIP Financing.

- (iii) Do Nothing and Hope for the Best: To the extent that changes to insolvency legislation are effective in providing comfort in respect of limitations of liability for court appointed receivers, this may lead to court appointed receiverships again becoming more prevalent, generating a move away from liquidating CCAAs, and reducing the concerns associated with unpaid suppliers of post filing trade credit.

Why should Trade Credit Suppliers be encouraged to supply post filing credit?

At its core, insolvency law has two fundamental goals: (i) to give debtors a fresh start; and (ii) to facilitate debt collection by promoting collective action.² In a corporate context, however, the fresh start principle is limited, in that there is no need to give a corporation itself a second chance because it is a shell. Rather, the goal should be to assist a business (or a portion

² T.H. Jackson, *The Logic and Limits of Bankruptcy Law*, (Cambridge: Harvard University Press, 1986) at 1-6.

of a business) in continuing to operate, so that the negative economic impact of business failure is minimized.

Consequently, the first question to be considered is: does encouraging Trade Credit Suppliers to supply post filing credit accord with these fundamental goals of insolvency legislation? To answer this question, it should be recognized that facilitating the continuation of business operations (where such business operations can be operated profitably) is vital to the fundamental goals of insolvency law. From a fresh start perspective, continuing such operations preserves the opportunity for the assets of a debtor to be sold as a going concern and provides those operations with the best opportunity to become a profitable business in the future. As well, from a collective action perspective, often the preservation of a going concern business is critical in maximizing value received from the sale of a debtor's assets.

To the extent that the supply of post filing credit from Trade Credit Suppliers facilitates a business continuing to operate and operating the business is thought to maximize value for pre-filing stakeholders, post filing credit from these sources should be encouraged.

Does the supply of post filing credit from Trade Credit Suppliers facilitate the continued operations of a debtor? To answer this question, consider the following example of a company filing for protection under the CCAA. Upon filing, parties with contracts with the debtor are typically required by Court order to continue supplying goods and services to the debtor on the same terms as they had previously done.³ Assuming that it is possible, from a practical point of view, to require that the debtor pay for goods and services on a COD basis, the requirement to do so may result in a strain on the cash and personnel resources of the debtor at a point in time where both resources are often scarce. However, the extent of this strain depends on the accounting systems in place. In most CCAAs, however, debtors arrange for DIP Financing, which often comes at a very high cost to the debtor, in order to ensure available funds to continue its supply of goods and services.⁴ As well, the cost in terms of dedication of scarce

³ The fact that no party can be required to extend credit to a company in CCAA protection, however, is rarely, if ever, embodied in the court order or clearly communicated to such post filing Trade Credit Suppliers who are often unrepresented.

⁴ As noted below, DIP Financing is also often portrayed as a form of payment comfort to trade suppliers. In a court appointed receivership the DIP equivalent are the borrowings made by the receiver based on receivers certificates. In both CCAAs and receiverships the post filing loan most often comes from the pre filing secured lenders.

management resources in processing payments on a COD basis can, in certain instances, be very high as such payments must often be manually processed and are not facilitated by certain computerized accounting systems currently in use.

Rather than encouraging debtors to use potentially costly DIP Financing, encouraging suppliers to continue to supply goods or services on historical payment terms diversifies the supply of post filing credit to the debtor. As well, the cost to the debtor of the credit should be reduced as credit is being obtained on historical (or perhaps somewhat shortened) payment patterns, which typically provide for a period of 30 days before payment is due and interest begins to accrue.

Further, for certain types of post filing suppliers, it is impossible to move to COD. Custom orders for example, require the extension of credit prior to delivery as the supplier is using time and resources to manufacture the custom part or piece of equipment. Payment on order in these circumstances, however, is even more problematic from a debtor's perspective than COD. Likewise, suppliers of certain consumable goods such as electricity, gas or water often require pre paid deposits (which may be quite large) to ensure that they are not required to extend post filing credit. Further, a good deal of time and resources (and therefore money) may be required to monitor the sufficiency of the amount of the deposit as compared to levels of usage of these goods. Encouraging supply of these goods and services on credit would reduce not only borrowing costs associated with the DIP Financing used to satisfy the deposits or pre payments, but, would also reduce the cost of resources necessary to ensure that creditors are not inadvertently providing post filing credit.

Consequently, there are valid arguments that Trade Credit Suppliers should be encouraged by our legal regimes to extend post filing credit where there are business operations worth saving.

Inconsistent treatment of Trade Credit Suppliers in the various insolvency regimes

Under the current law, insolvency filings typically proceed in one of, or some combination of, four main ways: (i) by the appointment of a trustee in bankruptcy under the BIA; (ii) by the appointment of a receiver under provisions of the BIA and/or provincial law; (iii) under the proposal provisions of the BIA; or (iv) a restructuring or liquidation under the CCAA.

Although the payment of post filing creditors in each of the four main insolvency proceedings are summarized briefly below, given the predominance of CCAA proceedings and, up until recent concerns about receiver liability flowing from case law, court appointed receivership proceedings. As such, these will be the focus of the paper. As will be seen, post filing credit is dealt with differently in each situation depending upon the type of filing and the question is why this should be so.

Bankruptcy

With limited exception, any obligation incurred by a trustee in bankruptcy following the filing of an assignment into bankruptcy by a debtor is an obligation of the trustee in bankruptcy and the Trustee is entitled to look to the assets of the bankrupt's estate to pay the obligations prior to paying claims of creditors in the bankruptcy. However, to the extent that there are insufficient assets in the estate, the debt becomes an obligation of the trustee personally (or the obligation of a creditor from whom the trustee may have obtained an indemnity). Consequently, in a bankruptcy, the primary risk associated with paying post filing obligations rests with the Trustee, who chose to incur the obligation. Any claim that the Trustee has against the assets rank behind those of the pre filing secured creditors. That said, where there is a material secured creditor, the secured creditor typically controls the proceeding by appointing a receiver, so that it is very rare that a Trustee in bankruptcy would in fact incur post filing obligations which are material.

Court Appointed Receivers and Interim Receivers (Collectively the "Receivers")⁵

Similarly, where there is a court appointed receiver, the typical receivership order provides that the costs incurred by the receiver in administering the estate are the obligations of the receiver and that the receiver will be granted a priority charge over the assets of the estate for these amounts.⁶ In fact, this charge is usually not only in priority to pre filing charges, but, also to the charge afforded to receiver's borrowings. As well, prior to accepting the appointment, the receiver may also have negotiated an indemnity from a creditor, usually the secured creditor who

⁵ The analysis in respect of private receivers is different from that of court appointed receivers. Private receivers act as agent for (where so stipulated in the security instrument, as is common) the debtor and thus do not pledge their own credit. Consequently, a practice had historically evolved whereby private receivers (with the comfort of an indemnity from the appointing creditor) would guarantee payment to post appointment creditors.

⁶ For example see paragraph 17 of the Ontario Model Receivership Order.

procured its appointment, with respect to any obligations the receiver may incur as receiver. Again, in this situation post filing creditors are in effect fully protected.

Proposal under the BIA

In a proposal under the BIA or a filing under the CCAA, an important distinction arises. In a proposal or a CCAA filing, the debtor remains in control of its property and can continue to incur obligations. Under a proposal scenario, because parties are still contracting with the debtor company, suppliers of goods and services supplying post filing credit bear the risk of going unpaid. If (i) there is a proposal filed; (ii) such proposal provides for the payment of post filing creditors in full; and (iii) such proposal is accepted and subsequently annulled (i.e. the debtor can not fulfill the terms of the proposal) post filing creditors have been found to have priority over pre filing creditors.⁷ However, as a corollary, courts have found that where the proposal does not provide that post filing creditors will be paid in full, and the proposal is annulled, all creditors will share on a *pari passu* basis.⁸ If there is no proposal filed or it is not accepted by the creditors or the court, however, post filing creditors will rank on the same priority as pre filing creditors. Further, the court has found that unsecured creditors which provided goods and services to a debtor following the filing of a Notice of Intention to Make a Proposal did not have priority over the claim of a pre filing secured creditor of the debtor absent clear evidence of fraud or fraudulent misrepresentation which induced the party to supply post filing credit.⁹

CCAA

As with a proposal under the BIA, the debtor maintains control of its assets in a CCAA filing. The role of the monitor appointed by the court in a CCAA proceeding has developed into primarily an ‘observing and reporting’ role and the monitor, except in vary rare circumstances, does not, operate the business or incur any liabilities. Similar to proposals, in a

⁷ see *Re Thoun* (1925), 7 C.B.R. 251 (Ont. S.C.) and *Re Ogden Enterprises Ltd.* (1978), 22 N.B.R. (2d) 344 (Q.B.) reversed another grounds [1980] C.T.C. 106 (C.A.).

⁸ see *Re Lipson* (1924), 4. CBR 432 (Ont. S.C.) and *Re Model Craft Hobbies Ltd.* (1981), 39 C.B.R. (N.S.) 97 (Ont. S.C.).

⁹ See *Pike v. Bel-Tronics Co.* (2000), 19 C.B.R. (4th) 262 (Ont. Sup. Ct.) at para 24 to 30. It is not clear why the court would have given priority to post filing claims which were fraudulently induced over those that were not since the burden in either case would fall upon the other innocent creditors and not the company which had perpetrated the fraud.

CCAA post filing Trade Credit Suppliers do not have any other recourse, other than to the debtor company.

Theoretically, if the debtor files a plan of arrangement or compromise which the creditors and the court approve, the debtor may emerge from insolvency protection and continue on as a going concern to which post filing Trade Credit Suppliers may look for recourse (assuming their claims were not compromised).¹⁰ However, in many if not most instances, the assets of a debtor in CCAA protection are sold to a third party with the proceeds being divided up among the creditors of the debtor such that this type of CCAA is barely distinguishable from a receivership. There is nothing in the typical CCAA initial order nor in the CCAA itself, which, provides post filing Trade Credit Suppliers with any priority over the assets of the debtor. However, in a very limited number of cases provisions for charges in favour of post filing trade suppliers have been established (“**PPTS Charges**”). These PPTS Charges, however, are not common and have previously led to disputes about who is covered by the charges.¹¹

Further, the PPTS Charge, like other court ordered charges in a CCAA proceeding, have been made by courts under their exercise of inherent jurisdiction. The recent amendments to the CCAA which have received royal ascent, but have not yet been proclaimed in force¹² provide the court with the express power to create most of the charges which have up to this point commonly been ordered based upon inherent jurisdiction, including charges in favour of professionals, DIP Lenders, directors and officers. But the amendments do not contain a provision which provides the court with an express power to order a general charge for the payment of post filing trade creditors.¹³ Given the codification of certain charges, there then

¹⁰ It is not just pre filing claims that are typically compromised by plans of arrangement. Normally, ‘repudiation claims’ are also compromised. These claims relate to obligations resulting from the post filing repudiations of pre filing contracts by the debtor under court authorization. As the plan is customized to the circumstances there is no firm rule as to which creditor’s claims will be subject to compromise.

¹¹ J. Sarra, “Steel, Sulphur and Coal, Update on Debtor in Possession Financing and Priming Liens in CCAA Applications” IIC – Art 2002-4, Insolvency Institutes of Canada, 13th Annual Conference,

¹² See both C. 47: “An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act and to make consequential amendments to other Acts” (previously Bill C-55) and C.36: “An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act, the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada, 2005” (previously Bill C-12).

¹³ See proposed section 11.4 of the CCAA. This new section provides that a court may designate a supplier of goods and services to be a ‘critical supplier’ and can make an order requiring the person to supply on any terms consistent with the supply relationship or that the court considers appropriate. If the court does so, 11.4(3) requires the court to

becomes a question of whether a court will determine that its inherent jurisdiction to order a PPTS Charge has thereby been curtailed.

Absent a PPTS Charge, there is nothing that requires post filing creditors to be paid before pre filing creditors. Moreover, court orders in CCAA proceedings typically provide that the debtor is authorized, but not obligated, to pay post filing creditors.¹⁴

In CCAA proceedings, the approval of DIP Financing is often used to encourage suppliers to extend credit to the debtor. For example, notices to creditors or press releases may contain statements similar to the following:

The court has approved a \$50 million credit facility provided by Bank Y which is intended to finance Company X's operations during their restructuring.

The above statement, which is factually accurate, is as a matter of practice clearly intended to encourage Trade Credit Suppliers to extend credit to the debtor company in order to minimize the cash outlay required by moving to a COD payment regime, and the presence of DIP Financing is actively marketed to Trade Creditor Suppliers to encourage them to grant post filing credit. However, many DIP Financing arrangements contain strict, and complicated margining requirements which make assessing the actual level of DIP Financing support which will be available to a debtor impossible for any Trade Credit Supplier, since detailed daily financial information would be necessary. As well, DIP Financing arrangements often contain numerous complex conditions whereby the DIP Lender is able to terminate funding to the debtor, often on very short or virtually no notice. Consequently, the comfort which Trade Credit Suppliers are encouraged to take by the presence of DIP Financing is, in reality, much less real than advertised.

Is there a reason to treat Trade Credit Suppliers differently based on the different insolvency regime?

What becomes apparent from the above, is that while post filing suppliers are well protected in receiverships (or bankruptcies), when the business may be continued and then sold

grant a charge over the debtor's property. There would be no need for such charge, unless it is assumed that the court is also ordering the critical supplier to supply on credit.

¹⁴ See for example paragraph 6 of the short form and paragraph 7 of the long form Ontario Model CCAA Orders.

as a going concern, the exact opposite is the case when essentially the same activity is prosecuted in a CCAA or BIA proposal.

If we return to the proposition that Trade Credit Suppliers should be encouraged to extend post filing credit in insolvencies, are there differences in the provisions of the various insolvency regimes that relate to the likelihood of ‘saving a business’ (i.e. selling operations as a going concern as opposed to piecemeal liquidation of assets), which, would account for the difference in treatment of post filing creditors?

As mentioned above, the majority of insolvency filings proceed by either court appointed receivership, or as is more common, given the current questions surrounding receivership liability, CCAA proceedings. Consequently, these will be the two regimes contrasted in this section of the paper.

Although there may have traditionally been the conception that the CCAA was a ‘reorganization’ statute while a court appointed receivership was a method by which assets are sold (commonly referred to as ‘liquidation’), this distinction between the two regimes has proved to be illusory in practice. It is rare that a CCAA filing will lead to a plan of arrangement or compromise being proposed to the creditors. Rather, CCAA proceedings have morphed over time into primarily asset sales, similar to those which are conducted by court appointed receivers.

In these ‘liquidating’ CCAAs the major theoretical difference between a CCAA proceeding and a court appointed receivership is who, legally, is making decisions. Theoretically, in a CCAA filing the debtor is bringing applications to court and making decisions about seeking certain relief from the court, including whether or not to continue operations, to obtain post filing credit or to propose a marketing and sale process etc. However, in reality, the debtor often is so tightly monitored and constrained by lending covenants that it has limited real control over these decisions and the terms and conditions of the specific relief it seeks before the court. In practice, it is the party providing the money, most often the DIP Lender (who is also typically the senior secured creditor and often also carved out of the proceedings) that has a dominating influence over the decisions being made with the monitor (and who often has been the secured lenders pre-filing financial advisor and who would also have been its receiver), providing a check and balance with its responsibility to report to the lenders and to court.

In many instances, this is not a materially different situation than what happens in a court appointed receivership, where typically the senior secured creditor has applied to the court for the appointment of the receiver, which it nominates, and where it is the one who provides funding to the receiver if necessary based on a court order providing charge in the form of receiver's certificates, which function in the same manner as DIP Financing in a CCAA proceeding.

The likelihood of preserving a business as a going concern to maximize value by selling the business as a going concern to a new purchaser is virtually identical under both a liquidating CCAA and receivership proceeding. Consequently, it is difficult to see how the small amount of additional debtor involvement that occurs in a CCAA provides a rational involvement for treating the supply of post filing credit from Trade Credit Suppliers so radically different under the two regimes.

What should be done?

Assume, as discussed above, that from a policy perspective it is decided to encourage Trade Creditor Suppliers to supply post filing credit in order to provide more liquidity which will help preserve business operations in hopes of achieving a going concern sale. The current concerns are that (i) Trade Credit Suppliers are being encouraged to provide post filing credit but are not fully informed as to the risks of doing so particularly when the presence of DIP Financing is used to encourage them to advance credit, or their legal rights to not do so; and (ii) the different treatment of post filing credit supplied by Trade Credit Suppliers based upon the insolvency regime chosen creates confusion and that is unjustified.

As noted at the start of this paper, however, the answers as to what, if anything, should be done are not easy. True informed consent would require ensuring Trade Credit Suppliers understand not only the differences between dealing with a court appointed receiver as opposed to a CCAA debtor and their legal rights to demand COD, but also with the true extent to which the DIP Financing protects them as well as the likelihood that a reorganization will occur rather than a liquidation of assets.

Ensuring Trade Credit Suppliers are fully informed is not practical from either the perspective of the party who is trying to disseminate the information (i.e. the debtor or the

monitor) or the party who is trying to process the information (i.e. the supplier). However, ensuring at a minimum that CCAA debtors disclose the fact that they are in CCAA protection and requiring CCAA debtors to comply with certain of the duties of a bankrupt under the BIA may be a starting point.¹⁵ Further, modifications to initial model orders to require rather than permit payment of post filing creditors and make it clear that no party is required to extend credit to a person in CCAA proceedings may also be appropriate.

An obvious way to encourage the supply of post filing credit is to ensure that post filing creditors get paid. Practically, this means giving the post filing suppliers of goods and services a charge over the assets of debtor as security for payment of goods and services supplied post filing or by the court insisting that the DIP Financing contains a commitment to fund the debtor to pay such creditors. As mentioned, ensuring that the new money in (or in this case new goods or services provided) is paid out first, ensures that the appropriate party is bearing the risk of incurring such further credit. In a court appointed receivership, the payment of post filing suppliers is a receiver's liability, secured by the receiver's charge, which typically has first priority over the assets of the debtor (along with administration costs), and in priority to the charge typically provided to secure receiver's borrowings. It is difficult to rationalize why suppliers of post filing credit, which, takes the form of goods or services should have a different priority than that afforded to suppliers of post filing credit, where the credit takes the form of funds. This is especially true when the funds are intended to be used to pay for the goods and services but at a practical matter the issue never seems to become relevant.

Interestingly, in Chapter 11 cases professionals, the unsecured creditors committee and the trustee have an incentive to ensure that a DIP Lender commits to fund post filing credit incurred in accordance with a reasonable budget and with provisions for funding during a "tail" period following termination of the DIP facilities. That is because all such parties are personally concerned about the effects of "administrative insolvency". The trustee's concerns relate to the public perception of the administration of justice. The unsecured creditors committee has a financial interest in ensuring post filing creditors are paid, as generally the pre

¹⁵ The proposed insolvency amendment would require CCAA debtors to comply with the duties of a bankrupt under s. 158 of the BIA (which relate to assisting in maximizing the value of the estate and co-operating with the trustee), but not with those under section 199 of the BIA (which require disclosure of bankrupt status before obtaining credit).

filing creditors on the committee are also supplying credit post filing. As well, the professionals have a direct financial interest, in that if a Chapter 11 proceeding is converted to a Chapter 7 proceeding in the event of an administration insolvency, a Chapter 7 trustee will look to amounts received by the professionals to be disgorged and redistributed on a pro rata basis to unpaid post filing creditors. Although the Canadian courts and the monitor have similar incentives to the trustee in Chapter 11 proceedings, the influence of the unsecured creditor's committee and economic incentives of the professionals running the file in a Chapter 11 proceeding are both absent in a CCAA proceeding.

Consequently, thought should be given as to (i) whether in CCAA proceedings it is appropriate to grant suppliers of post filing trade credit with a charge ranking *pari passu* with the DIP Lenders charge; (ii) whether the court should examine, at point of approval, if the DIP Financing commitment is appropriate and reasonable in the circumstances to ensure adequate protection for post filing Trade Credit Suppliers. The effect of a charge in favour of Trade Credit Suppliers on the price and availability of DIP Financing, however, as a practical reality needs to be considered; and (iii) the appropriateness of requiring the monitor to comment on the adequacy of the DIP terms in ensuring payment of post filing creditors at the time the DIP Financing is approved and, if the monitor is unable to advise that adequate protection is in place it may be appropriate for the court to order that the debtor may not procure post filing credit.

Administrative insolvency is an emerging issue in CCAA proceedings. Unless the new insolvency legislation brings with it a return to court appointed receiverships as a preferred process over liquidating CCAAs, in the absence of serious scrutiny at the commencement of the CCAA proceeding, to ensure that safe guards are in place to avoid non-payment of post filing creditors, there is a serious chance that this emerging problem will become both more prevalent and of greater magnitude.