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Summary of Amendments to the CCAA and BIA

On September 18, 2009, amendments (the "Amendments") to the *Companies' Creditors Arrangement Act* (the "CCAA") and *Bankruptcy and Insolvency Act* (the "BIA") came into force.

The CCAA Amendments are applicable to all entities which commence proceedings under the CCAA on or after September 18, 2009. The BIA Amendments are applicable to all persons that become bankrupt, file a notice of intention or a proposal, or have an interim receiver or receiver appointed in respect of all or part of that person's property on or after September 18, 2009.

The following is a summary of the major changes, excluding those changes relating to consumer bankruptcy and proposals, that have resulted from the coming into force of the Amendments.

These changes are the combined result of the following two pieces of legislation:

- Chapter 47 of the *Statutes of Canada, 2005*: "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
- Chapter 36 of the *Statutes of Canada, 2007*: "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).

Certain of the Amendments, specifically those with respect to the *Wage Earner Protection Program Act*, 2005, c. 47, s.1, were proclaimed in

force on July 7, 2008. On July 30, 2009 the Governor General in Council announced that the remaining Amendments were to come into force on September 18, 2009, with the exception of a few minor provisions.

Changes to CCAA/BIA

Approval of Plans of Arrangement or Compromise and Proposals

The Amendments significantly alter the existing case law and corresponding practice by stipulating that the Court may only sanction a plan under the CCAA or a proposal under the BIA, if the plan or proposal includes a provision for the payment of certain wage and pension-related amounts.

Pursuant to the Amendments, employees are to receive (i) the amounts they would have been entitled to receive under the BIA if the debtor company had gone bankrupt (being up to a maximum of \$2,000 for services provided in the six months prior to the date of the initial bankruptcy event (explicitly excluding termination and severance pay)); and (ii) amounts owing for services rendered after the commencement of the CCAA or proposal proceedings (however, no explicit exclusion for termination or severance pay is provided).

Should employees be terminated post-filing, it is therefore not clear if full payment of termination and severance amounts would be required to be paid to such employees upon the approval of the plan/proposal or only that portion which arose post-filing through their continued employment.

If the debtor company participates in a prescribed pension plan, the debtor company must provide, as a term of its plan or proposal, for the payment to the pension fund of an amount equal to the sum of all amounts that were deducted from the employee's remuneration for payment to the pension fund and amounts which were required to be paid by the employer to the pension fund,

unless the parties to the pension plan have entered into an agreement, approved by the relevant pension regulator, respecting payment of these amounts.

Asset Sales

While the CCAA did not previously contemplate asset sales, existing CCAA case law does permit the sale of assets outside of the ordinary course of business and outside of the filing of a plan. Similarly, asset sales outside of the ordinary course were not previously contemplated where a notice of intention to file a proposal ("NOI") or a proposal has been filed.

The Amendments codify existing case law, but also include detailed provisions regarding the sale of assets to related parties and prohibit the Court from approving a sale unless the debtor company can and will make certain employee and pension payments.

The new provisions apply to all asset sales and there is no threshold amount under which the provisions do not apply. This is a change from past practice where initial orders granted in CCAA proceedings generally included a provision allowing asset sales by the debtor company under a certain value to be completed without prior Court approval.

The Court may only approve a sale of assets if it is satisfied that the debtor company can and will make the payments that would have been required for unpaid wages and unpaid pension plan contributions if the Court had sanctioned the plan or proposal. These sections do not specifically exclude post-filing severance and termination amounts owing to employees.

Also, if the proposed sale is to a related person, the Court may only approve the sale if it is satisfied that good faith efforts were made to sell the assets to non-related persons and the consideration to be received is superior to the consideration that would have been received under any other offer.

Assignment of Agreements

The Amendments provide the Court with the ability, in certain circumstances, to order an assignment of an agreement between a third party and a debtor company without the required consent of the counterparty to the agreement. These changes are applicable in a proposal or CCAA proceeding, or if a receiver has been appointed.

The new explicit authority granted to the Court represents a substantive change to the CCAA and BIA and it is uncertain how these sections will be interpreted.

While the CCAA does not currently provide for the assignment of agreements, case law does exist where assignments have been ordered by the Court over the objection of the counterparty whose consent was required under the terms of the agreement. This has not, however, been common practice.

The Court is not authorized to order the assignment of certain agreements, namely those which; (i) are not assignable by their nature (i.e. personal service contracts), (ii) were entered into on or after the CCAA or BIA proceedings were commenced, (iii) are eligible financial contracts, or (iv) are collective agreements. The Court may not order an assignment unless it is satisfied that all monetary defaults in relation to the agreement will be remedied; such defaults do not include those arising by reason only of the debtor company's insolvency, the commencement of CCAA or BIA proceedings, or non-monetary obligations.

When determining whether or not to order the assignment, the Court will consider whether:

1. the monitor or proposal trustee (if the order is sought in a proposal proceeding) approved the proposed assignment;
2. the proposed assignee would be able to perform the obligations under the agreement; and

3. it would be appropriate to make the assignment.

Disclaimer of Agreements

The CCAA did not previously provide for the disclaimer of agreements and the BIA did not provide for the disclaimer of agreements (other than leases). Historically however, the Courts have permitted debtor companies to disclaim agreements and deal with the consequences thereof in the plan or proposal.

The past flexibility of disclaiming agreements is somewhat narrowed by the Amendments, which provide that the debtor company may disclaim any agreement, provided the monitor or trustee approves of the proposed disclaimer. The counterparties to the agreements to be disclaimed are also provided a process to object to the disclaimer.

Should the monitor or trustee not provide its consent to the disclaimer, the debtor company may apply to the Court for an order disclaiming the agreement. Similarly, a party whose agreement has been disclaimed under this provision may apply to the Court for an order that the agreement should not be disclaimed.

When deciding whether or not to make such orders, the Court shall consider a variety of factors, including whether:

1. the monitor or trustee has approved the disclaimer;
2. the disclaimer would enhance the prospect of a viable restructuring or proposal being made; and
3. the disclaimer would cause significant financial hardship to a party to the agreement.

Any loss suffered by a party pursuant to a disclaimer is considered to be a provable claim.

The debtor company's ability to disclaim agreements do not extend to eligible financial contracts, collective agreements, financing

agreements if the debtor company is the borrower, or leases of real property or of an immovable if the debtor company is the lessor. Similarly, a disclaimer of an agreement does not affect a counterparty's right to use intellectual property for which it has been granted a right to use by agreement.

Collective Agreements

Under past practice there was some uncertainty as to whether the Court had the power to amend a collective agreement. The Amendments make it clear that neither the debtor company, nor the Court, have such power.

While the debtor company is not unilaterally able to amend a collective agreement, under the new provisions, the debtor company is able to apply to the Court for an order authorizing it to enter into negotiations with the applicable bargaining agent pursuant to a "notice to bargain." Should the Court be satisfied that renegotiations are necessary and grant the order, and the parties to the collective agreement subsequently agree to revise the collective agreement, the bargaining agent will have a claim as an unsecured creditor for the value of any concessions it has made under the collective agreement.

Once the debtor company has been authorized by the Court to serve a "notice to bargain", the responding bargaining agent may apply to the Court for an order requiring any person to provide information to the bargaining agent which relates to the debtor company's business or financial affairs and is deemed to be relevant to the collective bargaining between the debtor company and the bargaining agent. This particular amendment now provides the bargaining agent with broad power to access the financial and business records of the debtor company.

Integrity of Agreements

In respect of proposal proceedings under the *BIA*, the *BIA* previously provided that no party could terminate, forfeit, amend, or claim for

accelerated payment under any agreement, including a security agreement, with a debtor company, by reason only that proceedings had been commenced under the *BIA*. Pursuant to the Amendments, existing case law has been codified to extend this limitation to bankruptcy and *CCAA* proceedings.

If a party can persuade the Court that the operation of this provision would cause them significant financial hardship, the Court may order that this provision does not apply to them or only applies to them in part. The Amendments would appear to change the focus of the test for relief from the stay to an evaluation of the prejudice suffered by the affected party, rather than the balancing of prejudices between the debtor company and the affected party, as has been historically exercised by the Court.

Stay of Proceedings

The Amendments have clarified the impact of a stay of proceedings arising under a *CCAA* filing or the filing of an NOI or proposal, in respect of the ability of a regulatory body to continue, or commence proceedings against an insolvent person.

Under the Amendments, a stay of proceedings does not affect a regulatory body's ability to investigate, or carry out an action, suit or other proceeding against, an insolvent person, so long as the action taken by the regulatory body is not with respect to recovery of a payment ordered by the regulatory body or the Court.

On application by the insolvent person, and on notice to the regulatory body and others likely to be affected by the order, the Court may order that the stay of proceedings is effective against the proceedings commenced or continued by a regulatory body, if the Court is satisfied that:

1. a viable restructuring or proposal could not be made if the regulatory body was exempt from the stay of proceedings; and

2. it is not contrary to the public interest that the regulatory body be subject to the stay of proceedings.

Administrative Charges

The Amendments codify the Court's current practice of granting charges over the debtor company's property and assets in order to provide protection for the payment of the fees and disbursements of monitors, trustees and receivers, as well as other professionals involved in the proceedings.

This protection is now extended to include the fees of any other professional engaged by an "interested person" if the Court is satisfied that the security/charge is necessary for their effective participation in the proceedings.

"Interested Person" is not defined in the CCAA, BIA or the regulations; accordingly, it is unknown as to how the Court will interpret this provision.

The Court may grant the administrative charge priority over all the secured creditors. However, like the other Court ordered charges, which have often been granted on minimal notice, this new provision requires that notice be given to secured creditors "likely to be affected" prior to the charge being made, which may be a significant change in practice.

The Court may also grant trustees, interim receivers, and receivers borrowing powers and security for costs incurred in the operation of an insolvent or bankrupt corporation.

DIP Lenders Charge

The Amendments codify the Court's past practice of granting charges against the debtor company's property and assets in favour of DIP lenders in CCAA proceedings and introduce the same provisions when an NOI or proposal has been filed. The Amendments prohibit the Court from granting a charge for obligations existing prior to the date of the order.

In determining whether to exercise its authority and grant a DIP charge the Court is to consider:

1. the period of time the debtor company is expected to be in CCAA proceedings or proposal proceedings under the BIA;
2. how the debtor company's affairs are to be managed during the CCAA proceedings or proposal proceedings under the BIA;
3. whether the debtor company's management has confidence of its major creditors;
4. whether the loan would enhance the prospects of a viable restructuring or proposal;
5. the nature and value of the debtor company's property;
6. whether any creditor would be materially prejudiced; and
7. the monitor's or trustee's report.

The DIP charge is expressly prohibited from securing any obligation that existed prior to the granting of the order, which is a deviation from past CCAA case law. The Court may grant the DIP lender priority over any existing secured creditor. The DIP charge, in the past, has often been granted on minimal notice to other creditors; the new provision requires that an application for a DIP charge be made on notice to secured creditors "likely to be affected". This may be a significant change in practice.

It is also unclear how the priority granted to the DIP charge in a CCAA proceeding will interact with the new employee charges for unpaid wages and pension amounts which would arise in a subsequent receivership or bankruptcy.

Directors' Charges

The Amendments codify the Court's current practice of granting a directors' and officers' charge over the debtor company's property and assets in CCAA proceedings. The codification however, restricts in various ways the Court's previously unfettered ability to create such charges.

In the context of the *BIA*, the Courts did not previously have the ability to grant directors and officers charges over the debtor company's property. The Amendments now provide the Court with such authority where an NOI or proposal has been filed.

The Court is only authorized to grant charges for liabilities incurred **after** the *CCAA* filing, or **after** an NOI or proposal has been filed, and only for those post-filing liabilities for which adequate insurance cannot be obtained at a reasonable cost. Additionally, directors' and officers' charges, which historically were often granted by the Court on minimal notice, may now only be granted if notice has been given to the secured creditors "likely to be affected." Though it is not clear as to how this new notice requirement will be applied, this may be a significant change in practice under the *CCAA*.

Preferences and Transfers at Undervalue

The Amendments have replaced the former settlement and reviewable transaction provisions of the *BIA* with a new remedy being "Transfers at Undervalue." The existing preference remedies have been amended to provide an effects-based test for non-arm's length transfers.

The revised preferences and new transfers at undervalue sections in the *BIA* have also been imported into the *CCAA* and makes unnecessary the historical practice of filing a bankruptcy application against the debtor company subject to *CCAA* proceedings, in order to trigger the "look-back" date for preference time periods under the *BIA*.

These *BIA* sections are now applicable to a plan in the *CCAA*, unless the plan provides otherwise.

With respect to preferences, the new provisions require that an arm's-length transfer may be deemed fraudulent and void if it was; (a) a transfer by an insolvent company, (b) with a view to preferring that creditor, and (c) the transfer occurred in the three months prior to the initial bankruptcy event. For a transfer between non

arm's-length parties to be deemed fraudulent and void it is only necessary to show; (a) a transfer by an insolvent person, (b) with the effect of preferring, and (c) the transfer occurred within the 12 months prior to the initial bankruptcy event.

With respect to transfers at undervalue, the new provisions require that a transfer between arm's length parties may be subject to attack if the:

1. transfer was at undervalue;
2. transfer occurred within one year prior to the date of the initial bankruptcy event;
3. debtor was insolvent at the time of the transfer or was rendered insolvent by it; and
4. debtor intended to defraud, defeat or delay a creditor.

A transfer between non-arm's length parties may be subject to attack if the:

1. transfer was at undervalue; and
2. transfer occurred within one year prior to the date of the initial bankruptcy event.

A transfer between non-arm's length parties where (i) the transfer was at undervalue and (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by the transfer OR the debtor intended to defraud, defeat or delay a creditor, then the look back period is extended from one year to five years.

Transfers at undervalue may be voided by the Court, or orders may be made that a party to the transfer or any other person who is privy to the transfer, pay to the estate the difference between the value of consideration received by the debtor and the value of the consideration given by the debtor, with fair market values to be considered.

Non Liability of Court-Officers

The past protections given to monitors under the *CCAA* and trustees and receivers under the *BIA*

have been broadened by the Amendments to specifically address successor employer issues.

In an attempt to negate the effects of the Supreme Court of Canada's decision in *GMAC Commercial Credit Corporation v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123, the *CCAA* and *BIA* have been amended to specifically provide that monitors, trustees and receivers shall not be liable for claims arising prior to their respective appointments, and shall not be considered successor employers by reason of carrying on the business of the debtor company or continuing the employment of the debtor company's employees in their respective capacities as monitor, trustee or receiver.

Removal of Directors

The Amendments reverse the current case law which had held that the Court did not have the jurisdiction to remove directors.

The Courts now have the authority to make an order removing from office any director of the debtor company in *CCAA* proceedings or in which an NOI or proposal has been filed, if the Court is satisfied that the director could jeopardize a viable plan/proposal being made, or is acting or likely to act inappropriately in respect of the debtor company's efforts to achieve same. Should the Court decide to remove a director, it also now has the authority to fill the vacancy created by such removal.

Equitable Claims

The Amendments contain a number of provisions which significantly impact the rights of creditor's having a claim in respect of an equity interest, including, among others, a dividend or similar payment, a return of capital, a redemption or retraction obligation, a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or contribution or indemnity in respect of a claim previously described.

Unless the Court orders otherwise, creditors having equity claims are to be in the same class of

creditors in relation to those claims and may not, as members of that class, vote at any meeting, including a meeting held to determine if a proposal should be accepted.

With respect to bankruptcy proceedings, a creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

Cross-Border Insolvencies

The prior cross-border insolvency provisions of the *CCAA* and *BIA* were very limited and gave the Court the authority and discretion to make any order or grant any relief in a cross-border proceeding to facilitate arrangements that would result in the coordination of the *CCAA* proceedings and foreign proceedings. The Amendments repeal the prior cross-border insolvency provisions of the *CCAA* and *BIA* and replace them with a modified version of the UNCITRAL Model Law on Cross-Border Insolvency. The new provisions provide a complete code for the recognition of foreign insolvency proceedings in Canada.

Certain of the key elements of the new provisions are as follows:

1. An application to the Court for recognition of a foreign proceeding shall be accompanied by various documents evidencing the existence of the foreign proceeding and the authority of the foreign representative.
2. An order of the Court recognizing a foreign proceeding will specify whether the proceeding is to be deemed a foreign "main" or "non-main" proceeding.
3. Once appointed, the foreign representative may commence and continue proceedings under the *CCAA* or *BIA* in respect of the debtor company as if the foreign representative was a creditor of the debtor company, or the debtor company.

4. If no prior proceedings have been initiated under the *CCAA* or no prior proposal proceedings have been initiated under the *BIA*, an order of the Court recognizing a foreign main proceeding shall be accompanied by a stay order.
5. Once a foreign proceeding is recognized by the Court, various obligations are imposed on both the Court and the foreign representative with respect to cooperation and disclosure, respectively.
6. If any *CCAA* or proposal proceedings are commenced after an order is made recognizing a foreign proceeding, the Court shall review the foreign order and if it determines that such order is inconsistent with the order subsequently granted in regard to the *CCAA* or proposal proceedings, it shall amend or revoke the foreign order.

Definitions

New definitions have been added to the *CCAA* and *BIA*, including a definition for income trusts. The amendments also clarify which parties will be treated as related parties for purposes of the *CCAA* and *BIA*.

The Amendments extend the definitions of company and corporation to include income trusts, confirming their applicability under the *CCAA* and *BIA*. The Amendments have also introduced the definition for an income trust within the *CCAA* and *BIA*. An income trust is defined as a trust which has assets in Canada and its units are listed on a prescribed stock exchange or the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event.

CCAA Specific Changes

Obligations of Debtor Companies

The Amendments have codified the obligations in *CCAA* proceedings of debtor companies to perform certain duties and have specifically mandated that the debtor company shall now perform the duties as set out in section 158 of the *BIA*, which are appropriate and applicable in the circumstances.

The detailed duties as provided for in section 158 of the *BIA* encompass the general concepts of being cooperative and providing such information and documents as may be requested by the monitor. Certain of the required duties of the debtor company are to:

1. make or give all the assistance within its power to the monitor in making an inventory of its assets;
2. make disclosure to the monitor of all property disposed of within the year before the date of the initial bankruptcy event, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;
3. make disclosure to the monitor of all property disposed of by gift or settlement without adequate valuable consideration within the five years before the date of the initial bankruptcy event;
4. aid to the utmost of its power in the realization of its property and the distribution of the proceeds among its creditors; and
5. inform the monitor of any material change in its financial situation.

Who May Act as Monitor

Previously, the *CCAA* did not restrict as to who may act as monitor. The Amendments have

changed this situation by establishing requirements for who may act as the monitor and also limiting which of the eligible monitors may act in any given situation.

Monitors are now required to be licensed trustees. Appointments are further limited, unless the Court orders otherwise, to licensed trustees who are not or who have not been affiliated with the debtor company in certain capacities, including having acted as its auditor, within two years preceding the CCAA proceedings. The Court has also been given explicit authority to replace the monitor by appointing another licensed trustee if it considers it appropriate in the circumstances.

Functions of the Monitor

The functions of the monitor previously delineated by the CCAA were fairly nebulous directions relating to examining the debtor company's property and filing reports with the Court. The Amendments effectively codify many of the monitor's functions. The increased codification, combined with the added supervisory role of the Office of the Superintendent of Bankruptcy (the "OSB") is a substantial change from past practice.

The newly codified functions of the monitor will include, amongst other things, the payment of the prescribed levy to the OSB (such levy not yet prescribed at this time) and advising the Court on the reasonableness and fairness of any proposed plan.

In exercising its powers and carrying out its newly defined duties, the monitor is now also expressly charged with acting honestly, in good faith and in compliance with the code of ethics. In tandem with the new requirement for monitors to be licensed trustees, the Canadian Association of Insolvency and Restructuring Professionals (the association which regulates licensed trustees) has introduced new standards of conduct for monitors.

The Amendments also grant monitors the additional right of access to the debtor company's property, to the extent necessary for the monitor to review the affairs of the debtor company.

OSB's Powers

The OSB did not previously have any defined role in CCAA proceedings or in respect of overseeing monitors appointed under the CCAA. The Amendments now give the OSB certain express duties and powers.

The OSB is now required to keep for the prescribed 10-year period, a public record of certain information relating to the proceedings under the CCAA, to provide the public record upon request and to receive and keep a record of all complaints regarding the conduct of monitors.

The OSB will now have the right to apply to the Court to review the appointment or conduct of a monitor, intervene in any matter or proceeding relating to the appointment or conduct of a monitor, make any inquiry or investigation regarding the conduct of a monitor, cancel or suspend a monitor's license as a trustee, or place any condition or limitation on the license that the OSB considers appropriate.

Critical Suppliers

In the past, the Court infrequently granted charges in favour of suppliers who were determined to be "critical suppliers." Pursuant to the Amendments, the Court is given the express authority to deem certain suppliers "critical," force them to continue to supply to the debtor company and grant such suppliers a charge over the debtor company's property and assets.

Pursuant to the Amendments, the Court may make an order declaring a person to be a "critical supplier" to the debtor company and make a corresponding order requiring that person to continue to supply to the debtor company. If the Court deems a person to be a critical supplier and makes an order requiring continuing supply, the Court shall grant the critical supplier a charge

against the property for the value of the goods/services supplied under the order.

Previously, typical CCAA initial orders required all suppliers to continue to supply goods or services post-filing. There may be an argument, based on the new provisions, that such orders should only be made by the Court if a supplier is considered "critical" and accompanied by the required charge. It was the previous practice for the Court to allow payment of pre-filing arrears to "critical suppliers" in certain circumstances and it is not clear whether the Amendments will prevent such practice from continuing.

Claims Process

The CCAA previously provided for a minimal claims procedure, as claims procedures were typically established by specific Court order on a case-by-case basis. The Amendments create a more delineated claims procedure, somewhat similar to that which exists in the *BIA*.

While the new claims provisions are arguably a codification of existing practice, the flexibility of the Court's powers has been reduced by this codification.

The new provisions stipulate the types of claims which may be compromised under a plan and specifically exclude fines, penalties, restitution orders, awards of damages for bodily harm and wrongful death and debts or liabilities arising out of fraud or false pretences, unless the plan explicitly provides for the claim's compromise and the relevant creditor has agreed to compromise under the plan.

The new provisions allow the debtor company to classify its creditors into classes for the purpose of voting at the meeting of creditors according to similarity of interests and rights, such as nature of debt, security and remedies. The debtor company must apply to the Court for approval of such classification prior to the meeting of creditors.

The new provisions prescribe that a creditor who is related to the debtor company may vote against, but not for the plan, and that equity claimants are not permitted to vote unless the Court orders otherwise.

BIA Specific Changes

Filing Location

The Amendments now specify that an application to appoint an interim receiver or national receiver must be made an application to appoint an interim receiver or a national receiver under the BIA must be filed with the Court having jurisdiction in the judicial district of the locality of the debtor.

As previously defined in the *BIA*, "locality of the debtor" means the principal place where the debtor has either carried on business or resided during the year immediately preceding the date of filing, or where the greater portion of the property of the debtor is situated.

Appointment of Interim Receiver

The Amendments seek to reassert the 'interim' nature of an interim receiver by specifying the duration of its appointment. In addition, the powers which a Court may grant to an interim receiver have been narrowed.

Pursuant to the Amendments, the appointment of an interim receiver when a section 244 notice of an intention to enforce security has been sent to the debtor or is about to be sent, will cease upon the earliest of the trustee or receiver taking possession of the debtor's property or the expiry of 30 days, or any other period specified by the Court, after the initial appointment.

Furthermore, if an interim receiver is appointed after an NOI has been filed, the appointment will expire upon the earliest of the trustee, or receiver taking possession of the debtor's property or the proposal being approved by the Court.

Under the Amendments, the Court's ability to direct interim receivers to take "such other action that the Court considers advisable" has been replaced with specific powers to take conservatory measures and to summarily dispose of property that is either perishable or likely to depreciate rapidly in value.

National Receiver

On the application of a secured creditor, the Court may now appoint a national receiver to take control of the business and the affairs of a debtor company.

The Amendments have introduced the new role of national receiver to carry out the functions previously performed by receivers appointed under provincial statutes and/or by interim receivers. The Court may now appoint a receiver under the *BIA* to take possession of all or substantially all of the property of an insolvent debtor, exercise any control that the Court considers appropriate over the debtor's business and property and take any other action that the Court considers advisable.

The Court may also make an order granting a priority charge over the property of the debtor for the fees and disbursements of the receiver. The Court's ability to make such an order is contingent on the Court being satisfied that adequate notice and an opportunity to make representations were provided to all secured creditors that may be materially prejudiced by the priority charge.

Repossession by Unpaid Supplier

The Amendments have modified the window in which an unpaid supplier may repossess goods, and have provided additional protection to suppliers in respect of the adverse affect of a debtor company commencing proceedings under the proposal provisions rather than initiating a bankruptcy or receivership.

Under the Amendments, an unpaid supplier may repossess goods delivered any time in the 30 days prior to the appointment of a bankruptcy trustee or receiver and, if they choose to do so, must make a demand for repossession within 15 days after the filing date. If the bankruptcy or receivership follows the filing of an NOI or proposal, the 30 day period is to be calculated from the filing of the NOI or proposal.

Definitions

New definitions have been added to the *BIA*, including a definition for "entity."

Under the Amendments, "entity" has also been included in the definitions under the *BIA*, and is defined as a person other than an individual. The inclusion of the term entity means that entities, such as partnerships and income trusts are now captured under the relevant sections of the *BIA*. References to "corporation" in the *BIA* have in most cases been replaced by the broader term "entity."

Special Thanks

Our Insolvency, Bankruptcy and Restructuring Group thanks [Alex MacFarlane](#), [Jane Dietrich](#), [Kate Stigler](#) and [Jarvis Héту](#) in our Toronto office for their assistance in preparing this communiqué.

Contact Us

If you have any questions or would like further information on these Amendments to the *CCAA* and *BIA*, please contact one of the following members of our [Insolvency | Restructuring Group](#):

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