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Contents

1. Market Trends and Developments p.5

1.1 State of the Restructuring Market p.5

1.2 Changes to the Restructuring and Insolvency Market p.5

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations p.5

2.1 Overview of Laws and Statutory Regimes p.5

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership p.5

2.3 Obligation to Commence Formal Insolvency Proceedings p.6

2.4 Procedural Options p.6

2.5 Commencing Involuntary Proceedings p.6

2.6 Requirement for Insolvency p.6

2.7 Specific Statutory Restructuring and Insolvency Regimes p.6

3. Out-of-court Restructurings and Consensual Workouts p.6

3.1 Restructuring Market Participants p.6

3.2 Consensual Restructuring and Workout Processes p.6

3.3 New Money p.6

3.4 Duties on Creditors p.6

3.5 Out-of-court Financial Restructuring or Workout p.7

4. Secured Creditor Rights and Remedies p.7

4.1 Liens/Security p.7

4.2 Rights and Remedies p.7

4.3 Typical Timelines p.7

4.4 Foreign Secured Creditors p.7

4.5 Special Procedural Protections and Rights p.7

5. Unsecured Creditor Rights, Remedies and Priorities p.7

5.1 Differing Rights and Priorities p.7

5.2 Unsecured Trade Creditors p.7

5.3 Rights and Remedies for Unsecured Creditors p.7

5.4 Pre-judgment Attachments p.7

5.5 Timeline for Enforcing an Unsecured Claim p.7

5.6 Bespoke Rights and Remedies for Landlords p.7

5.7 Foreign Creditors p.8

5.8 Statutory Waterfall of Claims p.8

5.9 Priority Claims in Restructuring and Insolvency Proceedings p.8

6. Statutory Restructurings, Rehabilitations and Reorganisations p.8

6.1 Statutory Process for a Financial Restructuring/Reorganisation p.8

6.2 Position of the Company p.8

6.3 Roles of Creditors p.8

6.4 Claims of Dissenting Creditors p.9

6.5 Trading of Claims Against a Company p.9

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group p.9

6.7 Restrictions on a Company's Use of or Sale of Its Assets p.9

6.8 Asset Disposition and Related Procedures p.9

6.9 Secured Creditor Liens and Security Arrangements p.9

6.10 Priority New Money p.9

6.11 Determining the Value of Claims and Creditors p.9

6.12 Restructuring or Reorganisation Agreement p.9

6.13 Non-debtor Parties p.9

6.14 Rights of Set-off p.9

6.15 Failure to Observe the Terms of Agreements p.9

6.16 Existing Equity Owners p.9

7. Statutory Insolvency and Liquidation Proceedings p.10

7.1 Types of Voluntary/Involuntary Proceedings p.10

7.2 Distressed Disposals p.10

7.3 Failure to Observe Terms of Agreed/Statutory Plan p.10

7.4 Priority New Money During the Statutory Process p.10

7.5 Insolvency Proceedings to Liquidate a Corporate Group p.10

7.6 Organisation of Creditors or Committees p.10

7.7 Use or Sale of Company Assets During Insolvency Proceedings p.10

8. International/Cross-border Issues and Processes p.11
8.1 Recognition or Relief in Connection with Overseas Proceedings p.11
8.2 Co-ordination in Cross-border Cases p.11
8.3 Rules, Standards and Guidelines p.11
8.4 Foreign Creditors p.11

9. Trustees/Receivers/Statutory Officers p.11
9.1 Types of Statutory Officers p.11
9.2 Statutory Roles, Rights and Responsibilities of Officers p.11
9.3 Selection of Officers p.11

10. Advisers and Their Roles p.11
10.1 Typical Advisers Employed p.11
10.2 Compensation of Advisers p.12
10.3 Authorisation and Judicial Approval p.12
10.4 Duties and Responsibilities p.12

11. Mediations/Arbitrations p.12
11.1 Utilisation of Mediation/Arbitration p.12
11.2 Mandatory Arbitration or Mediation p.12
11.3 Pre-insolvency Agreements to Arbitrate p.12
11.4 Statutes Governing Arbitration/Mediation p.12
11.5 Appointment of Arbitrators p.12

12. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies p.12
12.1 Duties of Directors p.12
12.2 Direct Fiduciary Breach Claims p.13
12.3 Chief Restructuring Officers p.13
12.4 Shadow Directorship p.13
12.5 Owner/Shareholder Liability p.13

13. Transfers/Transactions That May Be Set Aside p.13
13.1 Historical Transactions p.13
13.2 Look-Back Period p.13
13.3 Claims to Set Aside or Annul Transactions p.13

14. Importance of Valuations in the Restructuring and Insolvency Process p.13
14.1 Role of Valuations p.13
14.2 Initiating a Valuation p.13
14.3 Jurisprudence p.13

Brauti Thorning LLP is a full-service litigation and corporate law boutique that delivers personalised, prompt legal services. BT Legal's corporate restructuring and insolvency group is an experienced multi-disciplinary team that delivers practical solutions to difficult and complex business problems. The lawyers, all previously from top-tier Canadian law firms, agreed that a boutique setting offers clients greater cost-effectiveness and more efficient client service, with access to innovative business solutions. The team has the ability to engage and respond quickly to the most urgent business situations. As part of a full-service boutique firm, the restructuring and insolvency team is able to tap into expertise in various areas, including corporate, labour and employment, M&A, fraud, criminal law, and real estate. The lawyers act for all types of clients dealing with challenging financial circumstances or other business-critical issues and have been engaged as trusted advisers to directors, senior management, in-house counsel, credit and investment advisers, court-appointed monitors, receivers, and bankruptcy trustees. In addition, they regularly act for creditors, suppliers, distressed-asset purchasers, lending syndicates, bondholders, as well as ad hoc and official creditor and equity committees.

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1. Market Trends and Developments

1.1 State of the Restructuring Market

Results from the first half of 2019 indicate that Canadian insolvency markets are continuing to experience an upward trend in business, noted during the previous year. It is likely that this trend will continue into 2020. Second-quarter statistics for 2019 from the national Superintendent in Bankruptcy indicate an overall increase in bankruptcy filings of approximately 10% from 2018. In particular, there has been a noted increase in consumer bankruptcies, as well as corporate bankruptcies in the provinces of Manitoba and Nova Scotia. Canada's restructuring market has also seen considerable activity, with 15 major corporations filing for protection under the Companies' Creditors Arrangement Act by October 2019. These filings have contributed to an increase in business for insolvency administrators and legal counsel.

The Canadian experience reflects an international increase in insolvencies that began around 2017. At the global level, analysts are conflicted as to whether 2019 will continue growth trends seen in previous years, or whether this year will act as a plateau for an overall cooling across insolvency markets. The Canadian economy has exceeded forecasts for 2019, posting Q2 growth in the range of 3.7% and trending for an average annual growth rate in the range of 2%. These relatively optimistic figures are helped by strong trade with the United States and United Kingdom. Insolvency professionals will be watching closely as these markets are expected to cool in the short term. The average Canadian household is carrying significant debt, on the basis of historically-low interest rates. A slowing of the Canadian economy, and particularly, impacted employment and interest rates, could lead to significant insolvency issues.

1.2 Changes to the Restructuring and Insolvency Market

The Canadian insolvency market has not been materially affected by trends in corresponding commercial debt markets. Generally, Canadian syndicated lending volumes have steadily increased in previous years and the Canadian bank market has remained relatively stable. New loan volumes have followed a downturn trend from last year, due to a slight cooling of M&A activity. In light of these relatively static conditions, the insolvency market has not seen significant changes to refinancing or restructuring, debt investment, or debt trading strategies.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

There are two key insolvency statutes in Canada:

Companies' Creditors Arrangement Act (CCAA)

The CCAA is a federal statute that applies to insolvency matters in every Canadian province and territory. It is the main instrument for the reorganisation of large insolvent corporations – or for affiliated groups of companies – that are subject to over CAD5 million of aggregate claims.

Bankruptcy and Insolvency Act (BIA)

The BIA is a federal statute with provisions to facilitate liquidation and reorganisation of insolvent debtors. The reorganisation provisions under the BIA (known as the "proposal process") are typically used for smaller, less complex reorganisations than those under the CCAA. The proposal process adheres to strict timelines and is, overall, less flexible than the CCAA process. In a liquidation, the BIA provides for the appointment of a trustee-in-bankruptcy over the assets of an insolvent debtor; the statute also provides for the appointment of an interim receiver to protect and preserve assets where there is evidence that the estate of the debtor is in jeopardy – for instance, where assets are in danger of being disposed of prematurely.

In addition to the BIA and CCAA, each Canadian province and territory (except Québec) has enacted a provincial statute to govern the priorities, rights and obligations of secured creditors (eg, the Ontario Personal Property Security Act). These statutes play a significant role in insolvency practice.

Every Canadian province is also subject to respective rules of court which govern, among other things, the appointment of receivers in certain insolvency proceedings.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

In Canada, formal insolvency proceedings generally consist of the following processes:

- corporate or consumer bankruptcies (BIA Liquidation proceedings);
- a proposal to creditors under the BIA (BIA Proposal);
- receivership;
- corporate restructuring (CCAA);
- plans of arrangement effected through corporate law (ie, the Canadian Business Corporations Act); or
- for banks, insurance companies and certain other regulated entities, a winding-up pursuant to the Winding-up and Restructuring Act.

Restructuring proceedings are often entered into voluntarily. Conversely, receiverships are often involuntary, as these are primarily employed as a remedy for creditors (though corporate debtors will often co-operate with the appointment of a receiver). Bankruptcy, liquidation and winding-up all involve voluntary and involuntary processes.

2.3 Obligation to Commence Formal Insolvency Proceedings

In Canada, unless a debtor is legally compelled under an insolvency process (such as by a creditor), there is no free-standing obligation to commence insolvency proceedings within a certain timeframe. The choice to seek creditor protection is often primarily motivated as a business decision. Under corporate law, directors owe a fiduciary duty of care to the corporation. In appropriate circumstances, directors' fiduciary obligations may compel the board to commence insolvency proceedings.

2.4 Procedural Options

See **2.3 Obligation to Commence Formal Insolvency Proceedings**.

For further clarity: when a corporation proceeds voluntarily into bankruptcy or restructuring, the board has discretion over the choice of process.

2.5 Commencing Involuntary Proceedings

Creditors can commence involuntary proceedings against a debtor through the appointment of a receiver, or by bringing an application for a bankruptcy order. Further enforcement options may be available, depending on the character of the collateral. Generally, there are criteria that need to be met before a creditor may enforce its security; each step in this process is governed by rules of commercial reasonableness and reasonable notice of the creditor's intentions.

2.6 Requirement for Insolvency

A party is required to be insolvent to obtain creditor protection under the CCAA or BIA. The definition of "insolvent person" under the BIA governs the court's assessment in this regard; an "insolvent person" is a legal person:

- who is, for any reason, unable to meet its obligations as they generally become due;
- who has ceased paying its current obligations in the ordinary course of business as they become due; or
- the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

A pre-requisite criterion is a default in payments of over CAD1,000. Once this is established, the court looks to the second and third elements listed above. The second bullet is commonly referred to as the "cash flow test" and the third bullet is referred to as the "balance sheet test". One of these tests must be satisfied to establish insolvency.

Under the CCAA, the court has held that insolvency is also established when a corporation is presently solvent, but is expected to become insolvent within the period it would reasonably take to restructure.

2.7 Specific Statutory Restructuring and Insolvency Regimes

Insolvency proceedings for banks, insurance companies, trust companies and certain other regulated entitles are governed exclusively by the Winding-up and Restructuring Act (WURA).

3. Out-of-court Restructurings and Consensual Workouts

3.1 Restructuring Market Participants

Where possible, Canadian corporations will almost always prefer to resolve liquidity issues through private, out-of-court workouts before pursuing formal insolvency proceedings. Informal restructuring methods include partial sale of non-essential assets, refinancing, and/or negotiations with key creditors and stakeholders. For instance, the debtor may be able to negotiate a forbearance with a significant commercial lender that can temporarily resolve liquidity issues. Larger lending institutions are often amenable to assisting the debtor in maintaining their enterprise as a going concern. Such out-of-court restructuring processes are often conducted in accordance with INSOL Principles, though these are seldom referenced explicitly.

3.2 Consensual Restructuring and Workout Processes

Informal workouts and negotiations do not follow a prescribed process. Timelines and procedure vary significantly case by case.

3.3 New Money

Outside of a court-supervised process, new money can be injected through informal processes. For instance, an existing secured lender may offer additional credit on an existing collateralised loan. Within formal restructuring proceedings, the court has discretion to approve additional financing to maintain a corporate debtor's business as a going concern. This practice is referred to as "Debtor-in-Possession" (DIP) financing. To encourage and secure DIP financiers, these parties are typically granted a super-priority charge over the assets of the debtor.

Super priority for new financing is difficult to assert out of court. In some circumstances, this is achieved by introducing a provision for priority new financing under the terms of existing inter-creditor agreements.

3.4 Duties on Creditors

Creditors are subject to various legal requirements throughout an insolvency process. The BIA, CCAA and case law affect the rights and remedies available to creditors as against the debtor, as well as between each other. Depending on the circumstances, creditors may be subject to further requirements under federal and provincial corporate statutes.

3.5 Out-of-court Financial Restructuring or Workout

As mentioned in **3.2 Consensual Restructuring and Workout Processes**, out-of-court financial restructurings do not follow a prescribed process. Subject to the terms of the contract, there is no general obligation to obtain the consent of lenders or shareholders in the course of an informal process. Rights of dissent between lenders (if any) are set out in the loan documents; shareholders have recourse under corporate law if the conduct of the directors contravenes their reasonable expectations.

4. Secured Creditor Rights and Remedies

4.1 Liens/Security

Security interests can be granted over any property, including tangible personal property, intangible personal property such as licences and intellectual property, and real property. Security interests are typically established by a written grant of security interest, subject to criteria of attachment and perfection. As described in **2.1 Overview of Laws and Statutory Regimes**, each province and territory maintains title and notice-filing systems for personal property, which govern priority of claims.

4.2 Rights and Remedies

Enforcement procedures are set out in the Personal Property Security Act (PPSA), the BIA and real property mortgage statutes. The particular process will depend on the character of the collateral and may be subject to contractual qualifications/limitations. The filing of a proposal under the BIA or a CCAA application will trigger a stay of proceedings that will prevent further enforcement by creditors.

4.3 Typical Timelines

The timeline for enforcement of a secured claim depends on the character of the collateral and circumstances of the loan and security agreements.

4.4 Foreign Secured Creditors

Subject to appropriate registration and perfection of security, foreign creditors enjoy the same rights as domestic creditors under Canadian law.

4.5 Special Procedural Protections and Rights

The rights of secured creditors are not stayed in a bankruptcy. The powers of the trustee in bankruptcy take title to property and claw-back assets (among other things) are subject to properly perfected security interests. Furthermore, if a secured creditor realises upon its security and suffers a shortfall, it can make an unsecured claim against the estate for the value of the shortfall.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

Canada's insolvency regimes prioritise and/or prefer claims by certain types of creditors. So-called "priority claims" are imposed by court order or statute and rank above virtually all other claims. Common examples of court-ordered priorities are for the fees for counsel and court officers (administration charge), or to ensure a new financier is repaid (DIP charge). The concept of "preferred claims" relates to unsecured claims and recognises that certain unsecured parties ought to be paid before the general pool of unsecured creditors. These preferential rankings are supported by public policy and economic rationale.

Regardless of the operative statute, creditors are generally paid out according to the following ranking:

- priority claims;
- secured claims;
- preferred claims; and
- unsecured claims (paid pari passu).

Various nuances have developed through case law and the particular legislative context of the BIA, CCAA and receivership proceedings. This general ranking may vary somewhat, case by case.

5.2 Unsecured Trade Creditors

Unsecured trade creditors are seldom kept whole during a restructuring process; in most liquidation scenarios, trade creditors do not see any substantial recovery.

5.3 Rights and Remedies for Unsecured Creditors

Formal insolvency and restructuring proceedings impose a stay of proceedings which prevents unsecured creditors from advancing independent claims against the estate of the debtor.

5.4 Pre-judgment Attachments

Pre-judgment attachments may apply prior to the commencement of formal insolvency proceedings. These rarely play a material role once formal insolvency proceedings have commenced.

5.5 Timeline for Enforcing an Unsecured Claim

As unsecured claims are subject to the stay of proceedings, the timeline for enforcement of an unsecured claim is subject to the overall progress of the insolvency proceedings – this could involve a timeline of several months or years, depending on the overall complexity of the file.

5.6 Bespoke Rights and Remedies for Landlords

Landlords are significant stakeholders in most insolvency proceedings and have access to special rights and remedies.

In a bankruptcy, landlords have the option to assign or disclaim their lease; in the latter scenario, the landlord receives a preferred claim for arrears of rent. The landlord has a similar option to disclaim or assign leases under the CCAA and BIA proposal process, though instead of a preferred claim, the landlord must make a claim in damages against the estate. Finally, before initiating formal insolvency proceedings, landlords can exercise rights of distraint for arrears of rent.

5.7 Foreign Creditors

As with secured creditors, foreign unsecured creditors generally enjoy the same rights as their domestic counterparts under Canadian law.

5.8 Statutory Waterfall of Claims

See **5.1 Differing Rights and Priorities**.

5.9 Priority Claims in Restructuring and Insolvency Proceedings

Priority claims are imposed by court order or statute. As such, applicable priorities vary case by case. Typical priority issues include:

- 1) statutorily-mandated wage and pension claims;
- 2) DIP financing and administrative charges;
- 3) allocations for unpaid suppliers; and
- 4) crown, environment and tax claims, etc.

6. Statutory Restructurings, Rehabilitations and Reorganisations

6.1 Statutory Process for a Financial Restructuring/Reorganisation

A debtor may restructure its debts through a BIA proposal, a CCAA proceeding or, in limited circumstances, through certain business changes provided by corporate statutes.

A BIA proposal is initiated by filing a notice of intention (NOI) to make a proposal to creditors with the court. A BIA proposal can be made by:

- an insolvent person;
- a receiver in respect of an insolvent person's property; and
- a bankrupt, or a trustee of the estate of a bankrupt.

The filing of the NOI imposes a 30-day stay of proceedings against all unsecured creditors without the need for a court order, with further stay extensions available, up to a maximum of six months. A "proposal trustee" is appointed to oversee the process; this trustee supervises the debtor's cash flow and advises the court of any adverse material changes. The proposal trustee does not take possession and control of the debtor's assets. Proposal timelines are extremely rigid and failure to adhere to the rules results in an automatic assignment into bankruptcy; the same result occurs if the eventual proposal is rejected by a significant percentage of the creditors.

In contrast to the BIA proposal process, the CCAA is highly flexible and is ideal for large, complex corporations. The CCAA provides an advantage in situations where an extensive stay of proceedings is needed to develop creative business solutions for a favourable outcome. A CCAA proceeding begins as an application by the debtor corporation for creditor protection (see also the minimum statutory criteria in **2.1 Overview of the Laws and Statutory Regimes**). The application grants an initial stay of proceedings for 30 days, with extensions available at the court's discretion, although there is a limit to the overall duration. The CCAA process appoints a "monitor", who is a neutral court officer charged with reporting on the insolvent corporation and making recommendations to the court with respect to important financial issues.

As evident, Canadian restructuring proceedings are largely court-driven, with the essential goal of maintaining the debtor as a going concern. It should also be noted that the CCAA is increasingly being used to liquidate corporate debtors, due to the relative flexibility of the CCAA compared to the BIA.

6.2 Position of the Company

Both the BIA and the CCAA trigger a stay of claims. Under the BIA, a stay is automatic upon commencement of proceedings; under the CCAA, the stay is court-ordered and takes effect only after a successful application hearing before a commercial judge. Once the stay of proceedings is in effect, the corporation continues to operate as a going concern, with the existing board and management retaining full control over the business. Court officers are appointed under both the BIA and the CCAA, although these officers are limited to a supervisory role.

6.3 Roles of Creditors

Creditors must vote to approve a plan of arrangement in formal restructuring proceedings. Creditors with significant interests are often represented by legal counsel. Committees may be formed to co-ordinate large groups of creditors. These stakeholders are kept informed by records of court proceedings and reports from the insolvency administrator (trustee or monitor). All materials are typically made available online.

Creditors are grouped to vote by "class". The creditors are classified by the debtor at first instance, but these classifications may be challenged and changed before the court. Classes must share a commonality of interest. For a plan to be binding to a class, it must be approved by a two thirds majority of the members, representative of at least half of the total dollar value in claims within the class. Creditors

related to the debtor are allowed to vote against a plan, but not in favour of one.

A successful vote binds all creditors in the class. Court approval of a plan or proposal is required after each class of creditors has voted in favour of the plan; the court must be satisfied that the plan is fair, regardless of the fact that it was voted in by the requisite majority. Neither the CCAA nor the BIA contain cram-down provisions for dissenting creditors.

6.4 Claims of Dissenting Creditors
Dissenting creditors are bound by the decisions of their class in a plan of arrangement. The CCAA and BIA do not contain cram-down provisions for dissenting creditors.

6.5 Trading of Claims Against a Company
Trading of claims typically occurs through contractual arrangements between creditors and third-party purchasers. Persons with insider information who are trading their claims are subject to stringent legal requirements and, in some cases, are precluded from participating in the process.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group
It is common for CCAA filings to include multiple affiliated entities, in order to effect a restructuring of a broader corporate group. A proposal may include elements of substantive consolidation.

6.7 Restrictions on a Company's Use of or Sale of Its Assets
An insolvent company is generally prohibited from disposing of its assets without court approval. In limited circumstances, obtaining appropriate contractual consent will permit a corporation to transfer assets without court approval.

6.8 Asset Disposition and Related Procedures
Under both the BIA and the CCAA, the court will consider several factors before it approves a sale. The focus of the court's inquiry is generally on the procedural elements of the sale. Non-arm's-length transactions are subject to further procedural requirements.

Credit bids can be used to purchase assets in exchange for a release of debt, provided that any prior-ranking bids are assumed and paid, or that a sufficient reserve is retained to pay prior-ranking claims.

A "stalking horse" process may be used to incentivise bids, subject to court approval.

Where sales are completed, it is customary for the closing documents to minimise conditions for completion of the sale and for the purchaser to obtain a "sale approval and a vesting order", pursuant to which the purchaser will obtain the title free and clear of any encumbrances, liens, claims and charges.

6.9 Secured Creditor Liens and Security Arrangements
Secured creditor liens and security arrangements are released through the processes described in **6.8 Asset Disposition and Related Procedures**.

6.10 Priority New Money
See **3.3 New Money** regarding the priority of DIP financing.

6.11 Determining the Value of Claims and Creditors
A court-supervised restructuring will implement a claims process whereby creditors can submit claims against the estate to have these valued, ranked in priority, and eventually paid. Typically, this process is established at an early stage through a "claims procedure order".

6.12 Restructuring or Reorganisation Agreement
See **6.11 Determining the Value of Claims and Creditors**. The procedure for receiving and valuing claims typically requires court approval.

6.13 Non-debtor Parties
Third-party releases may be granted in the course of a restructuring plan or a proposal. In some cases, these releases are resolved through corporate changes. Generally, a third party must have contributed to the restructuring in some material way to obtain a release.

6.14 Rights of Set-off
Both the BIA and the CCAA contain mechanisms which allow creditors to exercise rights of set-off. Further protections also exist for the set-off/netting of eligible financial contracts.

6.15 Failure to Observe the Terms of Agreements
Under the BIA, failure to observe the terms of a proposal results in default and the annulment of the proposal by the court. If a proposal is annulled, this leads to automatic bankruptcy of the insolvent debtor. The CCAA does not contain a similar mechanism; in practice, the matter would likely return before the court for advice and directions.

6.16 Existing Equity Owners
In a restructuring, existing shareholders' equity interests may survive the proceedings. It is also possible for the business to be sold to a new owner as a going concern, or for existing share equity to be diluted or cancelled. In a liquidation, the business is sold for value and the proceeds are distributed according to priority; equity holders may, therefore, not see any recovery.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

Both the BIA and CCAA permit liquidations. The BIA is primarily oriented as a liquidation regime, whereas the CCAA was designed for restructuring, but is being increasingly utilised to bring about liquidations of large corporations. The BIA, provincial laws and certain contracts also permit the appointment of a receiver to liquidate assets.

A bankruptcy is commenced in one of three ways:

- by the debtor, making an assignment in bankruptcy for the general benefit of creditors;
- by the filing of an application for a bankruptcy order by a creditor; or
- through the failure of a BIA proposal.

The procedure for initiating a CCAA process is detailed in the preceding sections (in particular, see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**).

Liquidation proceedings trigger a stay of claims. In bankruptcy, a stay of proceedings is statutorily prescribed. In receivership and CCAA proceedings, the stay of proceedings is court-ordered through a standard form.

In a bankruptcy, all assets vest in the trustee; in the case of a corporation, the trustee assumes responsibility for the management of the corporation. In the CCAA process, the board remains in control of the corporation and is subject to oversight from the court-appointed monitor.

Liquidations typically involve a process of affirming or disclaiming contracts. Court-appointed administrators – such as trustees and receivers – are under no obligation to perform contracts; the relevant concern is whether a contract has value to the estate. Some contracts are terminated automatically upon bankruptcy. If a contract is disclaimed, the counterparty can make a claim for damages against the estate.

There are no timelimits on the duration of a bankruptcy or receivership proceedings. Claims trading is permitted and is contractual and subject to “record dates” established ahead of voting or distribution.

Rights of set-off are available to creditors under the CCAA and the BIA.

Liquidation proceedings typically conclude with an application for the discharge of the court officer, which includes approval of activities and the passing of accounts, and a court order approving the discharge.

7.2 Distressed Disposals

See **6.8 Asset Disposition and Related Procedures**.

In addition to the process described above, a trustee in bankruptcy has statutory power to convey assets, subject to the approval of inspectors. Any sale to a related party requires court approval. Sales negotiated prior to the initiation of liquidation proceedings are sometimes seen in receivership proceedings, although such transactions are subject to heightened judicial scrutiny to ensure that they maximise recoveries and are in the best interests of creditors.

7.3 Failure to Observe Terms of Agreed/Statutory Plan

Liquidation proceedings do not typically set out and seek approval of a “liquidation plan”. If such a plan were established, the consequences for failure to observe the plan would be similar as described in **6.15 Failure to Observe the Terms of Agreements**.

7.4 Priority New Money During the Statutory Process

A trustee or receiver may borrow funds, but such borrowing is typically less formal and less significant than in restructuring cases. Lenders may be given a priority status; however, in bankruptcy, a trustee is subject to prior-ranking secured claims, and any loans would be subordinated to existing secured claims.

7.5 Insolvency Proceedings to Liquidate a Corporate Group

Insolvency proceedings to liquidate a corporate group are common in Canada. There is often procedural consolidation, but rarely substantive consolidation.

7.6 Organisation of Creditors or Committees

Creditors with significant interests in the proceedings are usually represented by legal counsel, with groups of similar creditors often jointly represented. The sharing of legal costs is typically governed by contract. In some cases, creditor committees may be formed, for which the legal fees are paid by the estate of the debtor.

7.7 Use or Sale of Company Assets During Insolvency Proceedings

A trustee in bankruptcy is statutorily authorised to sell assets with inspector approval. Where the sale is to a party related to the bankrupt, court approval is required.

A receiver draws its authority to sell assets from the mechanism of its appointment (by statute under the BIA, contract or court order). For more significant sale transactions, court approval is customary.

8. International/Cross-border Issues and Processes

8.1 Recognition or Relief in Connection with Overseas Proceedings

Canadian courts recognise foreign restructuring proceedings according to principles of comity. Both the BIA and the CCAA allow for recognition of foreign insolvency proceedings in Canada, modelled on the UNCITRAL standard.

In cases of significant cross-border insolvencies, the court inquires into the "centre of main interest" of the proceeding (effectively, the main centre of business), in order to determine if the local proceeding is the "main" proceeding, or merely a recognition of proceedings elsewhere. If the main proceedings are elsewhere, the court appoints a "foreign representative" of the corporation to advocate on its behalf.

8.2 Co-ordination in Cross-border Cases

Commercial courts often establish cross-border protocols that seek to co-ordinate foreign and domestic proceedings. Cross-border co-operation is particularly strong between Canada and the United States, where courts conduct joint hearings and adopt shared protocols and guidelines to streamline the volume of complex cases (see Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute).

8.3 Rules, Standards and Guidelines

The UNCITRAL Model Law on cross-border insolvency is adopted and incorporated under the BIA and CCAA. Canadian cross-border insolvency practice is primarily governed by this standard, however, further international standards are considered and applied, where applicable. In the case of a conflict of laws, Canadian law has established protocols to resolve such conflicts.

As a general rule, procedural matters are administered according to the laws of the local jurisdiction; substantive matters are administered by the court with plenary jurisdiction. The parties may contract out of these general rules, or voluntarily attorn to the jurisdiction of another court.

8.4 Foreign Creditors

Foreign creditors do not receive materially different treatment from domestic creditors, although in many cases, foreign creditors will be entitled to longer notice periods and occasionally, foreign creditors are required to post security for costs.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

Court-appointed officers fill a number of roles in the course of typical insolvency proceedings, including:

- as trustees in bankruptcy;
- as receivers over assets of the debtor;
- as a BIA proposal trustee;
- as a CCAA monitor;
- as an information officer; or
- as liquidators and/or provisional liquidators.

9.2 Statutory Roles, Rights and Responsibilities of Officers

Court-appointed officers are impartial fiduciaries and report directly to the court. The particular obligations of a court officer vary by role and are generally prescribed by order or statute. All stakeholders rely on the information provided by court officers and such reports are often determinative at critical stages of the proceedings.

9.3 Selection of Officers

In Canada, only insolvency practitioners, duly licensed through the Office of the Superintendent of Bankruptcy, may be appointed as court officers. Candidates must satisfy the requirements of insolvency regulations with respect to education, practical training and experience in the insolvency field. These roles are typically filled by accounting and professional advisory firms.

The applicant in an insolvency proceeding often makes the initial recommendation of a court officer. The appointment must be approved by the court. Financial advisers to large corporations are often recommended for appointment as the monitor for these companies' CCAA proceedings. The other parties are entitled to contest the appointment of a particular firm as a court officer.

The BIA and the CCAA require that the court officer should be independent of the creditors and the debtor. The statutes also restrict the auditor of an insolvent company from acting as a court officer in the proceedings.

The degree of interaction between court officers and corporate management varies depending on the nature of the role and the proceedings. In a CCAA, there is significant collaboration; in bankruptcy or receivership, court officers assume much of the responsibility previously held by directors and officers.

In rare circumstances, court officers may be removed by the order of the court, on the basis of real or perceived misconduct or because of a conflict of interest.

10. Advisers and Their Roles

10.1 Typical Advisers Employed

Commercial insolvency proceedings often feature accountants and professional advisory firms as court officers. Valuators, investment bankers and other experts may also be

retained on an as-needed basis to assist with the sale of distressed assets. A chief restructuring officer (CRO) may be appointed to assist with the management of an insolvent corporation, in order to carry out an effective restructuring. Subject-matter experts may also be brought in to resolve highly contentious issues in litigation.

Competent legal representation is critically important in insolvency proceedings. Strong representation requires an understanding of corporate/transactional and litigation concepts. The Canadian Insolvency Bar is small and highly specialised to address the complex and highly technical issues that frequently arise in these proceedings.

10.2 Compensation of Advisers

Court officers are compensated differently, depending on their role, the nature of the proceedings, and the available assets. In most cases, a court officer's professional fees are secured as an administration charge against the estate and paid in priority to other claims. Officers will also typically pass their accounts with the court.

10.3 Authorisation and Judicial Approval

In most circumstances, appointment of a court officer requires court approval by a judicial order.

10.4 Duties and Responsibilities

Lawyers assist, advise and represent debtors in and out of court. Whether the file is an informal restructuring proceeding, or a complex bankruptcy case, attorneys will provide advice and represent the debtor through the negotiation and restructuring process.

Restructuring professionals give advice and assist in negotiation and litigation concerns. They include accountants, valuators and other financial and business professionals.

Investment bankers and experts in financial management may assist in evaluating the company's financial structure and how it may be impacted by a proposed plan of arrangement. Such an analysis can also assist in the sale of shares, or the sale of the business as a whole. These professionals also help to adjust credit agreements and obtain financing for the company.

Accountants typically help to prepare reports and schedules, and to determine whether the company's financial statements require auditing. They may also advise on business plans, liquidity and financial matters.

11. Mediations/Arbitrations

11.1 Utilisation of Mediation/Arbitration

Although they are not mandatory, arbitration and mediation proceedings are often used to help resolve particularly complex disputes and claims. When they are utilised, the courts may compel participation by stakeholders.

11.2 Mandatory Arbitration or Mediation

Mediation and arbitration are not frequently employed in the course of restructuring. However, it is fairly common for parties to mediate their disputes in liquidation proceedings. Arbitration is rarely used in either setting.

11.3 Pre-insolvency Agreements to Arbitrate

Contracts mandating mediation or arbitration may not be enforceable once insolvency proceedings have commenced. Particularly where the insolvency process is court-driven, a contractual provision that differs from the court's chosen approach will not be upheld.

11.4 Statutes Governing Arbitration/Mediation

Mediation and arbitration are governed by a number of statutes, including the federal Commercial Arbitration Act and, in the provinces, the Arbitration Act (in Ontario, and equivalent statutes in other provinces).

11.5 Appointment of Arbitrators

Parties may either obtain court approval of a mediation or arbitration plan, or follow a pre-existing contractual arrangement governing the mediation or arbitration procedure.

12. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

12.1 Duties of Directors

The actions of officers and directors are regulated by statute and common law. These obligations apply, regardless of whether the corporation is engaged in insolvency proceedings.

Generally, directors and officers owe a fiduciary duty to the corporation, which includes duties of confidentiality, candour and loyalty. The target of the duty is the corporation, not the creditors of that corporation. Moreover, while this duty extends to broader stakeholders of the corporation in the normal course of business, this particular principle does not apply in the context of insolvency proceedings.

There is no liability in Canada for "deepening" the insolvency of a company. However, corporate governance legislation does impose liability on individual directors and officers for, among other things, breach of obligations under securities, environmental, tax, and employment law. In most cases, directors and officers are not criminally liable, unless there is evidence of fraud or explicit criminality.

12.2 Direct Fiduciary Breach Claims
Generally, creditors do not have the standing to bring direct claims against a director or officer for breach of fiduciary duty. However, creditors may have the standing to bring a derivative action against the directors on behalf of the company. Derivative claims are not exclusive to creditors, but rather, are proceedings to enforce the fiduciary duty owed to the company itself.

12.3 Chief Restructuring Officers
A CRO may be appointed in complex insolvency cases, particularly where the management has resigned or lacks the experience to perform the restructuring. A CRO may also be appointed where the stakeholders express a lack of confidence in management to act in the company's best interests.

The appointment of a CRO is usually subject to court approval. Typically, the CRO reports directly to the board of directors, though this may vary by case.

12.4 Shadow Directorship
The concept of shadow directorship is not recognised in Canadian law. A shadow director is a person whose instructions and wishes the directors of the company are accustomed to following, regardless of that person's legal status vis-à-vis the corporation.

12.5 Owner/Shareholder Liability
Liability for shareholders in Canada is restricted to the value of the interest in their shares. Generally, shareholders cannot be held vicariously liable for causes of action against the corporation. However, there are limited statutory exceptions to this rule – for instance, where a shareholder was substantially in control of a company's business and violated environmental obligations. There are also exceptions for intentional wrongdoing, such as fraud.

13. Transfers/Transactions That May Be Set Aside

13.1 Historical Transactions
Historical transactions may be set aside in the course of an insolvency process. In particular, preferential payments and transfers at undervalue are seen to undermine the fairness of the process and will be clawed back in the course of typical insolvency proceedings. Share sales and other corporate changes may also be challenged by way of shareholder remedies in tort.

13.2 Look-Back Period
The "look-back period" refers to a period of time for which a claimant is entitled to challenge, and potentially claw back, transactions by the insolvent debtor. Generally, the look-back period for preferential payments and transfers at undervalue is three months prior to the date of the insolvency event. The look-back period is extended for transactions to non-arm's-length parties. Share redemptions and dividend payments have a one-year look-back period. For further clarity, the BIA provides particularised definitions of the look-back period, depending on the nature of the transaction.

The look-back period should be considered in light of civil limitations periods – in Ontario, this window begins on the date of discovery of a claim and runs for two years.

13.3 Claims to Set Aside or Annul Transactions
As a general rule, any creditor may have standing to challenge transactions. Depending on the avenue of the challenge, the creditor's standing as a complainant may be contested by the debtor. Court officers may also have standing to challenge a transaction. These claims may be brought in either restructuring or liquidation proceedings.

14. Importance of Valuations in the Restructuring and Insolvency Process

14.1 Role of Valuations
Actual value is determined by the market. As insolvency proceedings occur in real time, formal valuations are uncommon. Valuations may be employed in circumstances where an unbiased opinion is required to facilitate negotiation of a plan of arrangement. A valuation might also be required to properly effect a transaction, pursuant to securities laws, or where a proposed sale is to a non-arm's-length party. Partial valuations are also seen in sale processes that feature earn-outs, working capital adjustments, or similar features.

14.2 Initiating a Valuation
When valuation does occur, the onus is almost always on the debtor to commence the process. From a practical standpoint, it would be difficult for another party to access the records necessary to conduct a proper valuation.

14.3 Jurisprudence
Legal issues concerning valuations are most likely to arise in the context of corporate plans of arrangement and in certain sale transactions, particularly where these involve non-arm's-length parties. Such issues relating to valuation have not been substantially litigated in Canada.

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