Charting A New Course: Best Practices When Dealing with Employees, Retirees and Union Stakeholders in a Restructuring

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I. INTRODUCTION

Courts at all levels, as well as academic commentators, have long stated that the *Companies' Creditors Arrangement Act* ("*CCAA*")[1] is a bare bones statute that grants the court significant discretionary authority in overseeing the restructuring of an insolvent company. In most cases, the goal of the insolvent company and its stakeholders is to efficiently restructure the company.

In a restructuring, the role of the court is to oversee the restructuring process to ensure that justice is served. The courts have a mandate to make sure not only that is justice done, but that it is seen to be done.[2]

As restructuring professionals and officers of the court we owe a duty to assist the courts in that regard.[3] In a restructuring context, a guiding principle

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1 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

2 *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2002) 32 CPC (5th) 357 (Ont Div Ct) at para 4; *Re Calpine Canada Energy Ltd* (2007), 28 CBR (5th) 185 at para 31 (Alta QB).

3 See generally Law Society of Upper Canada, *Rules of Professional Conduct*, rr 4.06(1), 6.01; Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, rr 1.01, 1.02; Law Society of Alberta, *Code of Professional Conduct*, c 1, r 1-3; Law Society of Saskatchewan, *Code of Professional Conduct*, rr 1.01(1), 1.01(2); Law Society of Manitoba, *Code of Professional Conduct*, c 1.01(1), 10.1(2); Québec, *Code of Ethics of Advocates*, RRQ, c B-1, r 3, s 2.00.01; Nova Scotia Barrister's Society, *Code of Professional Conduct*, rr 1.01(1), 1.01(2); Law Society of New Brunswick, *Code of Professional Conduct*, c 20; Law Society of Newfound-

should be to ensure that, as far as practicable, stakeholders are given the fullest opportunity reasonably available in the circumstances both to understand the process, including with the assistance of counsel,[4] and to participate in a meaningful way in the restructuring outcome. The broader interests of justice are not served when key stakeholders, particularly vulnerable stakeholders like employees and pensioners, are left confused, angry and bereft of entitlements with the feeling that they have been the victims of a "drive by" restructuring.

Although the court has ultimate authority, the real action typically does not take place in the courtroom. Rather, what takes place before the court is most often the presentation of a negotiated outcome. In many cases what may have taken days or weeks to negotiate is presented in a one or two hour motion. Those stakeholders who were not involved in the negotiation may never know the full extent of the discussions, the alternatives advanced by particular parties or all of the options considered by the insolvent company.

In Ontario and Québec, restructurings are typically overseen by a specialized commercial court and are governed by rules and protocols that are designed to reflect the realities of the business world. In other jurisdictions, insolvency proceedings are usually presided over by specific judges with significant commercial experience. Time is an important commodity in such forums. The deadlines inherent to an insolvency proceeding require parties to deal with their issues quickly and efficiently or face the consequences of failure. "Real time litigation" means short service, little (if any) discovery and, in legal terms, the rapid resolution or determination of issues. Even for litigation counsel who are experienced in non-insolvency matters in the ordinary courts, proceedings in a specialized forum may be unfamiliar and frustrating. How much more unfamiliar and intimidating must this forum be for unsophisticated stakeholders who may not even be represented by counsel?

The "real time" process presumes that the parties involved are creditors, sophisticated, understand their legal rights and have the resources to advance and protect their interests, including by engaging competent counsel. In such an environment, the requirements of real time litigation both in terms of speed and confidential negotiations can be satisfied because the commercial parties not only understand the process, but they have the resources to protect their financial interests.

However, in *CCAA* proceedings, the court is expected to also consider the interests of stakeholders other than creditors. In *Century Services Inc*,[5] the Supreme Court of Canada ("SCC") observed that the broad, discretionary au-

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land and Labrador, *Code of Professional Conduct*, c 13; Law Society of Yukon, *Yukon Code of Professional Conduct*, c 3.

4 See discussion within this article regarding recommendations on how, when and on what terms to use representative counsel in a restructuring.

5 *Century Services Inc v. Canada (Attorney General)*, 2010 SCC 60 at para 18, [2010] 3 SCR 379.

thority of a court is required because more than creditor interests are at stake. Employees, their families, retirees and communities also have an interest in the outcome of the proceeding.

Unlike creditors, these stakeholders are not commercially sophisticated. They are unfamiliar with court processes, let alone the harsh reality of real time litigation. Their only prior experience with the judicial system may have been a traffic ticket or a divorce and they may never again be exposed to any aspect of the Canadian justice system. These disadvantages can be exacerbated by the fact that employee or retiree issues in a restructuring are complicated and can require stakeholders to gain an understanding of arcane and difficult matters such as pension plans and proposed business plans that require significant changes to wage rates, work rules and benefit levels.

Insolvent companies that leave stakeholder interests to the end of the process or simply hope to force employees and retirees to be subject to a *fait accompli* run the risk of the restructuring failing or being delayed. The recent decision of the Ontario Court of Appeal in *Indalex*[6] has caused much consternation in the creditor, lending and business communities. While the SCC will ultimately decide how that case will be determined on its facts, the authors are of the view that many issues of concern raised by the Ontario Court of Appeal on matters of process can be avoided in future restructurings if certain steps are taken to open the process to all affected stakeholders at the earliest possible time.

The purpose of this article is to propose process-based solutions and to encourage all professionals involved in a restructuring to step back and consider a fresh perspective on various aspects of a restructuring proceeding in Canada – both procedurally and substantively. The authors are from two law firms that generally represent stakeholders with quite different interests in a restructuring: one as counsel to union and non-union employees, retirees and pension authorities, and the other as counsel to insolvent companies, DIP lenders and secured and unsecured creditors. In the course of writing this article, we have challenged each other to view familiar issues through a different lens and to find ways in which we can better engage stakeholders to more meaningfully and appropriately participate in the restructuring process. It is our collective view that, by doing so, an insolvent company gives itself the best possible chance of succeeding in its restructuring efforts.

This article suggests a new approach to restructuring that looks to maximize the *efficiency* of the restructuring process and to serve the broader interest of ensuring a *just* restructuring process, by treating these key stakeholder groups not as obstacles to be overcome, but as important stakeholders who need to be engaged and understand the business and legal forces at work in a real-time restructuring.

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6 *Re Indalex Ltd*, 2011 ONCA 265, 75 CBR (5th) 19 [*Indalex*].

II. PRE-FILING CONSIDERATIONS

One issue on which professionals have spent a great deal of time, particularly since the Ontario Court of Appeal's decision in *Indalex*, is the matter of notice of an initial application for relief under the *CCAA*. Distinct from personal views of the merits of the appeal under reserve (at the time of writing) by the SCC, the decision has caused practitioners of all persuasions to more fully consider the procedural aspects of restructurings within our comfortable sphere of real-time litigation. The fact that a restructuring proceeding is commenced with little or no notice is not what leads to anxiety and criticism by certain stakeholders including employees, retirees and unions. Rather, it is the *extent* of the relief sought and often obtained as part of the initial application that creates the concern.

Substantive relief obtained without notice as part of an initial order has historically been the lightening rod that results in lines being drawn and parties entrenching themselves in a certain mindset at the outset of a restructuring. It creates a climate that, in our view, impedes the resolution process and can result in a less efficient restructuring. Changing the landscape at the outset of a proceeding can eliminate one roadblock to ensuring better dialogue among key stakeholders. In this article, we invite you to separate the issue of notice of the commencement of a proceeding from many aspects of the relief usually sought in connection with an initial order.

The only sections of the *CCAA* that refer specifically to the initial application by an insolvent company relate to (i) the appointment of a monitor[7] and (ii) the scope of the stay of proceedings under the initial order.[8] Section 11.02(1) of the *CCAA* provides as follows:

> A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
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> (a) *staying*, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of a company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
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> (b) *restraining*, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
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> (c) *prohibiting*, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.[9]

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7 *CCAA*, *supra* note 1, s 11.7(1).
8 *Ibid* ss 10(2), 11.02(1), 11.03, 11.04, 11.07, 11.08, 11.09, 23(1).
9 *Ibid* s 11.02(1) [emphasis added].

The section specifically refers to the power to (i) stay, (ii) restrain and (iii) prohibit certain actions from being taken. In short, the language is protective in nature. Compare that to the language of many initial orders obtained without notice, which include the power to repudiate contracts, terminate employees, cease certain operations, make no further payments into pension plans, borrow funds in an amount to carry the company through the entire restructuring secured by super-priority charges – in effect, the type of powers the insolvent company needs to undertake its entire restructuring. It is the broader relief obtained as part of an initial order that causes certain stakeholders and critics of the restructuring process to cry foul. Is there a better path forward than the current practice? We believe that there is.

It is generally accepted, as the protective language in section 11.02(1) of the *CCAA* provides, that an insolvent company must be able to obtain protection in the form of a broad protective stay of proceedings, with little or no notice, if it is to have any hope of being able to restructure its affairs. If broad notice of the company's insolvency and its intention to seek a protective stay of proceedings was provided, it would undermine the very basis for obtaining the stay. If advance notice of an impending filing was provided, it would be an admission of insolvency by a company that could trigger rights of termination by counterparties under material contracts, licenses and supply agreements. It could also cause key employees to leave or cause customers to immediately look for alternate sources for the supply of goods or services. Certain parties could use it as an opportunity to impose new payment terms or require payment on delivery (or "hostage payments"), effect rights of set off or refuse to deliver products or pay amounts owing.

It would assist certain stakeholders if the reasons for the lack of notice or minimal notice to employees, retirees and union stakeholders of the commencement of a restructuring proceeding and the implications of disclosure prior to a stay being obtained was better understood by those parties. That task is made easier if the relief sought as part of an initial order is protective in nature and does not extend to all relief required by the company to effect its entire restructuring.

Courts as far back as *Re Lehndorff General Partner Ltd*[10] have struggled to give guidance to the profession as to who should receive notice of a *CCAA* proceeding and how much notice, if any, is appropriate. Rather than trying to extract any hard and fast set of rules from the cases that have commented on this issue,[11] we suggest instead the following principles of general application,

10 *Re Lehndorff General Partner Ltd* (1993), 17 CBR (3d) 24 at para 3, 9 BLR (2d) 275 (Ont Gen Div) [*Lehndorff*].

11 *Ibid*; *Indalex*, *supra* note 6 at paras 130-140; *Re Royal Oak Mines Inc* (1999), 6 CBR (4th) 314 at para 24, [1999] OJ No 709 (Gen Div); *Re Royal Oak Mines Inc* (1999), 7 CBR (4th) 293 at para 7, [1999] OJ No 864 (Gen Div); *Re Timminco Ltd*, 2012

subject always to exceptions as circumstances require, and with particular suggestions regarding notice to employee, retiree and union stakeholders described below.

(a) Although the CCAA specifically permits any order that the court considers appropriate to be made without notice,[12] *this order ought to be the exception rather than the rule.*

Since at least 1993,[13] the courts have required at least some notice to be given to key stakeholders when the type of relief being sought in the initial application includes broad powers contained in the standard forms of initial orders now in use in many jurisdictions in Canada.[14] These cases collectively stand for the proposition that, if you are seeking sweeping *CCAA* relief as part of an initial order, it is not appropriate to surprise everybody. The courts will, and should, view with scepticism any application for an all-encompassing order, without notice to anyone.

(b) Key stakeholders should be given at least some notice of the initial hearing.

This principle is easily stated, but contains two terms requiring further discussion. Who are "key stakeholders" and how much is "some notice"? The answers to both questions depend on the facts of each particular case.

A review of cases and of the common practice across the country reveals that, in most cases, secured creditors are considered to be "key stakeholders" for this purpose, but, for the most part, unsecured (trade) creditors are not. Unsecured but organized creditors, such as bondholders, can fall on either side of this line of distinction. Regulatory authorities, including pension regulators in the applicable jurisdictions, usually do not receive notice of the application for relief until the initial order is obtained.

Similarly, "some notice" can mean anything from less than an hour up to a few days or longer, depending on the facts of the case and the effect and scope of the relief being sought.

For the reasons outlined above, employees, unions and retirees rarely get *advance* notice of the commencement of a proceeding. Usually, notice is given to employees and unions contemporaneously with the hearing of the initial application or immediately after the initial order is granted. As a general

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ONSC 106, 89 CBR (5th) 127 (SCJ) [*Timminco*]; *Re Algoma Steel Inc* (2001), 25 CBR (4th) 194 at paras 1-7, [2001] OJ No 1943 (CA).

12 *CCAA*, *supra* note 1, s 11.

13 *Lehndorff*, *supra* note 10.

14 Currently, the provinces of Ontario, British Columbia, Alberta, Québec and Saskatchewan all have model *CCAA* orders in place.

rule, retirees are often the last stakeholder group to receive formal notice and, in most cases, this notice occurs after the initial order has been obtained and often from informal sources (media outlets, speaking with other retirees, word of mouth) rather than formal notice from the company, the monitor or counsel to any stakeholder.

The first challenge we pose on the issue of notice is to reconsider the scope of relief contained in most initial orders. We recognize that a great deal of time and effort has been spent by many professionals across the country in achieving "standard form" initial orders. This effort has been an admirable and exhaustive project with very positive implications and useful application in modern *CCAA* proceedings. However, the existence of an approved precedent should not override the third and fourth principles that we say emerge from a review and consideration of the cases and the *CCAA* itself regarding notice, as follows:

(c) Stakeholders who are particularly and/or uniquely affected by the relief being sought should be given as much notice as practicable in the circumstances.

(d) If it is not practicable to give adequate notice to particularly/uniquely affected stakeholders so as to have an effective substantive hearing in "real time" on the merits, the matter should be dealt with under the comeback clause of the initial order with the burden remaining on the applicants to justify the relief obtained.

The comeback clause, although a seemingly powerful remedy and a practical solution in many cases, is subject to real-world limitations. Often by the time a comeback motion is scheduled, the landscape of the restructuring has shifted based on the terms contained in the already-issued initial order such that the objecting stakeholder does not bother to proceed with the comeback motion. For this reason, we suggest comeback clauses should be used as a back-stop, not as a cure-all, for notice deficiencies in the first instance.

There is a different, and in our view better, method of proceeding that would lead to more substantive involvement of affected stakeholders in a practical and respectful way at the earliest possible time in a restructuring that would, far from undermining the restructuring efforts, ensure that such restructuring occurs with the proper, informed and necessary input of affected stakeholders.

III. THE INITIAL ORDER RE-VISITED

Prior to the first court attendance seeking an initial order and the commencement of a restructuring proceeding, the debtor company and its advisors will have spent weeks – in many cases months – preparing. The company's business, assets, liabilities, contractual obligations, contingent obligations and many other aspects of its operations will have been reviewed, assessed and considered in the context of the impending restructuring and all other available options. Often, the company's advisors will have been working for weeks or months obtaining the necessary information, reviewing documents and preparing extensive court materials, cash flow forecasts and negotiating interim financing term sheets. In almost all cases, the company and its counsel has had time to draft materials and to customize, to some extent, the standard form of initial order. Counsel usually has draft materials in progress as a "plan B" for many weeks or months. The only parties with knowledge of these steps are the company's own advisors, its board of directors and senior management and possibly its senior secured lenders and proposed interim financiers.

When the proceeding is commenced, the most immediate need is for stability in the form of a stay of proceedings to ensure that creditors cannot exercise remedies that would thwart the ability of the debtor company to ultimately effect a restructuring. Very often, the company filing for protection has already run out of cash or has used up any available runway provided by its existing lenders outside of a formal court proceeding. Immediate financial obligations may be looming, whether in the form of payroll, special payments required under defined benefit pension plans, termination or severance payments under collective agreements or other large or immediate payments. Quite often, these impending payments are the reasons cited for the filing and the need for immediate interim financing ("DIP financing").

There is always urgency associated with a debtor company's insolvency and the commencement of a restructuring proceeding. All *CCAA* proceedings are, to some extent, urgent. Any time there is, by definition, not enough money to pay everyone, it creates tensions that can quickly elevate to a crisis level. Everyone is under pressure and much is at stake, including the very survival of the business. As Justice Farley once said, each "insolvency usually carries its own internal seeds of chaos, unpredictability and instability."[15] This statement is true in every restructuring. However, within that context, some crises are more real than others.

Many restructurings are not commenced until the very last possible minute, resulting in the financial situation being a crisis simply by virtue of the fact that the company did not take the step of seeking protection earlier, even by days or weeks. This urgency is often cited as the reason that DIP financing is sought at the outset, failing which the insolvent company has no ability to continue its operations even in the short term.

There are situations where an unexpected or significant financial obligation arises with no realistic ability to address it, precipitating an immediate

15 *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc* (1994), 27 CBR (3d) 148 at para 22, 114 DLR (4th) 176 (Ont Gen Div).

filing and corresponding need for interim financing to be made available above the company's current financing arrangements. In such a crisis, the usual preparatory work cannot be done.[16] In those cases where there hasn't been adequate time to be thoughtful about the approach, counsel for the company is required to get as much as they can under the initial order to ensure that the company survives and the issues can be dealt with under a comeback clause, as is currently done in most cases. In our view those crisis situations, unless manufactured to be so as a result of timing, ought to be the *exception* rather than the rule.

A crisis creates tension. Tension results in leverage that can be used to achieve a certain result in order to avoid the less favourable alternative. The alternative is often framed as a cessation of business operations, loss of employees/customers/suppliers resulting in a wind-down of the business. When requested relief has the effect of altering substantive rights of certain stakeholders without prior notice, the presence of a comeback clause provides little practical redress in many situations.

We suggest that under an initial order, applicant companies should get what they *need* to stabilize the company, not everything they may *want* to have all the rights and powers necessary to restructure the business. In most cases, many of the powers customarily granted on the first day in a standard form initial order have little application until many weeks or months down the road.

In most cases, stability can be achieved by obtaining an initial order that includes only the bare minimum relief; for example, a stay of proceedings, protection for continuing directors and officers, if their continued involvement is beneficial to the company and its stakeholders, protection for professional advisors providing services to the insolvent company and the appointment of a monitor–without the necessity for altering substantive rights including through the creation of a priority charge for DIP financing. Rarely does a company have absolutely no liquidity runway such that no notice can be given for the motion seeking the DIP financing charge.

An initial order as we propose would not include things like super-priority charges except to the extent such charges are absolutely necessary to stabilize the company until a substantive hearing on the merits on notice to all directly affected stakeholders can occur.

It is worth reflecting on a number of restructuring proceedings undertaken over the past 15 years and considering those circumstances where it was truly essential to obtain DIP financing on day one as part of the initial order. Much of the criticism voiced by stakeholders within various proceedings and concern expressed by members of the judiciary arises from the simple concept of notice. As a basic proposition, a party's substantive rights ought not to be affected without advance notice and an opportunity to be heard. Amendments

16 See generally *Re Warehouse Drug Store Ltd* (2006), 30 CBR (5th) 218, 2006 CarswellOnt 8375 (SCJ).

to the *CCAA*[17] have assisted by specifying those parties who are entitled (required) to receive notice of a motion seeking priority charges for interim financing over the property of an insolvent company. Do those requirements represent the high-water mark or the floor?

Obtaining immediate relief on an urgent basis in the form of a stay of proceedings that simply suspends, but does not otherwise affect, a party's rights for the sole purpose of stabilizing the business operations of an insolvent company cannot really be disputed. For reasons cited above, advance notice of such relief cannot be given to parties where to do so would undermine the very reason for the relief to be sought. If stability in the form of a stay of proceedings was the extent of the relief sought on an initial order, the basis for criticism on the issue of notice would disappear. Once stability is achieved through a stay of proceedings under an initial order, there is rarely a case where some form of notice cannot be given for all other relief to be sought by the debtor company in a restructuring proceeding. This notice would include an order for DIP financing, the ability to terminate contracts, disclaim leases and take other steps that relate to the actual restructuring of the business, rather than simply stabilizing tenuous business operations.

On this basis, the authors propose that we shift our traditional thinking on initial orders in a restructuring proceeding to reflect a clearly delineated two-step process. Under this model, the initial order would simply commence the proceeding, appoint a monitor, stay the enforcement of all rights and remedies, ensure the continuing supply of essential services, preserve and maintain the role of directors and officers by providing them with protection in the form of a director's charge, ensure that the company has the ability to maintain advisors through an administration charge, provide for a continuation of services to the debtor company provided payments are made from and after the date of the initial order in accordance with normal practices and provide for service of materials and other general matters in connection with the proceeding. Any order seeking DIP financing, permitting the debtor company to take steps in connection with a restructuring and all ancillary relief (the "return date order") would then be deferred for seven to ten days after the date of the initial order, to permit notice of the commencement of the proceeding to be disseminated to the public and to affected parties.

The authors invite greater judicial scrutiny to the type of relief sought as part of initial orders, including where DIP financing is sought. Counsel for the monitor and the debtor company ought to be expected to advise the court as to the reason why the application for a stay of proceedings and minimal relief could not have been brought even one week earlier, with the request for DIP financing and other relief deferred to the current return date on notice to affected stakeholders. If this approach became the norm, all parties would be prepared to respond and would react accordingly.

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17 *CCAA*, *supra* note 1, s 11.2(1).

A two-step process does not mean that a second set of court materials needs to be filed by the debtor company. The original application record in support of the initial order should be sufficiently detailed and contain full disclosure of all facts and evidence to support relief sought by the applicant on its first day initial order, as well as the relief to be sought seven or ten days later. The application materials can contain both forms of order – the initial order and the return date order. The completeness of that record constitutes notice for the relief to be sought as part of the return date order.

As the same application record will be used, any additional costs that may be incurred by the insolvent company in requiring two court attendances rather than one would be minimized. On the initial hearing, no parties other than the insolvent company, secured creditors, the monitor and possibly the intended DIP lender would be in attendance. If only protective relief is sought under the initial order, the first attendance would not likely be lengthy. All substantive relief would be sought as part of the return date order seven or ten days later.

One concern that counsel for the debtor company, monitor and DIP lender may have with a two-step process is the further delay that may result if an adjournment is sought and obtained by certain stakeholders. Just as it is appropriate for the presiding judge to require counsel for the debtor company and the monitor to satisfy the court on the real urgency of combining other relief with a bare minimum initial order, a similar burden should fall on counsel for any stakeholder who seeks to use delay as a tactic to create leverage. Once notice has been given of an insolvent company's request for additional relief in the form of a return date order, requests for adjournments ought to be granted very sparingly, and only if the resulting potential harm to the insolvent company can be appropriately addressed. Otherwise, the potential for mischief would be great and the ability of a company to get on with its restructuring could be bogged down unnecessarily.

A second concern that could be raised relates to the fact that the stay under the initial order can only be granted for a period of 30 days, resulting in the parties attending in court a total of three times, including for the first extension, within 30 days, rather than twice. A corresponding concern would be that by day 29, when the parties return to court seeking an extension of the stay under the initial order, there will have been little time for the debtor company to demonstrate what has been accomplished in support of its request for a stay extension. The argument would be that an intervening court attendance on notice to all parties took place, providing an opportunity for the company and its advisors to engage in dialogue on the terms of the return date order, rather than using that time to actually begin to restructure.

The authors believe that if the two-step process for obtaining the initial order on day 1 and seeking the return date order seven or days later was followed, the court would be free to include as part of the return date order, an extension of the initial 30-day stay of proceedings by ten days, to permit the debtor company to have the full 30 days from the date of the return date order. The court's authority for granting this extension would be the same as applies to the usual request for an extension of the stay of proceedings within the first 30 days of a proceeding having been commenced.[18]

IV. THE PROCEEDING

A. Timing for Seeking DIP Financing

Having moved this issue conceptually past the initial order except in the most critical of emergency filings, what type of notice is required and to whom should it be given? In particular, do the notice requirements in the recent amendments to the *CCAA* reflect a bare minimum, or the high-water mark for notice to affected parties of a request for DIP financing?

In our view, there is a legal response to this question and a practical one. The legal response is that the recent amendments to the *CCAA* requiring notice to secured creditors for the granting of priority charges means that they are the only stakeholders that Parliament saw fit to ensure received such prior notice. There is good reason for that legal position, as outlined below, in discussing the relative weight that ought to be given to submissions made by various parties on the matter of DIP financing. However, the practical response is less legalistic and more likely to facilitate the type of consensus building approach that will increase the likelihood of a successful restructuring with stakeholders being fully engaged at the earliest opportunity.

Separate from the issue of the relative weight to be given to submissions that may be made by various stakeholders on a hearing seeking DIP Financing, in our view, it is a best practice to provide notice to unions and other employee groups, regulatory authorities and all key stakeholders that interim financing is being sought and the terms of same. The granting of priority charges affects all creditors of the company and key stakeholders are entitled to attend and make their views known.

There are situations where the level of urgency facing the insolvent company is so significant that adequate notice cannot be given to stakeholders. In those cases, priority charges ought to be limited to only such amounts as are absolutely necessary to stabilize the company until a substantive hearing on the merits on notice to all directly-affected stakeholders can occur. This procedure is sometimes referred to as "drip feeding" the DIP financing. Similar considerations apply to the directors and officers charge and the administrative charge. They too should be limited to only the amounts necessary to protect those

18 *CCAA*, *supra* note 1, s 11.01(2).

parties until a substantive hearing on the merits with notice to the stakeholders uniquely affected thereby can be provided.

One example of "drip feeding" approvals of priority charges can be found in the case of *Re Timminco Ltd.*[19] On its initial application, Timminco obtained two priority charges for administrative expenses in the amount of $500,000 each, with a director and officer charge intervening between the two administrative charges in the amount of $400,000.[20] By order obtained approximately two weeks later, Justice Morawetz altered the priority of existing charges and added a key employee retention plan ("KERP") charge.[21] Approximately one month after the initial order was granted, Timminco sought and received approval for DIP financing in the amount of $4,250,000. In *Timminco*, they were able to follow the process of iterative approvals because the company did not require emergency financing until shortly before the hearing regarding the approval of the DIP financing.

B. Stakeholder Input on DIP Financing

There are some aspects of this article on which the authors (despite relentless arm-wrestling) simply could not agree. The appropriate extent of stakeholder input on DIP financing is one such issue and judicial determination in future cases would be welcome. For those insolvency practitioners who often represent debtor companies and DIP lenders in *CCAA* proceedings, the granting of DIP financing is a lifeline thrown to a drowning person. If the captain (monitor) and the coast guard (court) are satisfied that the terms are fair and reasonable, the drowning person has agreed to the terms upon which the lifeline is being made available, then, since the person's dependents ultimately stand to gain by his rescue, that ought to suffice. Consider then the weight that should be given to those passengers sitting in the boat who argue that a different form of lifeline should be used, or that the person isn't really drowning and could probably save himself given enough time.

DIP financing is similar in many respects to a purchase money security interest ("PMSI") and it is helpful to consider the notice provisions applicable in that situation. A properly perfected PMSI is afforded "super-priority" over existing security interests because it has the effect of adding to a debtor's estate,

19 *Timminco*, *supra* note 11.

20 Pursuant to the initial prder, the priorities of the administration charge and director and officer charge was as follows: first–the administration charge (to a maximum of $500,000); second–the director and officer charge (to a maximum of $400,000); and third–the administration charge (to a maximum of $500,000) ranking behind all encumbrances pending return of the comeback motion.

21 First–the administration charge (to a maximum of $1,000,000); second–the KERP charge (to a maximum of $269,000); and third–the director and officer charge (to a maximum of $400,000).

rather than taking away from it. PMSI are often referred to as "enabling loans" as they enable a debtor to buy equipment or inventory that it would otherwise not have the funds to purchase. The equipment or inventory that is purchased *augments* the debtor's existing property, and its use in the business benefits creditors and stakeholders generally. The only parties who receive notice of a newly-created PMSI are existing secured creditors who hold a perfected security interest over the same type of collateral. Unsecured creditors, employees, suppliers and others do not receive advance notice of such security transactions involving a debtor company.

DIP financing brings money into the debtor's estate that is then available to augment the entire estate, rather than being used to purchase a particular piece of equipment or inventory. Value is created for the benefit of all stakeholders, both secured and unsecured. The priority charge that protects advances made to an insolvent company reflects the value generated for the business and undertaking as a whole, without which the company would not be able to restructure. The *CCAA* provides that existing secured creditors are to receive notice of a motion seeking a charge in priority to their interest, but does not require that unsecured creditors receive notice. The standing of unsecured creditors to oppose the granting of DIP financing and the weight to be given to such submissions are, of course, a matter of judicial discretion and are considered on a case by case basis. For the purposes of this article and the question of what input employees, retirees, pensioners and unions should have, we simply note the applicable provisions of the *CCAA* and the analogous situations outside of the *CCAA* such as under the *Personal Property Security Act* (Ontario).[22]

C. Appointment of Representative Counsel

i. When is the Appointment of Representative Counsel Appropriate?

In a *CCAA* proceeding, employees (both union and non-union), former employees and retirees who are beneficiaries of the insolvent company's pension, benefits and post-retirement benefit plans may seek to have representative counsel appointed to assist them in protecting their interests in the *CCAA* proceeding. The insolvent company itself may bring a motion seeking to have representative counsel appointed for employees and former employees in order to better manage communications and information requests, and to know with certainty who it can negotiate binding agreements or compromises with. In this section of the article, we will discuss (a) the jurisdiction of the court to appoint representative counsel; (b) the reasons to appoint representative counsel, including the factors that a court may consider in the appointment of representative

22 *Personal Property Security Act*, RSO 1990, c P10 [*PPSA*].

counsel; (c) the potential or actual conflicts of interest that may require the appointment of representative counsel for different groups of employees or between employees, former employees and retirees; and (d) the role of the collective bargaining agent in the *CCAA* process.

(a) Authority to Appoint

Courts have observed that the authority to appoint representative counsel derives from two sources. The first is under the Rules of Civil Procedure in each Province (the "Rules"), which continue to govern practice and procedure in restructuring proceedings under the federal insolvency statutes except in cases of a conflict where the federal statutes prevail. Rule 10.01 of the Ontario Rules provides that a representative may be appointed to represent any person or class of persons with an interest in an estate (or regarding any other matter where it is necessary or desirable to make an order) who cannot be readily ascertained, found or served. Rule 12.07 of the Rules also provides the court with authority to appoint a representative party where numerous people have the same interests and Rule 12.08 has a similar provision dealing with members of a trade union or unincorporated associated.

The second source, section 11 of the *CCAA*, gives the court wide discretion in any matter relating to a *CCAA* application before it. Section 11 of the *CCAA* provides that:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.[23]

This discretion has been used to appoint representative counsel and make funding orders for such counsel.

(b) Reasons to Appoint Representative Counsel

Courts have recognized that the appointment of representative counsel serves two general purposes: (i) allowing representation for employees and former employees who are vulnerable and would otherwise find it difficult and/or costly to pursue a claim in a proceeding; and (ii) providing efficiencies for

23 *CCAA*, *supra* note 1, s 11.

the other parties who might otherwise have to communicate and negotiate with a large number of unrepresented individuals.[24]

The courts consider a number of factors when determining whether the appointment of representative counsel is appropriate. The factors have been summarized as follows:

- the vulnerability and resources of the group seeking representation;
- any benefit to the companies under *CCAA* protection;
- any social benefit to be derived from representation of the group;
- facilitation of the administration of the proceedings as well as making the proceedings more efficient;
- avoiding a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the insolvent company's estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and if so, is that representative counsel also prepared to act for the group seeking the order; and
- the position of other stakeholders and the monitor.[25]

Re Catalyst Paper Corp[26] demonstrates the power of the early appointment of representative counsel. Former members of a pension plan, persons entitled to survivor benefits, and designated beneficiaries of former members had representative counsel appointed on their behalf in an early stage in the proceeding. Representatives of current plan members sought to have counsel appointed for themselves and for the others, with such counsel to replace the one for former plan members. The court declined to make the order.

The court considered the support from the pensioners that the original representative counsel enjoyed; that they had effectively represented the group to date; the relative efficiency of the governance structure as compared to the one suggested by the applicants; and the fact that the initial order left choice to the pensioners; which was preferable to the order sought, which would appoint one particular law firm as counsel. As both firms were good choices, this factor was not in favour of the moving parties. The court noted that the future pensioners should have representation, but declined to make an order appointing representative counsel to a group other than the one proposed in the application.

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24 *Re Nortel Networks Corp* (2009), 53 CBR (5th) 196 at para 13, [2009] OJ No 2166 (SCJ) [*Nortel*].

25 *Re Canwest Publishing*, 2010 ONSC 1328 at para 21, 65 CBR (5th) 152.

26 *Re Catalyst Paper Corp*, 2012 BCSC 451, 89 CBR (5th) 292.

(c) Conflicts of Interest within Representative Groups

Competing representative orders have been sought by groups purporting to represent different stakeholders within the employee and former employee constituencies. Courts have considered the commonality of interest present between and among these proposed groups, especially where different constituencies such as employees, former employees, and retirees would be included in the group. In examining the issue of whether more than one representative counsel is required courts have identified the following factors:

(1) Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.

(2) The interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.

(3) The commonality of interests are to be viewed purposively, bearing in mind the object of the *CCAA*, namely to facilitate reorganizations if possible.

(4) In placing a broad and purposive interpretation on the *CCAA*, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.

(5) Absent bad faith, the motivations of creditors to approve or disapprove of the plan are irrelevant.

(6) The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner. [27]

Once commonality of interests has been established, other factors to be considered in the selection of representative counsel may include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages if required for members of the group; and estimated costs.[28]

Other than general comments seeking to avoid fragmentation or classification and support the ability of an insolvent company to reach consensus, courts have provided very little in the way of specific guidance about when there should be separate representation for different categories of employees or

27 *Nortel*, *supra* note 24, citing *Re Stelco* (2005), 15 CBR (5th) 307, 11 BLR (4th) 185 (Ont CA); *Re Canadian Airlines Corp* (2000), 19 CBR (4th) 12, 2000 CarswellAlta 623 (QB); *Re Fraser Papers*, [2009] OJ No 4287 (Sup Ct J) [*Fraser Papers*].

28 *Fraser Papers*, *ibid* at para 12.

whether retirees and active employees should be separately represented. Experience dictates that in any situation where consensus is sought, having fewer parties to negotiate with increases the likelihood of that occurring.

In determining whether separate representation is warranted a number of factors are relevant. First, unionized and non-union employees may not have the same interests and may not have the same ability to influence the ultimate bargain. Unionized employees are able to negotiate the terms and conditions of their employment pursuant to the collective agreement that governs their employment relationship with the insolvent company. In addition, the *CCAA* recognizes that a collective agreement cannot be overridden without negotiation with the union representing the affected employees. Non-union employees, for their part, do not have the same legal authority to bargain over the terms and conditions of their employment. In a *CCAA* proceeding, the ability of the court to override the employment terms and conditions of a non-union group is much clearer. For this reason, it may be functionally necessary to have separate representation for unionized and non-unionized employees.

Second, if employees are in different pension and non-pension benefit plans, then it may be sensible to have separate representation based on the plan that the particular group of employees participate in. Participation in a different plan may give rise to different issues based on factors such as the funded position of the plan, the benefits offered and whether the plan is subject to, and therefore protected by, a collective agreement. In our view, the determination as to whether separate counsel is appropriate must be made on a case by case basis and will depend on whether the different plans give rise to different interests that require separate representation. The mere fact that there are separate plans should not, in and of itself, give rise to the need for separate counsel for each plan. Courts will still want to ensure that the process is efficient.

Third, executive employees sometimes seek separate representation on the basis that the executive pension plan creates the need for separate representation. A key difference between an executive plan and a registered pension plan is that executive plans that are supplemental plans (i.e., non-registered) are typically unfunded and generally do not survive a restructuring. By contrast, the assets of registered plans are held in trust and are not subject to creditor claims. When a registered plan is wound up, its assets are available only to satisfy the claims of its beneficiaries. If there is an unfunded liability, the members of the registered plan will lose a portion of their benefit (e.g., if a plan is 80 percent funded, the beneficiary will suffer a 20 percent loss). In an unfunded plan, the members will lose the entire value of their benefit. The existence of an unfunded plan, in and of itself, should not give rise to the need for separate counsel. Unfunded plans have no assets and are not subject to regulation, although the absence of funds will give rise to an unsecured claim.

Fourth, the interests of active and retired members may be in conflict at the outset of a restructuring, or a conflict may subsequently arise. Unions typically take the position that they represent the interests of their former members, and usually seek to ensure that representative counsel appointed over non-union employees or retirees will not also represent their former members. In circumstances where the pension plan is underfunded and a compromise of the deficit is imperative to restructuring, active and retiree interests could conflict. In appropriate circumstances, a court may appoint separate counsel for active members and retirees in order to avoid the appearance of a conflict of interest. In other cases, the order appointing representative counsel may make it incumbent on that representative to monitor any situations where a conflict could arise, and take steps to avoid the conflict by having separate counsel appointed on particular issues if a conflict arises. This can create a dangerous dynamic.

Finally, in the case of federally-regulated pension plans, the Distressed Pension Plan Workout Scheme established by the *Pension Benefits Standards Act* ("*PBSA*")[29] sets out a legislative scheme to allow for a negotiated solution to the problem of a plan sponsor being unable to make required special payments. The workout scheme established by the *PBSA* requires separate representation for unionized, non-union and retired pension plan members. The *PBSA* provides for a court-appointed representative for each group other than a trade union. Unions are deemed to be the representative of their active members while non-unionized employees and retirees are required to have separate court appointed representation. To date, there have been no cases under this provision of the *PBSA*. We note that the funding obligation is a legislative requirement. DIP lenders, insolvent companies and courts will need to grapple with how funding will be provided. If an insolvent company seeks to take advantage of the distressed workout provisions under the *PBSA*, we believe that it will need to take account of the requirement to provide funding for the different groups enumerated in the *PBSA*.

(d) Role of the Collective Bargaining Agent

Unions often seek representation orders as well as funding orders for their participation in insolvency proceedings. While representation orders are often granted (with some remarks as to whether or not they are strictly necessary), funding orders are not typically granted. The courts appear to be of the view that representation in insolvency proceedings is part of a union's mandate in its representation of the bargaining unit. As a result, no further funding should be necessary and to do so would impose an unnecessary additional burden on the insolvent company.

In *Nortel* for example, the union, which admitted that it would nevertheless continue to represent its members, was not given a representation order. The court stated:

29 *Pension Benefits Standards Act*, RSC 1985, c 32 (2d Supp) [*PBSA*].

> In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.[30]

In *Fraser Papers*, the United Steelworkers Union (USW) and Communications, Energy, and Paperworkers Union of Canada (CEP) unions sought funding to represent their active and retired members, whereas the CMAW union chose to represent only their active members. CMAW retirees were therefore left to be represented by counsel appointed by the court for all otherwise-unrepresented employees and retirees, both union and non-union. Similarly, retired members of a fourth union, IBEW, were also left to be represented by counsel appointed by the court for all unrepresented employees and retirees, as that union had no active members involved with Fraser Papers and chose not to represent its retirees.

The USW's request for funding was withdrawn prior to the motion being argued, and CEP's motion seeking funding was denied. In its materials seeking a representation order and requesting funding, the CEP stated that it was the only party legally authorized to represent its active members, and that due to its relationship with CEP retirees, ongoing communication with them, and the link between pension benefits provided to the retirees and the terms of collective agreements negotiated by CEP, CEP was in the best position to represent the retirees as well. Notwithstanding the motion seeking funding, CEP indicated that it would represent its active and retired members with or without funding.

Funding from the estate was granted to counsel appointed by the court to represent all otherwise-unrepresented employees and retirees, which therefore included IBEW and CMAW retirees who were not represented by their unions. In making the distinction and granting funding to the court-appointed representative counsel Justice Pepall stated: "Unlike the unions, absent funding, Davies [law firm] would not be expected to serve as representative counsel."[31] CEP's motion for leave to appeal on the issue of funding was dismissed by the Ontario Court of Appeal.

It is also useful to consider the distinction between Canadian and United States (US) law on a union's representation of its retirees, which can be particularly relevant in cross-border restructurings where unionized employees and retirees are beneficiaries under pension plans in both jurisdictions. Based on materials filed and submissions made by counsel for the USW, Justice Pepall noted the following:

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30 *Nortel*, *supra* note 24 at para 61.

31 *Fraser Papers*, *supra* note 27 at para 18.

> It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. *Bankruptcy Code* provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.
>
> In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.[32]

ii. Funding of Representative Counsel

As a general rule, the biggest issue with regard to representative counsel is funding. Employees, unions, and retirees will all typically seek funding from the estate of the insolvent company. In making a decision to provide funding, courts have, in the absence of a negotiated agreement, typically refused to provide funding for counsel to a union. The basis for the refusal seems to be that courts take the view that union members already have an established body to represent them, which has both the resources and the responsibility to represent members who are employed by an insolvent company. Their funding is in the form of union dues that are paid by all members, including retirees during the time that they were active employees. Conversely, courts have been more willing to fund non-unionized employees on the basis that these employees have not had an established legal representative in place that they could look to, or the means to fund their own counsel, particularly at a time when their existing and future financial position may be in serious jeopardy.

The issue of providing funding to unions is, in our view, more complex than most reported cases suggest. Unions are important stakeholders who potentially have a functional veto, since a collective agreement cannot be amended without its consent. As such it may, in appropriate circumstances, be beneficial for an insolvent company to provide some funding subject to certain conditions. Counsel who regularly represent unions would argue that such funding may allow for the union to participate in a more effective manner and allow for the restructuring to take place in a more efficient fashion, particularly if experts or

32 *Ibid* at paras 8–9.

specialized advice is required. Those parties who face unions in the course of negotiating a restructuring may argue that such funding actually frustrates those efforts by creating a disincentive in rewarding protracted negotiations or delay tactics, particularly if the availability of funding is not tied to and payable only upon a successful outcome.

Counsel who regularly represent unions would also argue that although unions collect dues and have greater financial resources than unrepresented individuals, unions are also required to represent employees at a number of different employers. Union budgets do not typically contain a line item for restructurings and union resources must be deployed to benefit all members, not just those who are employed by a company that has obtained protection under the *CCAA*. Accordingly, the assumption that unions have the necessary resources to participate effectively may not always hold true.

Taking these various perspectives into account, we believe that the following factors are appropriate to consider in determining whether funding should be provided for representative counsel:

(1) *Is the risk of potential loss to this group of stakeholders significant*? In this regard, it would be appropriate to consider the potential risk of job loss, existence of pension deficits, ability to terminate other benefit plans or effect other similar changes.

(2) *Could the interests of the parties be appropriately represented in the proceeding if funding from the estate was not provided*? In other words, would the absence of funding result in these stakeholders being unrepresented in the proceeding.

(3) *Would the restructuring be more likely to succeed or fail if funding was provided from the estate*? In this respect, considerations as to the availability and use of funding through DIP financing or otherwise are relevant. In addition, if the retention of experts would assist in navigating difficult issues such as understanding tax losses or testing actuarial assumptions or findings, then that may be relevant.

(4) *Would the proposed representative party act on behalf of the stakeholders with or without funding*? Evidence should be filed indicating whether the party who is seeking to be appointed as representative counsel would be prepared to represent the parties whether or not funding is provided from the estate.

(5) *What resources are available to the group requesting funding, other than from the debtor company*? If a union puts its financial position in issue by seeking funding to represent its members, it is open to the court and other affected stakeholders to be provided with evidence supporting such request. Unions are typically unwilling re-

veal their financial status, source and use of funds, or ability to fund certain activities, and that is their choice. However, the insolvent company's financial position is disclosed, such that the burden of additional funding can be considered. The party seeking the benefit of such funding should be required to provide similar disclosure to support its request.

(6) *Is it anticipated that experts will need to be retained in order for the representative to be able to properly represent its constituents*? This fact may be known at the outset, or may arise in the course of the restructuring. In some cases, tax or pension experts may be required in order to give advice or prepare reports for the benefit of the represented parties. If facilitating a better understanding of a key component of the restructuring would increase the likelihood of a successful restructuring and there is a financial ability to cover the cost of such expert, it may be an appropriate factor to consider at a particular point in the restructuring.

iii. Binding Represented Group Constituents

(a) Non-union employees and retirees

The issue of ensuring that those who are represented by court-appointed representative counsel is generally determined by the applicable rules of civil procedure in the Province in which the proceeding is commenced. Once counsel is appointed, notice is given to class members at their last known address. Individuals are generally given the opportunity to decide whether or not they wish to be represented by court-appointed counsel. Those individuals who opt out are then required to represent themselves in the process.

The Rules[33] provide that individuals represented by a party appointed by court order within a proceeding are bound by that order. The only exceptions are in circumstances of fraud or where a person affected by the order claims that his or her interests were different than those individuals who were represented at the hearing.[34]

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33 A number of Provinces have enacted such rules. Notably, Québec does not have such a rule. See Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, r 10.01[*ROCP*]; British Columbia, *Supreme Court Civil Rules*, BC Reg 168/2009, r 20-3; Newfoundland and Labrador, *Rules of the Supreme Court*, SNL 1986, c 42, Schedule D, r 7.12; *Alberta Rules of Court*, Alta Reg 124/2010, rr 2.11-2.21; Saskatchewan, *Queen's Bench Rules*, SS 1998, c Q-1.01, r 2-10; Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, r 10.01; *Nova Scotia Civil Procedure Rules*, NS Reg 370/2008, r 36; New Brunswick, *Rules of Court*, NB Reg 82-73, r 11.01

34 *ROCP*, *supra* note 33, r 10.03.

The ability to bind all those who may be affected by either a particular order or the plan of compromise and arrangement itself provides great incentive in having a representative party appointed and is a key reason to avoid a conflict between the members of a represented group. If a sub-group of such a class was able to demonstrate that their interests were different than other members of the class, it could result in delay in the process or even a rejection of the plan of arrangement.

The issue of differing interests within a represented class becomes particularly apparent when retiree interests are considered. Retirees' main objective will be to maintain their current level of pension and post-retirement, non-pension benefits such as extended health or out of country medical benefits. On the other hand, active employees may be more interested in maintaining their jobs or current income levels. Active employees who are only a few years away from retirement may be somewhere in the middle of that spectrum. The interests of active and retired members may therefore either be in conflict or have the potential to be in conflict.

In many restructurings, the pension plan deficit is the largest claim relating to employees or retirees and the priority status of that claim is the same irrespective of the composition of the group of beneficiaries. From an employer / debtor company perspective, there is a benefit to the employees and retirees having only one voice, as it effectively leverages those interests and minimizes the number of groups with whom negotiations must occur. However, the very leverage and minimal fragmentation that an employer favours for negotiating purposes can create a conflict between employees and retirees that favours separate representation.

(b) Unionized employees and retirees

Changes to working terms and conditions for employees represented by a union are typically governed by the provisions of a collective agreement. Unions do not need a court order to fulfill this role because it is a role they are already legally entitled and required to perform on behalf of their members. Members choose to accept or reject changes to their collective agreement through a ratification process that is recognized at law under the labour relations legislation of the applicable jurisdiction. For these reasons, courts do not typically require or issue a representation order for a union to represent its active members in a *CCAA* proceeding.

The issue of whether a union has the authority or obligation to represent its retired members is a more complicated matter. Unions will almost always take the view that they have both the right and obligation to represent their retired members. From a legal point of view, the authority for unions to perform this role is, at best, unclear in Canada. There is no definitive case law or statutory authority that supports the union's point of view and the potential for a conflict of interest between active union members and retirees may exist. Practically speaking, unless union retirees take the position that the union should not represent their interests and that they wish to be separately represented, the issue will not likely ever arise for determination in a restructuring. The insolvent company, monitor, DIP lender or other parties will not necessarily feel that it is incumbent on them to proactively determine the best (or any) formal representation for these retirees. Caution should be exercised, however, if an insolvent employer, pension plan sponsor and administrator, is proceeding on the assumption that a union has, in the absence of a representation order, the unqualified legal authority to compromise pension plan entitlements or any claim in respect of a deficit under the pension plan on behalf of such retirees.

In our view, the assessment of whether a union should be permitted to represent its retired members as well as its active members in a *CCAA* proceeding must be considered on a case-by-case basis. For example, in a situation where the union has entered into a plant closure agreement and its representation of active employees therefore does not involve the possibility of ongoing employment, it may be appropriate for the union to continue to represent its former members (retirees) in a subsequent *CCAA* proceeding affecting the terms of the plant closure agreement it had entered into.

In a recent proceeding where motions were brought by unions seeking to represent their retirees as well as their active members in a representative capacity, the monitor's report highlighted for the court that retirees outnumbered active members of each union in respect of each pension plan, such that "in any vote of DB Pension Plan members which requires a majority, the active members cannot "out vote" the retirees".[35] In reality, unlike representation orders for non-union employees and retirees where terms are routinely incorporated ensuring that the views of all constituents are appropriately recognized and given due weight, that is not necessarily the case when a union represents its active and retired members.

One distinction between representation orders for unions and their counsel on the one hand, and orders appointing counsel in a representative capacity who are otherwise strangers to the proceeding, is the accountability of the appointed party to the constituent group and the court. Unions who represent their active members and retirees, with or without a court order operate autonomously and independently. They generally do not disclose to the monitor, the insolvent company or the court what methods they utilize to ensure that the views of all constituents (active and retired) are heard, what internal voting mechanism exists to ensure that the interests of their retired members are taken into account or how decisions are communicated to counsel on behalf of the represented group.

Active union employees have the ability to vote on changes affecting their collective agreement through the protections existing under provincial

35 *Re Fraser Papers Inc* (3 September 2009), CV-09-8241-00CL (Monitor's 4th Report to the Court at para 27).

labour laws. Union retirees have no such statutory protection. This situation can result in a "don't ask, don't tell" approach.

Where active and retired members are both represented by the union, the existence of a conflict of interest or the potential for a conflict of interest may result in the unionized retirees seeking separate representation. Such a determination can only be made after a careful examination of the facts of a particular case. As noted earlier in this article, the Distressed Workout Scheme established under the *PBSA* requires separate representation for unionized employees and retirees.[36] This legislative provision may become influential in *CCAA* proceedings that do not involve the *PBSA*, i.e. those where provincially-regulated pension plans are involved, and could come to be viewed in future as a best practice.

D. Role of Pension Plan Sponsor and Administrator

If the insolvent company is the sponsor of a single employer, defined benefit pension plan, then the insolvent company needs to consider its responsibilities both as the sponsor and the administrator of the pension plan. A company is normally both the sponsor and the administrator of its pension plans. As sponsor of the pension plan, the insolvent company is permitted to act in its own self-interest. As the administrator of the pension plan, however, the insolvent company acts in a fiduciary capacity with respect to the beneficiaries of the pension plan.

In order to determine the proper balance between the role of a sponsor and administrator, regulatory authorities and courts have developed the so-called "two hats theory". This theory recognizes that a corporate sponsor (employer) can play both roles. In practice, the two hats theory can work in the following way. When the sponsor is looking at changes or amendments to the plan, such as eliminating early retirement benefits, the company can act in a self-interested manner. When the company is administering the plan, for example, determining if beneficiaries meet the qualifications for certain benefits, the company must act in an even-handed manner on the basis of the fiduciary duties it owes to members.

Insolvent plan administrators will need to exercise particular care in determining their investment strategies and making funding decisions. A solvent plan administrator will have more freedom to implement investment strategies that are designed to earn high returns that result in lower funding obligations. An insolvent plan administrator may need to give greater consideration to the interests of plan beneficiaries. In such circumstances, a plan administrator may find it advisable to implement more conservative investment strategies that lessen the risk of loss for plan members. Discretion with respect to funding

36 *PBSA*, *supra* note 29.

decisions will also be limited for an insolvent plan administrator. Funding decisions will almost always be limited to normal cost contributions as set out in the *CCAA*.

The distinction between the role of sponsor and that of administrator on the basis of the function being performed is more difficult to identify when a company is insolvent and seeks protection under the *CCAA*. In a *CCAA* proceeding, an insolvent company will typically continue to make normal cost or current service contributions and will usually stop making special payments into a pension fund. From the sponsor perspective, this action will typically be based on the fact that the impending special payments may have been one of the reasons for the company's insolvency, there are no funds to make such payments, and the terms of any DIP financing prohibit its use for such payments.

This application of the self-preservation principle is permissible from a sponsor perspective, but can be problematic from an administrator's perspective. An administrator has a statutory duty to ensure that required, special payment contributions are made to the pension plan. In addition, an administrator may have a duty to warn beneficiaries that contributions are not being made to the pension plan. While it is not an issue after an initial order has been obtained and the company's insolvency is publicly known, the duty to warn beneficiaries is very problematic if it exists prior to that time.

An insolvent company often relies on the terms of the initial order or other court order to protect it from an allegation that it has violated its fiduciary and statutory duties in ceasing to make required special payment contributions to the pension plan. This position is based on the stay of proceedings and the fact that parties are relying on the terms of court orders. In Ontario, a party's protection for acting in good faith under a court order is entrenched in section 142 of the *Courts of Justice Act*.[37] If an order is obtained that permits the suspension of special payments, parties rely on such order as the basis on which the payments need not be made.

Stepping back for a moment to consider the basis for relief obtained by an insolvent company, the stay of proceedings is fundamentally intended to prevent third parties from exercising their rights and remedies, where to do so could thwart the company's efforts to restructure. It is intended to provide a period of time wherein the insolvent company can reorganize its affairs and present a plan of arrangement that will, prospectively, provide the roadmap for how existing claims are compromised and how the company will look after the plan is sanctioned. In the course of the reorganization process, the way in which the insolvent company deals with the pension plan may create an environment that could bring the company's duties as plan administrator into conflict with the company's duties as plan sponsor. While court orders obtained as part of the restructuring may insulate the insolvent company and its directors from the

37 *Courts of Justice Act*, RSO 1990, c C43 [*CJA*].

effects of such conflict, they do not extinguish or eliminate the source of the potential conflict.

Absent insolvency, a company is free as plan sponsor to make determinations about the future of the pension plan it sponsors, including its continuance or benefit changes, with little fear that any such determinations constitute a breach of fiduciary duties. This is the case because a solvent company must give notice of adverse amendments and if the company fails to honour its commitments or obligations, beneficiaries can seek recourse from the company through the courts or through regulatory intervention. While beneficiaries would be vulnerable in such a circumstance, they have a meaningful ability to protect their interests.

An insolvent company making the same determinations results in a different dynamic. The reality of real-time litigation, a stay of proceedings and a reorganization may mean that beneficiaries do not receive advance notice of potential changes or have any meaningful ability to have their interest brought to the attention of the court, let alone advanced or protected.

In an environment where an insolvent company is seeking to reduce benefits or special payment obligations or even to eliminate the particular plan, it may be increasingly difficult for the company to discharge its fiduciary obligations. In our view, the answer to this problem does not lie in the appointment of a third party administrator. Federal and provincial pension legislation contemplates the appointment of a third party administrator in circumstances where a plan is being wound-up. For that reason, an insolvent company seeking the appointment of a third party administrator, even for the seemingly positive purpose of ensuring that the company does not breach its duties as administrator of the plan, is likely to encounter resistance to such an appointment from both the beneficiaries and regulatory authorities because they will see it as leading to the wind-up of the pension plan.

From a practical point of view, it is also important to note that the appointment of a third party administrator does not necessarily resolve the matter. A third party administrator is, by definition, a fiduciary and must act in the best interests of all plan beneficiaries. As a result, it will be very difficult for a third party administrator to negotiate an arrangement that is anything other than risk-free. In a typical restructuring the future viability of a reorganized corporation has attendant risks. Compromises around the pension plan typically require plan beneficiaries to share in the risk of the restructured company in a manner that may not be palatable to a third party administrator.

In analyzing this situation, our view is that following a diligent process is the best way for an insolvent company to comply with its fiduciary responsibilities as plan administrator. If, for example, beneficiaries receive notice at the earliest possible stage after an initial order is issued, and have an ability to participate in the restructuring process, then there is less potential for there to be a blurring of the role of sponsor and that of administrator. If the beneficiaries are represented in the process, there will be clear evidence that the pension plan was actively considered and the interests of beneficiaries were taken into account.

Providing notice to pension regulatory authorities, collective bargaining agents, non-union employees and pensioners is the fundamental building block of constructive dialogue resulting in a proper process. In our view, the notice should clearly advise the beneficiaries and the regulatory authorities that the insolvent company has ceased to make, or intends to cease making, special payments to the plan, the funded position of the plan and the insolvent company's intentions with respect to the plan to the extent that they are known. If the company is seeking to eliminate the plan or to make changes to future benefits or reductions in special payment amounts or schedules, then the notice should provide this information. The benefit of this form of notice is that the company will have met its fiduciary obligation to beneficiaries because it will have advised beneficiaries that the company is no longer able to protect the pension interests of beneficiaries and it will also have warned them of the consequences of the insolvency. After receiving such a notice, plan beneficiaries can then choose to become involved either through their collective bargaining agent or in seeking the appointment of representative counsel.

E. Involving Pension Regulatory Authorities

If the insolvent company has a pension plan, it is important to involve pension regulatory authorities from the outset of the process. Based both on our experience and our research for this article, we have concluded that the manner in which insolvent companies involve pension regulatory authorities is inconsistent. In particular, we have noted that the inconsistency is often based on a lack of familiarity with the relevant regulatory authority. Based on this assessment, we offer the following practical suggestions:

(1) Provide the regulator in each Province in which pension plans are registered with an electronic copy of the initial order on the day that the order is issued, and direct them to the website maintained by the monitor for all materials filed.

(2) Provide the copy of the initial order to the regulatory authority's internal counsel. Orders that are sent to a pension officer, relationship manager or a general fax number may not be brought to the attention of the proper staff people in a timely manner. If the initial order is sent to internal counsel for the regulator, this problem will be avoided. Internal counsel should also be added to the service list immediately upon the initial order being obtained, and consideration should be given to scheduling a telephone conversation with internal counsel after the initial order is issued.

(3) Provide the regulator with the name of the unions involved for any

of the relevant pension plans, and the contact information for their counsel once identified.

(4) Typically, the information held by the regulator will be the most recently filed actuarial report. The report may be out of date at the time of the insolvency. For that reason, it is a good practice to provide the regulator with the most recent actuarial information and any other relevant information for each pension plan.

(5) If regulatory approvals are required, involve the regulatory authorities at an early stage. A regulatory authority will never simply "rubber stamp" an arrangement reached between the parties.

F. Pension Plans in Multiple Jurisdictions

An insolvent company that has employees in more than one Province may have to comply with the legislation in each Province in which it has employees or has pension plans registered. This situation can involve (i) separate pension plans registered in various Provinces; or (ii) one pension plan registered in more than one Province (a multi-jurisdictional pension plan). It is important to be mindful of how a multi-jurisdictional pension plan operates from a regulatory perspective. The federal government and all Provinces signed an Agreement Respecting Multi-Jurisdictional Pension Plans in 1968 and an updated agreement was signed in 2011 by Ontario and Québec with other Provinces expected to follow (the "Agreement"). The Agreement provides for how multi-jurisdictional pension plans are regulated.

Under the terms of the Agreement, the jurisdiction (Province) in which a majority of plan members reside will be deemed to be the major authority while all other jurisdictions will be minor authorities. The effect of this designation is that the major authority will be the lead regulator for matters that apply to the ongoing operation of the plan, such as filings, funding obligations, investments and plan changes. However, if the pension plan is wound-up, then the rules of each Province regarding wind-up and member entitlements on wind-up will apply. Deemed trust rules vary by Province as do funding obligations on wind-up. In addition, Ontario plan members are also eligible for benefit enhancements (grow-ins) on plan termination as well as coverage under the Ontario Pension Benefits Guarantee Fund.

It is well beyond the scope of this article to explore the differences that exist between the various Provinces in terms of pension matters. Insolvency practitioners need to be aware that on wind-up of a pension plan, the rules of each jurisdiction will apply and the result will not necessarily be dictated by the rules of the major authority. There may be a need to seek the assistance of the major authority to obtain the support of the minor authorities or to seek out the views of the minor authorities before finalizing the terms of the plan of arrangement.

Another issue that can arise in the context of a restructuring involving pension plan beneficiaries in multiple jurisdictions is the treatment they receive in connection with any compromise of the deficit under the pension plan. The plan of arrangement will provide for similar treatment for all unsecured claims, which, subject to the SCC's decision in *Indalex*, presently includes the deficit in each defined benefit pension plan. While that determines the pension plan's entitlement under the plan of arrangement, beneficiaries under a pension plan may also benefit from additional sources based on where they live. In Ontario for example, plan beneficiaries are entitled to claim under the Pension Benefits Guarantee Fund for an amount up to approximately $1,000 per month for lost pension benefits. Pension regulators in New Brunswick caused special legislation to be passed in the course of a recent *CCAA* restructuring,[38] amending that Province's *Pension Benefits Act* to permit a longer period for wind-up of a plan, and to provide a longer runway for potential recovery of the invested plan assets. That regulator also took into account non-cash consideration payable under a plan of arrangement (previously prohibited) to increase the funded status of the pension plan and minimize the effect of pension reductions for retirees. These changes, and other accommodations negotiated with each individual Province, can result in quite different outcomes for employees and retirees of the same insolvent company.

In a restructuring involving Canadian and US or other foreign pension plans, beneficiaries under the various plans may receive vastly different treatment; not by the plan of arrangement itself–but as a result of the differing jurisdictional protections or other sources of recovery. This different treatment can present unique challenges to restructuring professionals and representative counsel appointed to represent these employees and retirees, and may lead to conflicts within a representative group if constituents who are beneficiaries under one pension plan want the claim of the plan to be voted in favour of a plan of arrangement and other members of the represented group provide contrary instructions.

G. Subsection 33(5) of the CCAA

As part of the amendments to the *CCAA* that became effective on September 18, 2009, subsection 33(5) was enacted which provides that:

> If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the company, the bargaining agent that is a party to the agreement is deemed to have a

38 Bill 51, *An Act to Amend the Pension Benefits Act*, 4th Sess, 56th Leg, New Brunswick, 2010 (assented to 19 March 2010), SNB 2010, c 13, s1.

> claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

There is no case law to date interpreting this subsection of the *CCAA*.[39] In analyzing the provision, it is important to note that it refers to the value of a concession for a defined time period, being the remaining term of a collective agreement. In order to determine the amount of the claim, there must be an assessment of the value of the concession over the remaining term of the agreement.

In the case of a wage reduction of, say, $1.00 per hour, which affects 100 employees for the two-year period under a collective agreement, the calculation would be straight arithmetic. However, a pension plan often forms part of and is embedded into a union's collective agreement with its employer. Calculating concessions involving a pension plan is far more complex. The first question to consider is whether the pension plan forms part of the collective agreement. If the pension plan is referenced in the collective agreement, then there is a good argument that it is part of the collective agreement.

However, even if the pension plan is part of the collective agreement, valuing a pension concession may not be straightforward. A reduction in benefits would be a relatively straightforward example. The value of the reduction over the remaining term of the collective agreement can be determined by an actuary.

If there is a change in the special payment schedule, there will be a very real issue about whether the change amounts to a concession. An insolvent plan sponsor will argue that an extended payment period is not a concession because plan beneficiaries have not suffered a diminution in their benefit entitlements or pension payments. Unions will argue that the extension of a payment period reduces benefit security and is, therefore, a concession. Once this difference is resolved, the valuation of the reduction in required special payments over the remaining term of the collective agreement would be the way in which the concession will be calculated.

Another issue that may arise when this subsection is considered in future restructurings is the identity of the party holding the claim and the effect on voting on a plan of arrangement put forward by the company. Currently, a claim filed in respect of a pension plan is a claim of the plan itself; not, for example, a claim of the union whose members are beneficiaries under the plan. The claim is filed, advanced and voted by the pension committee if the plan remains ongoing, or by the new administrator if one was appointed in the proceeding, or possibly by the pension regulator if the plan is in the process of being wound up. Creating a new claim in favour of unions for concessions granted as part of the restructuring could create a very interesting dynamic for negotiations around

39 As of the date this article was drafted (November 16, 2012).

the terms of a plan, as the aggregate dollar value of the concessions could tip the balance to a position of tremendous leverage.

V. THE PLAN OF ARRANGEMENT

The culmination of a successful restructuring is the acceptance of a plan of compromise and arrangement (the "*CCAA* plan") by the requisite threshold of creditors and the implementation of same. Of prime importance to the insolvent companies and those professionals who have assisted them is to ensure that the *CCAA* plan, once approved by creditors and sanctioned by the court, is final and binding. This finality is crucial to the insolvent company's ability to move forward. After considerable time and money has been spent strategizing and negotiating every aspect of the restructuring and ultimately the *CCAA* plan itself, the applicant company does not want to be subsequently faced with a claim asserting that the *CCAA* plan is not binding on that stakeholder.

The best means of ensuring that a *CCAA* plan is binding on employees, former employees and pension plan beneficiaries is to ensure that the parties who advance, negotiate and ultimately vote claims on behalf of those stakeholders have the legal authority to do so.

Two issues can arise in respect of claims asserted following the sanctioning of a *CCAA* plan; first the *scope* of what was covered (released) by the *CCAA* plan; and second the *parties* who are entitled to rely on the terms of the *CCAA* plan, including releases. The first point addresses the terms on which the *CCAA* plan is to be implemented and primarily involves the type of claims that are compromised and the manner in which such claims are compromised. This point can usually be answered by reviewing the claims process in the restructuring, the ultimate determination of those claims by the claims officer and the language of the *CCAA* plan as it relates to claims not asserted or filed. The second issue concerns the parties who are entitled to rely on the provisions of the *CCAA* plan, primarily the releases contained therein. The obvious parties include the debtor companies which are released from all debts, liabilities and claims that were, or could have been asserted against them. Releases pursuant to a *CCAA* plan usually also extend to the company's directors and officers and may also include third parties. Those parties will have contributed in some way to the restructuring, and the releases granted under the *CCAA* plan provide the recognition and reward for those efforts.

A recent Ontario decision highlights the significance of ensuring that the claims of all employees, former employees, pension plan beneficiaries and similar stakeholders are formally represented within a restructuring proceeding, particularly where compromises of employee entitlements are negotiated and releases obtained by directors, officers and third parties.[40]

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40 *Re Fraser Papers Inc*, 2012 ONSC 4882, 2012 CarswellOnt 11519.

A class action proceeding was commenced in Québec on behalf of three former employees of the insolvent company (the "class action plaintiffs") against two of its former directors (the "defendant directors") well after a *CCAA* plan had been sanctioned by the Ontario Superior Court (Commercial List), which had supervised the restructuring over a two year period. The claim against the defendant directors was for the amount of the unfunded deficit existing under a defined benefit pension plan registered in Québec for the company's hourly unionized employees and former employees (the "Québec hourly plan"), in the amount of approximately $12 million.

Early in the restructuring, the CEP union had sought and obtained an order authorizing it to represent its current (active) union employees, as well as former members of bargaining units represented by CEP including pensioners, retirees, deferred vested participants and surviving spouses and dependents employed or formerly employed by Fraser Papers Inc (the "current and former CEP members").[41] Other representation orders were issued by the court at the same time on consent of the insolvent debtors, such that all employees, former employees, pension plan beneficiaries and other similar stakeholders of the insolvent company were represented by counsel throughout the proceeding.

A proof of claim had been filed and accepted within the restructuring for the full amount of the deficit owing under the Québec hourly plan, and consideration had been received in respect of that claim following the sanctioning of the *CCAA* plan. The class action plaintiffs subsequently commenced an action against the defendant directors personally on the basis that, among other things, they were acting in a capacity *other than* as directors while participating on the pension committee responsible for the Québec hourly plan. A motion was brought before the Ontario Superior Court of Justice (Commercial List) on behalf of the defendant directors seeking a declaration that, *inter alia*: (i) the class action plaintiffs were current and former CEP members and were therefore represented in the restructuring proceeding with respect to any claim that exists; (ii) CEP was authorized to and did negotiate settlements, contractual releases and court orders that released the defendant directors from all claims that could be brought at any time including with respect to the Québec hourly plan; and (iii) the releases under the *CCAA* plan prevented the class action plaintiffs from being entitled to bring an action against the defendant directors in Québec.

In finding in favour of the defendant directors, Morawetz J addressed each of these points in detail. Of importance in the decision was the fact that the class action plaintiffs had been represented throughout the restructuring by a party that was authorized by court order to negotiate and compromise any claims on their behalf. As the parties were represented and chose not to opt out of that representation, they could not subsequently attempt to assert a separate claim. They were bound by the compromise negotiated by the representative party, the releases granted in support of the compromise and the consideration

41 *Re Fraser Papers Inc*, 2009 CarswellOnt 6169 (Sup Ct J).

received under the *CCAA* plan was in full and final satisfaction of their claim against the releasees under the *CCAA* plan including the defendant directors. The benefit to having ensured that all employees, former employees and pension plan beneficiaries were represented by a court-authorized party was that the *CCAA* plan and orders issued within the restructuring proceeding were final and binding in all respects.

VI. WHERE DO WE GO FROM HERE?

Old habits are hard to break. The swing of a pendulum can be affected by a sudden force or by gradual efforts to ease it in one direction or another. We have observed that the treatment of employees and pension plan beneficiaries in restructuring proceedings over recent years has been subject to both sudden and gradual forces. Statutory amendments such as wage earner protection provision under the *Bankruptcy and Insolvency Act* (*BIA*),[42] as well as priority for certain types of unpaid pension amounts under the *BIA*[43] and the *CCAA*[44] recognize the increasingly complex situation that employees and former employees find themselves in. The Ontario Court of Appeal's decision in *Indalex* caused shockwaves throughout the profession, but, pending the SCC's ruling, which remains under reserve at the time of writing, post-*Indalex* tremors have been managed and addressed by restructuring professionals and the judiciary in a creative and responsive manner, consistent with the hallmarks of our flexible Canadian restructuring regime.

The purpose of this article is to suggest a fresh perspective on various aspects of a restructuring in Canada, both procedurally and substantively, and to provide an overview of certain process-based solutions that the authors believe will give insolvent companies the best chance of success. That is only possible if there is a willingness on the part of all participants in a restructuring proceeding to consider the benefits of doing so.

42 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 81.3-81.4 [*BIA*].
43 *Ibid*, s 81.5.
44 *CCAA*, *supra* note 1, ss 6(6)-(7).