REPORT

ON

THE COMMERCIAL PROVISIONS OF BILL C-55

By

The Legislative Review Task Force (Commercial)

of

The Insolvency Institute of Canada

and

The Canadian Association of Insolvency and Restructuring Professionals

INTRODUCTION

The Legislative Review Task Force (Commercial) on Bill C-55 respectfully submits this report to its sponsoring organizations, The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals. The Legislative Review Task Force (LRTF) was appointed jointly by these two leading national organizations, represented both regionally across Canada and in terms of diversity in area and type of practice. A detailed account of the composition, mandate and methodology of the LRTF is attached as Schedule A to this report (Methodology). Readers are advised to acquaint themselves with the Methodology if they are to understand this report fully.

Essentially, the LRTF's mandate was to consider and make recommendations with respect to the commercial law provisions of Bill C-55 in the limited time available to do so. The LRTF's deliberations included thorough analysis, discussion and vigorous debate of the most significant aspects of Bill C-55, as well as consideration of issues not addressed in Bill C-55 but which the sponsoring organizations have previously recommended be addressed in the Joint Task Force on Commercial Insolvency Reform Report (JTF) in 2002 and the Draft JTF Supplemental Report in 2005 (JTF Recommendations).

This report represents a summary of our recommendations and reflects the collective views of representatives of both sponsoring organizations. This report is not a clause by clause account of the technical amendments that could be made to improve upon Bill C-55 generally. Nor is it an exhaustive treatment of all aspects of Bill C-55 that may deserve attention.

The LRTF has identified nine important aspects of Bill C-55 that the LRTF strongly supports with recommended amendments and seven equally important aspects that are best characterized as either under-treated or requiring substantial amendment. Schedule B of this report sets out a more detailed treatment of the particular issues considered and some of the underlying reasons for our recommendations. Schedule C contains a detailed comparison of the treatment of the JTF Recommendations in Bill C-55 and those provisions of Bill C-55 not previously the subject of a JTF Recommendation.

The LRTF applauds the government's initiative to introduce comprehensive law reform to the *Bankruptcy and Insolvency Act* (*BIA*) and the *Companies' Creditors Arrangement Act* (*CCAA*). While there are a number of very positive features to the existing legislation, there is a need for legislative reform to a number of aspects of Canada's insolvency laws. On balance, the LRTF supports Bill C-55 and we hope that it will receive timely consideration and enactment, with

amendments. However, we have a number of recommendations that would enhance the fairness, effectiveness and efficiency of the legislation.

SUMMARY OF RECOMMENDATIONS

I. PROPOSED REFORMS THAT THE LRTF SUPPORTS WITH AMENDMENTS

1. Debtor in Possession Financing

The LRTF strongly supports an approach to the codification of the court's power to authorize secured debtor-in-possession ("DIP") financing as contemplated by Bill C-55. These amendments will help to clarify and provide certainty as to when and to what extent financing can be made available on a priority basis for a debtor that is attempting to reorganize under the *CCAA* or under a *BIA* proposal. Providing financial stability for the debtor's operations is an important initial step in assisting a debtor to develop and implement a successful restructuring under the *CCAA* or *BIA*.

The DIP financing provisions in Bill C-55 are close to but not entirely consistent with the JTF recommendations. We believe that some technical amendments should be made to the wording of the proposed amendments in order to ensure that they achieve the policy objectives they appear intended to address.

(a) Material Prejudice to other Creditors

The LRTF agrees that one of the factors the court should consider in deciding whether to approve DIP financing is whether there will be material prejudice to other creditors. This is dealt with in part by the requirement that the court consider "whether any creditor will be materially prejudiced by the debtor's continued operations", as contemplated in the draft section 11.2(5)(f) of the *CCAA* and section 50.6(4)(f) of the *BIA*. However, this is only part of the issue. The courts have also considered the extent to which the priority granted to the DIP lender's security will materially prejudice other creditors. The effect of granting priority to DIP security is that there may be less value in the debtor's assets to cover the claims of other creditors. The impact of this priority on other creditors may be quite different than the impact of the debtor's continued operations. For example, a lessor of equipment may be only slightly affected by the debtor's continued operations if the equipment is properly maintained. However, it may be significantly affected if the DIP financing is given a first ranking claim against the equipment for an amount greater than the value of the equipment.

In the cases where DIP financing has been approved, the courts have attempted to balance the potential prejudice to other creditors against the risk of prejudice to the debtor and its stakeholders as a whole if the financing is not approved. The JTF recommended that the court should be required to use the balancing of prejudices/limited prejudice test that has been used by the courts.

We recommend that Bill C-55 be amended to make clear that (i) prior notice is to be given to affected secured creditors in all cases; and (ii) the court be directed to consider both aspects of the material prejudice test, including the extent to which the priority granted to the DIP lender's security will materially prejudice other creditors.

(b) Harmonization of *CCAA* and *BIA*

We agree with the proposal that DIP financing be made available in both *CCAA* and *BIA* proceedings. However, the draft statutory language contains several differences between the rules for DIP financing under the *CCAA* and *BIA*, yet there is no obvious rationale for the difference in wording. As noted elsewhere in this report, we believe that the language of the *CCAA* and *BIA* should be consistent unless there is a specific policy reason for the difference.

For example, section 11.2(5)(d) of the proposed amendments to the *CCAA* would direct the court to consider whether the DIP financing will "enhance the prospects of a viable compromise or arrangement being made", but *BIA* section 50.6(4)(d) proposes that the court consider whether the DIP financing will "enhance the debtor's prospects as a going concern if the proposal is approved".

The LRTF believes that in this case, both factors should be considered. The *CCAA* language follows JTF Recommendation 2 and the *BIA* language is consistent with Supplementary Recommendation 2, which suggested that in addition to the factors in Recommendation 2, the court should also consider "whether the DIP loans are necessary for the continuation of the business operations of the debtor or the preservation of its assets."

2. Monitors

The LRTF commends the government for its recognition of the importance of proper governance of financially troubled businesses. The LRTF strongly supports the increased codification of the role of the monitor and other changes relating to the monitor, which recognize (i) the importance of the role of an independent monitor in ensuring the integrity and fairness of *CCAA* proceedings,

(ii) the need to avoid any real or perceived conflict of interest, both in the selection of a monitor and in the monitor's performance of the role and responsibilities, and (iii) the desire for transparency by increased reporting to the court and to all stakeholders on a timely basis.

The proposed new standards being applied to monitors in *CCAA* proceedings are the same as those being applied to trustees who play an analogous role in the context of proceedings under the *BIA,* including the requirements that:

- monitors be licensed as trustees and comply with a code of ethics; and
- the "watchdog role" of the Superintendent of Bankruptcy be extended to *CCAA* proceedings.

The LRTF believes that in the interests of proper governance, the government should provide for monitor approval, unless otherwise ordered by the court, of any disclaimer of executory contracts by the debtor pursuant to proposed *CCAA* section 32 and any proposed asset sale pursuant to proposed *CCAA* section 36.

3. Receivers

The LRTF strongly supports the provisions of Bill C-55 permitting the appointment of a national receiver. The current practice of having receivers appointed only under provincial law is outdated and does not reflect the current commercial reality of increasingly inter-provincial and international transactions. We support uniform insolvency law throughout Canada and the proposed amendments will reduce the uncertainty and additional administrative costs that have arisen with different practices across the country. This amendment is consistent with Bill C-55's objective of harmonizing insolvency law both national and internationally.

The LRTF strongly supports increased codification of the role of a national receiver, in order to create greater certainty in both civil law and common law jurisdictions with respect to the remedies and powers available to a receiver. Bill C-55 is silent on these remedies and powers.

The LRTF strongly supports better defining the role of an interim receiver as interim. This amendment is consistent with the Report of the Senate Standing Committee on Banking, Trade and Commerce (the "Senate Committee") of November 2003, which recommended that the *BIA* be amended to clarify the role of the interim receiver, and the duration and meaning of the term 'interim'.

The LRTF strongly supports the requirement that all *CCAA* monitors and all *BIA* appointed receivers are to be licensed trustees in bankruptcy. These amendments are consistent with the proposed supervisory role for the OSB.

4. Income Trust/Securitizations

The LRTF strongly supports the inclusion of provisions in Bill C-55 to deal expressly with commercial trusts in the context of both reorganization and liquidation proceedings under the *CCAA* and *BIA*. These amendments will help bring a significant financing vehicle for commercial activities in Canada under a legislative framework to deal with distressed situations.

Although a good first step, we believe the provisions in Bill C-55 dealing with commercial trusts require amendments in order to ensure that they achieve the policy objectives they are intended to address. In particular, the proposed amendments have not dealt with a number of important aspects relating to insolvencies involving commercial trusts and special purpose financing vehicles such as:

- the relative positions of the trustees, the assets and the creditors of commercial trusts in bankruptcies; and
- the need for liquidation and non-consolidation provisions in respect of special purpose financing vehicles.

5. Asset Sales

The LRTF strongly supports the provisions of Bill C-55 that give the court express jurisdiction to authorize a debtor company, both under *CCAA* and *BIA*, to dispose of or sell its assets outside the ordinary course of its business. The LRTF commends the government's move to clarify principles governing the disposal of assets in the context of a debtor's restructuring and the vesting of assets for the purpose of completing disposition transactions.

6. Preferences

The LRTF strongly supports Bill C-55's movement towards providing uniform, consistent and simplified rules in relation to challenges of certain transactions. While not the complete code or national standard previously recommended by the JTF and supported by the Senate Committee, these proposed amendments support the policy objective of increasing the ability to recover

money or property from parties where there has been a diminishment of the value of assets of the debtor to the detriment of creditors.

The LRTF believes that further amendments to the preference provisions are necessary to more effectively achieve the goals of consistency and uniformity:

(a) Remedies

The potential remedies available in respect of transfers at undervalue (TUVs) should include the recovery of the property itself or proceeds in a manner similar to that which applied with respect to settlements.

(b) Form of Transactions Subject to Attack

TUVs should be more broadly defined so as to provide the estate with as much flexibility as possible in terms of challenging transactions or other dealings by the debtor, notwithstanding their form.

(c) Transaction Review under the *CCAA*

The TUV provisions should be included in the *CCAA*. Notwithstanding the JTF recommendations and support of the Senate Committee, Bill C-55 does not propose any amendments to the *CCAA* in respect of preference provisions. We strongly support uniform and consistent rules under both the *CCAA* and the *BIA* in respect of these types of transactions. Many provisions of Bill C-55 seek to harmonize the respective provisions of the *CCAA* and *BIA* and it is therefore unclear why the preference provisions were not part of this effort to ensure consistency between the two statutes.

(d) Who May Challenge Transactions

Currently, creditors in a bankruptcy (under section 38 of the *BIA*), bankruptcy trustees and proposal trustees have rights to attack transactions under the *BIA*. Again, with a view to providing consistent and uniform rules under both the *CCAA* and *BIA*, we recommend that creditors have section 38 type remedies in both *BIA* proposal and *CCAA* proceedings, and that monitors should have the ability to challenge TUVs in *CCAA* proceedings, without limiting the ability of insolvency administrators to settle claims.

7. Cross Border Insolvencies

The LRTF strongly supports the inclusion of provisions in Bill C-55 to deal expressly with cross border insolvency proceedings. The LRTF views the amendments as striking a reasonable balance between the codification of the "UNCITRAL Model Law on Cross Border Insolvency" (the "Model Law") and retention of the jurisdiction of the laws of Canada and Canadian courts.

The LRTF views the amendments in Bill C-55 as achieving the objectives of the reform to cross border insolvency legislation as set out in the Model Law adopted by the United Nations on May 30, 1997, namely promoting:

- cooperation between the courts and other competent authorities in the local jurisdiction with those of foreign jurisdictions in cases of cross border insolvency;
- greater legal certainty for trade and investment;
- the fair and efficient administration of cross border insolvencies that protect the interests of creditors and other interested persons, and those of the debtors;
- the protection and the maximization of the value of the debtor's property; and
- the rescue of financially troubled businesses to protect investment and preserve employment.

While the LRTF strongly supports the Bill C-55 provisions dealing with cross border insolvency proceedings, the LRTF views certain supplemental amendments as desirable from the perspective of maintaining and enhancing the overall public policy interests of Canada. The following amendments are consistent with this objective, without impeaching Canada's approach to globalization through adoption of the principles of the Model Law:

(a) a reciprocity provision that the adoption of the model law concept and recognition of foreign insolvency proceedings will only be applied in respect of foreign jurisdictions that have adopted the same principles of the Model Law; and

(b) a provision that acknowledges the court's power to appoint a creditors' committee or monitor as a condition of recognizing the foreign proceeding, taking into consideration the circumstances of the case before the court, and on such terms as the court may determine, including a provision that reasonable funding is available to the creditors' committee or monitor, as the case may be.

8. Wage Earner Protection Provisions

The LRTF strongly supports the implementation of the Wage Earner Protection Program Act ("WEPP") but recommends the introduction of certain amendments and regulations to help balance the interests of key stakeholders and address some practical concerns to ensure that WEPP achieves its intended results.

The LRTF recognizes that employees are more vulnerable than other creditors who can take steps to register security to protect their credit position and have easier access to information to manage their credit exposure. However, insolvency laws must balance many competing interests (including those of employees, creditors, investors and others) to support a competitive Canadian business environment, access to available capital at reasonable rates and an ability to either restructure or sell insolvent businesses such that some or all of the workforce can find continued employment in a restructured entity.

(a) Need for an Operating Option

WEPP provides for only one process to be followed if there are unpaid wages, including vacation pay, on the date of bankruptcy or receivership. In most commercial insolvencies where employees are terminated upon bankruptcy or receivership, there are unpaid wages. In certain insolvencies where funds are available for access by the receiver or trustee, particularly operating situations, the receiver or trustee pays the outstanding wages in the normal course. The assurance and speed of such payments are often critical to retaining employees, maintaining operations and discouraging vandalism. In a literal reading of WEPP, there is no provision for a second option, where the receiver or trustee pays the wages (and possibly vacation pay) owing at the date of receivership/bankruptcy.

If the intent of the legislation is to be a backstop for only those circumstances where neither a trustee nor receiver pay the wages, the LRTF recommends that WEPP provide for a second option where unpaid wages may be paid by a receiver or trustee. By encouraging the payment of wages by a receiver/trustee, the underlying policy objectives of WEPP to ensure wages are paid, and as quickly as possible, is more likely to be achieved. In addition, the receiver/trustee can then deal with the administrative requirement of preparing T4s for the employees and submitting employee deductions in the normal course. It is unclear from WEPP as to how T4s would be handled and who would be responsible for remitting employee deductions. With the second

option, the receiver/trustee would be exempted from advising the employees of WEPP but would be entitled to file an aggregate claim with WEPP that, once filed, would constitute a super-priority charge against current assets, to the extent of the prescribed limits, and a right to file a claim against the directors.

(b) Quantum Concerns

The LRTF strongly supports the definition of wages to include vacation pay and to exclude severance or termination pay. The LRTF also recommends that in the regulations it be made clear that the definition of wages includes any deductions from an employee's pay that have not been remitted to a third party but excludes any other expenses, including expenses paid by the employer on behalf of the employee group such as medical and dental plan premiums.

The quantum of the payment under WEPP for wages (max. $3,000) and the quantum of the super-priority for wages under the *BIA* (max. $2,000) should be revisited to avoid unintended consequences when the payment of wages is left to WEPP so that only a maximum of $2,000 per employee is paid from estate assets or funded by a secured creditor, and the federal government is left to try to recover the difference from directors who often have no funds or limited funds to pay a variety of claims. The Senate Committee previously recommended an upper limit of $2,000 and the JTF supported this limit. It should also be made clear in Bill C-55 that payments under the WEPP for wages and payments in respect of pension claims do not "double up" when there is both a receivership and a bankruptcy.

(c) All Arms-Length Employees Should be Covered

The LRTF recommends that individuals who are employed for three months or less not be ineligible to receive a payment under WEPP, as such employees are often the most vulnerable to layoffs in operating scenarios and less likely to have any sizeable claims for severance and termination. Surely potential abuses in respect of "last minute" related party hires can be addressed through more equitable means if that is the intent of this aspect of WEPP.

(d) Six Month Limit

The LRTF also recommends revisiting the date for calculating the six-month period to determine the extent of unpaid wages. The date of bankruptcy is the date on which the assignment is made or a receiving order is granted. The phrase "date of initial bankruptcy event" allows for dating

back to the filing of the bankruptcy petition in certain situations but is not used in WEPP. There are contested bankruptcy hearings that can go beyond six months to resolve.

(e) Termination of Employment

We understand that the regulations are to define what constitutes termination of employment. The regulations should take into account recent court decisions that have discouraged carrying on the operations of insolvent businesses as a result of successor rights issues, to make it clear that termination of employment is triggered by a bankruptcy.

(f) Payment of Administrative Expenses

There will be time and expenses incurred by the receiver/trustee to comply with WEPP. Although WEPP provides for the recovery of such time and expenses out of the debtor's assets, the trustee/receiver should be entitled to claim reasonable costs from the federal government for helping to administer the WEPP and, where the only recoveries in an estate are the assets that will be primed by the WEPP claims, for the costs of administering the bankruptcy. There is currently a Directive (12R) – Administrative Agreements with Trustees and Receivers, which provides for insolvency administrators, on a case by case basis and with certain restrictions, to recover their costs ahead of the Crown's claims under section 227(5) of the *Income Tax Act* and enhanced garnishments under section 224(1.2) of the *Income Tax Act* or similar legislation. A similar administrative agreement should be in place with respect to the proposed super-priority for WEPP claims, which are in turn subject to other priorities including section 67(3) of the *BIA* for deemed trusts.

(g) Administrative Protections

WEPP requires a receiver or trustee to determine the amount of wages (and vacation pay) owing to each individual in respect of a six-month period. In certain situations, the books and records of a debtor are either non-existent or not up-do-date such that it is either an impossible task to do the calculation or considerable effort would be required to reconstruct the records. The regulations should provide for a notice period wherein the receiver or trustee would advise the Minister of problems encountered in complying with WEPP and an administrative agreement should be put in place to determine how such claims are to be resolved, how related receiver/trustee fees are to be paid and to ensure the receiver/trustee is not held personally liable for errors or an inability to comply with WEPP.

(h) Balancing Anti-Abuse Protections

There are extensive anti-abuse measures included in WEPP for various offences including criminal sanctions for failure by a trustee and receiver to comply with the requirements of section 21 as described above. These anti-abuse measures are stronger than those commonly found in insolvency legislation and appear to be unduly harsh.

9. Governance

(a) Removal of Directors

The LRTF strongly supports the proposed amendments that would give the court the authority to remove any director of a company that is being reorganized under the *CCAA* or *BIA* if the director is unreasonably impairing the possibility of a viable restructuring.

We note that the proposed amendments would also give the court the power to remove a director based on concerns about future conduct of the director, if the court is satisfied that the director is "likely to" unreasonably impair the possibility of a viable restructuring. We hope that the courts will exercise this power cautiously and only in the clearest of cases, considering the predictive nature of the test.

(b) Interim Receiver

LRTF recommends that the court continue to have the discretion to appoint an interim receiver or receiver in appropriate circumstances under a *CCAA* proceeding.

In some cases, replacing one or more of the debtor's directors may not be the most effective means of ensuring that the debtor is able to propose a viable restructuring plan. Occasionally, the role of the monitor in a *CCAA* case has been expanded by having the monitor appointed as interim receiver of the debtor; and the interim receiver then proposed the restructuring plan to the creditors, with the assistance of the debtor's management. While we welcome the recasting of the role of interim receivers generally so that it is once again truly "interim", the LRTF believes that it would be helpful to continue to have the possibility of an interim receiver or receiver appointment of the type described above in restructuring cases.

(c) Due Diligence Defence for Directors

LRTF recommends that a general due diligence defence be made available for directors.

The JTF had previously recommended, as did the Senate Committee, that directors be provided with a general due diligence defence against personal liabilities. The proposed amendments do not provide equivalent protection and continue to leave directors open to the risk of personal liability even if they have taken whatever steps they are in a position to control to ensure that payments are made. Other aspects of the proposed amendments, such as the government's subrogated rights in connection with amounts paid under the WEPP, will make claims against directors more likely. We expect that this will make it harder to persuade qualified independent directors to remain on or join the boards of troubled companies, at the time when they are needed most. A general due diligence defence would address this issue.

The proposed amendments would permit a company being reorganized under the *CCAA* or *BIA* to provide an indemnity to directors and officers for post-filing liabilities, and provide that the court can secure the indemnity with a priority charge over the debtor's assets. This will provide some protection to directors and officers, but the value of the protection will be limited by (a) the creation or ranking of priority charges and (b) the value of the security granted over the debtor's assets, and is provided at the expense of the debtor's secured creditors.

II. ISSUES THAT HAVE BEEN UNDER-TREATED OR REQUIRE SUBSTANTIAL AMENDMENT

1. Collective Agreements and Notice to Bargain

The provisions of Bill C-55 specify that a collective agreement may not be altered except where the parties to the collective agreement have agreed to revise it, following service by the company of a "notice to bargain" and bargaining under the laws of the jurisdiction governing collective bargaining between the parties. These proposed amendments are not sufficient and require recourse to a final solution to impasse.

Where a debtor company and the union representing its employees fail to reach a voluntary agreement to revise provisions of the collective agreement, Bill C-55 gives the court jurisdiction to grant an order authorizing the company to serve a "notice to bargain" on the bargaining agent. While the "notice to bargain" constitutes a good first step in forcing the parties to come to a negotiated compromise regarding provisions of the collective agreement, the LRTF believes that

the provisions of Bill C-55 are insufficient in that they fail to provide a timely process to arrive at a final solution to collective bargaining issues, issues that are often critical to the successful outcome of *CCAA* proceedings.

The Senate Committee recognized and the JTF recommended that implementing a comprehensive solution to address a protracted impasse over labour issues in a restructuring was necessary. For whatever reason, Bill C-55 fails to adopt such a comprehensive solution. The LRTF recommends that Bill C-55 be amended to grant to the court express authority to implement some comprehensive solution to a labour impasse (whether it be by way of court supervised modification to collective bargaining agreements or through some other process) where, after a reasonable period, negotiations entered into pursuant to the service of a "notice to bargain" prove to be unsuccessful. The LRTF suggests that, apart from any other relevant criteria, the court's authority to do so should be subject to the court being satisfied that (i) a viable compromise or arrangement could not be made, taking into account the terms of the collective agreement, (ii) the company has made good faith efforts to renegotiate the provisions of the collective agreement, and (iii) failure to adopt a comprehensive solution could result in irreparable damage to the company.

2. Insufficient Alignment of the *CCAA* and *BIA*

The LRTF generally recognizes and supports the intent of Bill C-55 to align certain provisions of Part III – Section I of the *BIA* and the *CCAA*. The LRTF views the objectives of such alignment to promote the following:

- greater consistency between the treatment of creditors and other interested persons under the two regimes;
- greater public awareness and regulatory oversight to the Office of the Superintendent of Bankruptcy in respect of *CCAA* proceedings;
- the two statute approach to restructuring debtor companies based on the size and nature of the respective entity, (i.e., retain the flexible *CCAA* statute for larger debtor companies requiring more complex reorganization strategies and the Division I proposal regime for smaller debtor companies able to deal better with a more detailed procedural restructuring framework); and
- a codified structure to the *CCAA* restructuring framework and greater consistency with a *BIA* Division I proposal without removing the progressive nature of the *CCAA* statute that permits the unrivalled speed, cost effectiveness, flexibility and pragmatism of the Canadian restructuring system.

The LRTF supports efforts to align the legislation and notes there are certain deficiencies in Bill C-55 that should be addressed prior to its enactment. These alignment deficiencies can be summarized as follows:

Structural Alignment:

(a) The capacity of the regulator is clarified in a *CCAA* proceeding (ss. 11.1 (1) to (5)), whereas similar clarification is not provided within the *BIA* Division I proposal provisions.
(b) Critical supplier provisions as provided for in the framework of the *CCAA* (ss. 11.4 (1) to (4)) are not provided for in the framework of a *BIA* Division I proposal.
(c) The provisions of the *BIA* Division I proposal (ss. 65.2(1) to (7)) that define the methodology and landlord rights resulting from the repudiation of commercial real property leases should be incorporated into the provisions of the *CCAA*. Assuming an amendment similar to section 65.2 of the *BIA* is incorporated into the *CCAA*, certain ancillary amendments to other sections of the *CCAA* will be required to align the provisions, including an amendment to section 11.3(3), which would be inconsistent with *BIA* section 84.1(3)(b).
(d) Related party creditor entitlement to vote under a *BIA* proposal (section 54(3)) is inconsistent with the *CCAA*. To align the two proposal regimes we recommend a similar restriction be added to the provisions of the *CCAA*.

Consistency Alignment:

(a) Timing of payment of pension amounts under a *BIA* Division I proposal (s. 60(1.5)(a)) and *CCAA* plan (s. 6(5)(a)) are inconsistent.
(b) The language recognizing the enforceability of collective agreements on the commencement of a restructuring proceeding is substantively different under a *BIA* Division I proposal (s. 65.12(6)) and *CCAA* (s. 33(1)).
(c) The test to be considered by the court prior to ordering an assignment of an agreement under the *BIA* (s. 84.1(5)) and *CCAA* (s. 11.3(5)) are inconsistent. To align the two proposal regimes, we recommend that the *BIA* be amended to be consistent with the *CCAA*.

3. Equity Interests

The LRTF supports the inclusion of provisions in Bill C-55 to deal expressly with equity interests comprehensively. Regrettably, the LRTF does not believe that Bill C-55 adequately addresses issues relating to equity interests in an insolvency context. Nor do the proposed amendments deal with equity interests uniformly in the *CCAA* and the *BIA*.

The LRTF believes that amendments should be made to Bill C-55 in order to ensure that they achieve the policy objectives they are intended to address. In particular, amendments should be made to:

(a) expressly permit the court supervising a reorganization effort to dispense with any form of "equity" approval and deal in all respects with equity interests;

(b) uniformly treat equity interests in *BIA* and *CCAA* reorganization cases and expressly provide for their subordination and non-voting status; and

(c) ensure that the provisions apply to all forms of equity interests.

4. Priority of Charges in *BIA* and *CCAA* Proceedings

(a) Priority of Charges

The LRTF recommends that Bill C-55 should specify the court's express authority to make orders to rank priorities of the charges created by court order, unless otherwise expressly stipulated by a statutory priority.

The LRTF also recommends that Bill C-55 should be amended to provide for the statutory priority of charges in respect of the fees and expenses of professionals and other advisors providing services to or in respect of the debtor's affairs that the court determines are necessary to the debtor's ability to attempt or effect a reorganization attempt, or take possession or control of the debtor's assets or undertaking, in priority to all other statutory priorities.

Bill C-55 codifies a number of super-priority charges, some of which have statutory priority in bankruptcy and others that may be granted by court orders against the current and fixed assets of a debtor during a re-organization attempt; and all such charges can rank in priority to the claims of existing secured lenders. These newly created charges relate to employee wage and expense claims, certain unremitted pension plan contributions, DIP loans, administrative expenses and

D&O liabilities. These charges are in addition to the deemed trust for employee source deductions and the rights of suppliers.

Current practice permits judicial discretion to rank these competing charges on a case by case basis. This preserves the speed, cost-effectiveness, flexibility and pragmatism of court-supervised restructurings generally in Canada. The statutory ranking of some or all of these charges (e.g., to expressly state that the security or charges granted for DIP loans, the administrative expenses and D&O liabilities are to rank behind the statutory priority charges for employee source deductions, employee wage and expense claims and the pension plan claims as defined) will have an impact on the ability to effect restructurings and administer insolvent estates in Canada.

The LRTF does not object to the creation of statutory priorities for some employee claims but believes that the courts should continue to have the discretion to make orders ranking the various priorities created by court order on a case by case basis, unless expressly prohibited by statute. As such, the LRTF believes that Bill C-55 should expressly state that the court can specifically make orders to rank priorities of court ordered charges, unless otherwise expressly stipulated by a statutory priority. The LRTF also believes that unless a form of statutory priority is established for administrative expenses, above any and all other statutory priorities, there will be many circumstances where: (a) insolvent debtors will be unable to attract and retain qualified advisors to assist in accomplishing a restructuring; or (b) assets will be abandoned.

(b) No Set-off of Pre-Filing Claims against Post-Filing Obligations

The LRTF recommends that there should be a specific prohibition against the set off of pre-filing claims against post-filing obligations of creditors, to assist the court in resolving these issues.

Bill C-55 does not incorporate the JTF recommendations providing that in a reorganization proceeding: i) the counter-party to an executory contract should have the right to set off pre-filing claims against pre-filing obligations, but not against post-filing obligations; and ii) that the court be given the power to stay the legal set-off of pre-filing claims against post-filing obligations of the creditor.

5. Pension Plan Priority

Bill C-55 creates a super-priority for amounts deducted from employees for pension plan contributions that were not remitted to the plan, and for unremitted 'normal cost' plan contributions outstanding as of the date of filing. Normal cost liabilities exclude special payment obligations, which are generally required to be made by an employer-sponsor of a defined benefit plan to fund, over a period of time, unfunded plan liabilities or solvency deficiencies.

Bill C-55 creates a security interest for those amounts, ranking above every other claim, right, charge or security, regardless of when that charge arose on all the debtor's assets in both bankruptcy and receivership situations. This charge ranks behind the deemed trust for employee source deductions, supplier rights to repossess goods, and the super-priority charge against current assets for the limited employee wage and expense claims of $2,000 and $1,000, respectively.

The LRTF supports the super-priority for outstanding amounts that were withheld from employees' remuneration and not remitted to pension plans.

The LRTF believes that the super-priority granted for pension obligations should create a charge against only the current assets of a debtor.

The LRTF believes that the priority amount should be limited to unpaid amounts accruing during the six-month period immediately preceding the bankruptcy or receivership.

The LRTF supports the exclusion of 'special payment' obligations and defined benefit plan deficiencies from the proposed super-priority.

The LRTF supports the provisions in Bill C-55 that permit a proposal or plan to be approved by the court without providing for the payment of outstanding pension plan liabilities if the relevant parties agree and the relevant pension regulator has approved the agreement.

6. Access to Independent Legal Counsel

Section 13.4(1) of the *BIA* provides that a trustee of an estate cannot also act for or assist a secured creditor of the estate without having received a written opinion from a solicitor who does not act for the secured creditor that the security is valid and enforceable against the estate.

Section 12 of Bill C-55 expands on section 13.4(1) by effectively defining a solicitor who does not act for the secured creditor as someone who has not acted for the secured creditor in the previous two years and is not related to the trustee.

The objective of section 13.4(1) of the *BIA* appears to be to ensure that the security opinion obtained by the trustee has been provided by an independent professional. However, by defining independence so broadly, it may be difficult in some markets and circumstances for trustees to find a solicitor that would qualify as being independent under the new provision. Further, there appears to be an unintended differentiation in the standard applied to counsel for a trustee who is also acting as a receiver (who would be subject to the scrutiny of section 13.4(1)), versus counsel who is acting for the trustee only (who may have acted for the secured creditor in the previous two years but would not be subject to section 13.4(1)).

The LRTF supports the objective of the proposed amendments to section 13.4(1) of the *BIA*. However, the LRTF is of the view that the amendments will be awkward in practice and need to be more practically oriented so as to not unduly limit a trustee's access to qualified counsel. The LRTF recommends that Bill C-55 be amended to provide for the ability of the Official Receiver or a court to waive the restriction on the provision of legal services to the secured creditor within the prior two year period, if satisfied that it is necessary to permit the trustee to obtain the benefit of qualified counsel.

7. Successor Protections

The LRTF strongly supports the provisions in Bill C-55 designed to further clarify the protections currently afforded insolvency administrators from the personal assumption of liabilities that could arise in continuing the business of a debtor, including through the employment of the debtor's former staff members following an appointment.

However, the LRTF recommends that Bill C-55 be amended to clarify the protections provided to insolvency administrators from potential employment related liabilities relating in any way to the pre-appointment period.

The LRTF believes that the objective of insolvency reform in protecting insolvency administrators from successor employer obligations is vitally important and should be designed to:

- promote the continued operation of an insolvent enterprise under the control of insolvency administrators on a going concern basis, where viable, to improve realizations to creditors and sustain employment for the employees;
- permit insolvency administrators to maintain the standard terms and conditions of employment to which employees were accustomed prior to the appointment of the insolvency administrator, where viable, including the payment of wages, vacation pay, pension amounts and other benefits without the risk of assuming liabilities for other claims;
- permit the insolvency administrators to interact in a cooperative and proactive manner with employee representatives in cases involving organized labour;
- insulate insolvency administrators from termination and severance obligations of employees dismissed subsequent to the date of appointment of the insolvency administrator;
- encourage competent individuals to serve as insolvency administrators by providing protection that ensures the potential risks to be assumed through the provision of services do not act as a deterrent;
- promote trade and investment in Canada by providing several potential avenues of recovery in the event that enterprises become financially troubled; and
- ensure the priority of pre-appointment claims is not, in effect, re-ordered by exposing insolvency administrators to claims relating in any way to pre-appointment employment.

The LRTF views the above stated objectives as consistent with public policy objectives directed toward providing sustainable long term employment for individuals. The LRTF believes that amendments to Bill C-55 should be made to apply the following principles, consistent with the above stated objectives:

(a) a clear and unequivocal recognition of the protection afforded insolvency administrators in the exercise of their duties relative to potential successor employer obligations, which would include specification of the potential obligations and liabilities to which the exoneration would be extended; and

(b) an absolute bar of third party leave applications before courts supervising insolvency proceedings seeking determinative declarations of employer status of an insolvency administrator before a labour relations board or tribunal in respect of the role of the insolvency administrator within an insolvency proceeding.

All of which is respectfully submitted.

October 13, 2005

Legislative Review Task Force (Commercial)
Jointly Struck by
The Insolvency Institute of Canada and
The Canadian Association of Insolvency and Restructuring Professionals

Philippe Bélanger, McCarthy Tétrault LLP
Kevin Brennan, Ernst & Young Inc.
Craig Bushell, PricewaterhouseCoopers Inc.
Karen Cramm, Deloitte & Touche Inc.
Paul Casey, Kroll Restructuring Ltd. (CAIRP, Co-chair)
Shelley Fitzpatrick, Davis & Company LLP
Susan Grundy, Blake Cassels & Graydon LLP
Philip Manel, RSM Richter LLP
Douglas McIntosh, KPMG Inc.
Edward Sellers, Osler, Hoskin & Harcourt LLP (IIC, Co-chair)
Walter Vail, Cox Hanson O'Reilly Matheson

Schedule A

METHODOLOGY

The Legislative Review Task Force (Commercial)

of

The Insolvency Institute of Canada

and

The Canadian Association of Insolvency and Restructuring Professionals

IIC/CAIRP
LEGISLATIVE REVIEW TASK FORCE
METHODOLOGY

Set out below is a description of the formation of the Legislative Review Task Force ("LRTF"), jointly established by The Insolvency Institute of Canada ("IIC") and the Canadian Association of Insolvency and Restructuring Professionals ("CAIRP") to consider the commercial aspects of Bill C-55, tabled in the House of Commons in June 2005, and the LRTF's methodology in analyzing and reporting to its sponsoring organizations on Bill C-55.

IIC/CAIRP Dialogue

In response to the unanticipated introduction of Bill C-55 in the House of Commons in June 2005, and the real prospect of Parliamentary hearings before the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology early in the Fall of 2005, the respective board of directors and executive officers of the IIC and CAIRP initiated a dialogue about how best to analyse and comment on Bill C-55 in view of the apparently short time available for that purpose. The IIC's and CAIRP's discussions in that regard were reflective of their prior success in establishing a joint task force (the "JTF") to analyse and recommend potential legislative amendments to Canada's federal insolvency regime (the "JTF Recommendations").

Composition of the LRTF

In mid-July, 2005, the IIC and CAIRP:

(a) established terms of reference for two joint legislative review task forces dealing with, respectively, commercial and consumer aspects of Bill C-55; and

(b) appointed from among their respective members co-chairs of each task force.

Each of the task force co-chairs then recruited members from both IIC and CAIRP to serve on the respective task forces.

After:

(a) due consideration and discussion concerning the desirability of professional, geographic, linguistic and gender diversity in the composition of the LRTF; and

(b) after consultation with prospective members of the LRTF as to their availability and preparedness to contribute,

membership of the LRTF was established as follows:

Philippe Bélanger, McCarthy Tétrault LLP
Kevin Brennan, Ernst & Young Inc.
Craig Bushell, PricewaterhouseCoopers Inc.
Karen Cramm, Deloitte & Touche Inc.
Paul Casey, Kroll Restructuring Ltd. (CAIRP, Co-chair)
Shelley Fitzpatrick, Davis & Company LLP
Susan Grundy, Blake Cassels & Graydon LLP
Philip Manel, RSM Richter LLP
Douglas McIntosh, KPMG Inc.
Edward Sellers, Osler, Hoskin & Harcourt LLP (IIC, Co-chair)
Walter Vail, Cox Hanson O'Reilly Matheson

Dr. Janis Sarra of UBC Faculty of Law agreed to serve as reporter for the LRTF's work.

Among the members of the LRTF are a former vice-chair of the JTF, a board member of the IIC having assisted in the development of numerous technical aspects of JTF reports, an executive officer of the IIC and 4 members of CAIRP's Corporate Practice Committee**.** Dr. Sarra also served as reporter to a number of JTF working groups and as co-reporter to the IIC's and CAIRP's joint task force on consumer aspects of Bill C-55.

The Work of the LRTF

Also during the latter part of July 2005, discussions between the LRTF co-chairs and their respective sponsoring organizations ensued concerning the potential scope of work to be accomplished and the availability of resources to the LRTF for its administration, production and potential advocacy. Those discussions led to the adoption of a proposed timetable for the LRTF's work that was aggressive but achievable with the concerted effort of the LRTF's membership. A summary timeline setting out what were understood to be the likely activities of the LRTF (more fully discussed below) is attached.

It became apparent early on that before the LRTF could effectively analyse and report on Bill C-55, it required a deeper appreciation for the degree to which Bill C-55 was reflective of the JTF Recommendations and the report issued by the Senate Standing Committee on Banking, Trade and Commerce (the "Senate Report"). Two summer students serving in the Toronto offices of Osler, Hoskin & Harcourt LLP ("Osler") (Medard Fisher and Penelope Ng), under the direction and guidance of LRTF members, commenced work on a comparative review of the JTF Recommendations (both the original recommendations and those supplemental to the Senate Report) as against the provisions of Bill C-55. Attached to the LRTF Report are copies of the

charts prepared by Osler outlining in broad terms both the treatment of previous JTF Recommendations and those aspects of Bill C-55 not previously the subject of a JTF Recommendation (the "Comparative Review").

Recognizing that there were far too many aspects of Bill C-55 to be dealt with effectively on an individual basis within the timeframe contemplated for completion of the work of the LRTF, the LRTF determined to examine in detail what it considered to be the most significant aspects of Bill C-55, so as to establish the "framework" that the LRTF would adopt in its treatment of Bill C-55. Accordingly, during the second and third weeks of August 2005, the LRTF held a number of conference calls to discuss and refine:

(a) the outcome of the Comparative Review; and

(b) the most significant aspects of Bill C-55 (both positive and negative) that were worthy of further consideration by the LRTF.

The Top Ten Lists

In order to advance the work of the LRTF and deal with the most significant aspects of Bill C-55 in a timely fashion, members of the LRTF were asked to establish "top ten" lists of what they considered to be the most positive and most negative aspects of Bill C-55. Each of the members of the LRTF shared their views in that regard and two composite lists of the most significant positive and negative aspects to Bill C-55 were created. The criteria for inclusion on the composite LRTF top ten lists was that an aspect of Bill C-55 had to have generated comment from or have been included on the top ten lists of at least three of the LTRF members. It was thought that unless that minimum threshold of three members had been met, although the issue may have been important itself, it was of relatively lesser importance and should not take the focus of the LRTF away from considering more significant aspects of Bill C-55 in the limited time available.

Individual Issue Analysis

Thereafter, for the balance of the month of August 2005, individual members of the LRTF took responsibility for providing an analysis and commentary to the LRTF as a whole in respect of one or more aspects of Bill C-55 that had met the top ten criteria. Full discussion and vigorous debate ensued amongst members of the LRTF concerning the relative positions put forward by individual members in conjunction with the most significant aspects of Bill C-55. All reasonably held views were heard, considered and debated. The LRTF deliberations took into account many aspects, including a) the JTF Recommendations; b) the policy choices inherent in Bill C-55; c) individual member's views of the practical application of the provision of Bill C-55; and d) the prospect of successfully achieving amendment or modification of certain provisions of Bill C-55. Ultimately,

consensus was achieved on most significant aspects of Bill C-55, but in limited instances polls were taken of the LRTF membership to determine the majority view of the appropriate characterization of the aspects of Bill C-55.

Dialogue with Government Officials

Throughout the course of the LRTF's mandate, a number of its members, and the directors and officers of the sponsoring organizations, have had numerous discussions with government officials in departments charged with the responsibility of formulating and steering Bill C-55 through the legislative process. Those discussions have been aimed at better understanding the policy choices that are inherent in Bill C-55 and whether they were made on a conscious basis. Those discussions have also been directed toward assisting the LRTF in understanding whether and to what extent amendments to Bill C-55 might be entertained during the legislative process.

The LRTF does not consider it appropriate to render in writing the views that have been provided to it concerning receptivity, or lack thereof, to proposed amendments to Bill C-55. However, the LRTF has approached its consideration of potential amendments to Bill C-55 (and therefore its conclusions and recommendations regarding Bill C-55) on a basis generally consistent with not calling for amendments on issues that:

(a) appear to be related to items not treated in Bill C-55, so as to minimize the prospect of outright rejection because they are "new" provisions requiring amendments in areas beyond the existing scope of what Bill C-55 attempts to address;

(b) are largely dealt with in some other manner in Bill C-55;

(c) are not a practical concern;

(d) could appear to unduly encroach on areas of provincial legislative competence;

(e) appear to have been left to the judiciary to deal with;

(f) are already largely dealt with in the common law or other statutes; or

(g) appear to have no prospect of support.

There were, however, certain instances when the LRTF believed it important to address issues in Bill C-55, notwithstanding the criteria set out above.

Framework Agreement

At or about the end of August 2005, and after the analysis, discussion and vigorous debate of the most significant aspects of Bill C-55 described above, after consultation with the IIC and CAIRP, the LRTF agreed to adopt a "framework" approach to its further work in conjunction with its

analysis and recommendations regarding Bill C-55. That framework approach was to determine, amongst a range of options, whether the LRTF would or would not support the adoption of Bill C-55, with or without amendments. Essentially, the framework approach was to determine whether there was sufficient merit in the comprehensive reform of Canada's federal insolvency regime inherent in Bill C-55 (with or without amendment) to justify the LRTF supporting its adoption, or whether the shortcomings inherent in Bill C-55 were so significant that it warranted a "kill the Bill" approach.

During the first week of September 2005, it was unanimously agreed amongst the membership of the LRTF that the positive attributes of comprehensive reform to Canada's federal insolvency regime contained in Bill C-55 warranted the adoption of a framework approach that was supportive, but with an indication from the LRTF of the most material aspects of Bill C-55 that required amendment for it to:

(a) be substantially consistent with the JTF Recommendations;

(b) achieve its inherent policy objectives; and

(c) accommodate the practical application of its provisions.

Development of the Report

As indicated above, each LRTF member was assigned one or more of the top ten significant positive and negative aspects of Bill C-55 for analysis and commentary in written form. The contributions from individual LRTF members were circulated amongst the LRTF as a whole and again became the subject of discussion, and in some cases vigorous debate. Again, in certain instances, polls were taken of the LRTF membership to determine what the majority view was on particular points so that ultimately, the views of the LRTF as a whole could be stated on a collective basis. Throughout the first two weeks of September, 2005, the LRTF held a number of lengthy meetings and ultimately produced a draft report that was reflective of what the LRTF considered to be appropriate treatment of the most significant aspects of Bill C-55.

Solicitation of Input

Early on, the Co-chairs of the LRTF recommended to their respective sponsoring organizations that individual members be provided with an opportunity to submit their views in respect of Bill C-55 generally to members of the LRTF. In that regard, both the IIC and CAIRP circulated to their members generally in mid-August a call for submissions to be made to members of the LRTF on or about the end of August or the first week of September 2005. Very few individual members took the opportunity to provide the LRTF with any such input at that time.

The LRTF understood that the sponsoring organizations may have wanted to: a) give consideration to whether, how and on what basis individual members of the sponsoring organizations could or should be consulted in respect of the LRTF report; and b) comment on a draft of the LRTF report, prior to it being finalized and circulated. In that regard, the LRTF delivered a draft report to the boards of directors of the sponsoring organizations for their consideration and received feedback from both boards, including through an ad hoc committee of the IIC's board of directors who provided detailed feedback on a number of aspects of the draft report.

Consideration of JTF Recommendations

As indicated, throughout its deliberations the LRTF was mindful of the JTF Recommendations. The LRTF recognizes that in certain limited respects, the conclusions reached and the recommendations made by it could be read as varying slightly from the JTF Recommendations, which were made without the benefit of proposed legislation. The LRTF is not troubled by this difference in any respect having:

(a) considered the actual legislation tabled;

(b) pursued many opportunities to dialogue with a number of government officials concerning policy choices that have been made and are inherent in Bill C-55; and

(c) considered the potential for amendment during the current session of Parliament.

Conclusion

Ultimately, the conclusions and recommendations of the LRTF in respect of Bill C-55 are reflective of a thorough analysis, broad discussion, vigorous debate and consensual resolution by a material number of Canada's leading insolvency practitioners as to the most significant aspects and the recommended approach to Bill C-55 in the context of:

(a) the JTF Recommendations;

(b) the Senate Report;

(c) dialogue with informed government officials;

(d) dialogue with the directors of both sponsoring organizations;

(e) what the LRTF believes are necessary amendments to achieve the practical implementation of the policy objectives inherent in Bill C-55; and

(f) the time available.

IIC/CAIRP
LEGISLATIVE REVIEW TASK FORCE
TIMETABLE

WEEK OF:	ACTION:
July 25	Commence discussions between the IIC and CAIRP on LRTF framework and approach Commence establishment of LRTF membership and resource pool Complete LRTF draft budget outline Receive and review JTF Reports Commence comparative review (conceptual and mechanical) of JTF Reports and C-55
Aug. 1	Complete discussions between the IIC and CAIRP on framework and approach Complete establishment of LRTF membership and announce to IIC/CAIRP membership Consult with IIC/CAIRP executives regarding possible lobbyist engagement Refine LRTF budget Continue comparative review (conceptual and mechanical) of C-55
Aug. 8	Complete comparative review (conceptual) of JTF Reports and C-55 Commence LRTF consideration of framework for approach to C-55 Consult with IIC/CAIRP executives on framework Continue comparative review (mechanical) of C-55
Aug. 15	Circulate comparative review (conceptual) of JTF Reports and C-55 to LRTF Convene first full LRTF conference call Call for submissions from IIC/CAIRP membership to LRTF Issue RFP to lobbyists to advise on approach to legislative process (tentative) Continue LRTF consideration of framework to approach C-55 Continue comparative review (mechanical) of C-55
Aug. 22	Commence draft of LRTF framework response to C-55 Receive RFP responses from lobbyists (tentative) Continue comparative review (mechanical) of C-55
Aug. 29	Receipt of submissions from IIC/CAIRP membership Finalize comparative review (mechanical) of C-55 Consult with IIC/CAIRP executive regarding lobbyist RFP responses (tentative) Finalize LRTF budget Engage lobbyist to advise on approach to legislative process (tentative)
Sept. 6	Receipt of recommendations from lobbyist on legislative process (tentative) Finalize LRTF framework to approach C-55 Prepare initial draft of LRTF Report to IIC/CAIRP boards
Sept. 12	Circulate draft LRTF Report to IIC/CAIRP boards

IIC/CAIRP
LEGISLATIVE REVIEW TASK FORCE
TIMETABLE

WEEK OF:	ACTION:
	Solicit IIC membership views electronically on new recommendations
Sept. 19	Receive comments from IIC/CAIRP boards on draft Report Receive IIC membership views electronically on new recommendations Finalize Report to IIC/CAIRP boards Initiate lobbyist activities (tentative)
Sept. 26	Support preparations of IIC and CAIRP for Commons Committee hearings Continue lobbyist activities (tentative)

Schedule B

HISTORY AND SELECT RATIONALE FOR THE LRTF RECOMMENDATIONS

The Legislative Review Task Force (Commercial)

of

The Insolvency Institute of Canada

and

The Canadian Association of Insolvency and Restructuring Professionals

HISTORY AND UNDERLYING RATIONALE FOR THE LRTF RECOMMENDATIONS

Our recommendations with respect to Bill C-55 were influenced greatly by the Report of the Joint Task Force (JTF) on Business Insolvency Law Reform (JTF Report) to the federal government dated March 15, 2002 and the Draft Supplemental Report of the Joint Task Force on Business Insolvency Law Reform dated July 20, 2005 (JTF Draft Supplemental Report), which recommended some modifications and additions to the original report. Our recommendations, however, also recognize the tabling of an actual Bill in the House of Commons, some recently emerging challenges in insolvency law and some pragmatic realities (including the need for insolvency law reform).

Readers are advised to acquaint themselves with the detailed account of the composition, mandate and methodology of the Legislative Review Task Force (Commercial) on Bill C-55 jointly struck by The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals accompanying this Schedule.

I. PROPOSED REFORMS THAT THE LRTF SUPPORTS WITH AMENDMENTS

1. DEBTOR IN POSSESSION FINANCING

The LRTF strongly supports an approach to the codification of the court's power to authorize secured debtor-in-possession ("DIP") financing as contemplated by Bill C-55. These amendments will help to clarify and provide certainty as to when and to what extent financing can be made available on a priority basis for a debtor that is attempting to reorganize under the *CCAA* or under a *BIA* proposal. Providing financial stability for the debtor's operations is an important initial step in assisting a debtor to develop and implement a successful restructuring under the *CCAA* or *BIA*.

The DIP financing provisions in Bill C-55 are close to but not entirely consistent with the JTF recommendations. We believe that some technical amendments should be made to the wording of the proposed amendments in order to ensure that they achieve the policy objectives they appear intended to address.

(a) Material Prejudice to other Creditors

The LRTF agrees that one of the factors the court should consider in deciding whether to approve DIP financing is whether there will be material prejudice to other creditors. This is dealt with in

part by the requirement that the court consider "whether any creditor will be materially prejudiced by the debtor's continued operations", as contemplated in the draft section 11.2(5)(f) of the *CCAA* and section 50.6(4)(f) of the *BIA*. However, this is only part of the issue. The courts have also considered the extent to which the priority granted to the DIP lender's security will materially prejudice other creditors. The effect of granting priority to DIP security is that there may be less value in the debtor's assets to cover the claims of other creditors. The impact of this priority on other creditors may be quite different than the impact of the debtor's continued operations. For example, a lessor of equipment may be only slightly affected by the debtor's continued operations if the equipment is properly maintained. However, it may be significantly affected if the DIP financing is given a first ranking claim against the equipment for an amount greater than the value of the equipment.

In the cases where DIP financing has been approved, the courts have attempted to balance the potential prejudice to other creditors against the risk of prejudice to the debtor and its stakeholders as a whole if the financing is not approved. The JTF recommended that the court should be required to use the balancing of prejudices/limited prejudice test that has been used by the courts.

We recommend that Bill C-55 be amended to make clear that (i) prior notice is to be given to affected secured creditors in all cases; and (ii)the court be directed to consider both aspects of the material prejudice test, including the extent to which the priority granted to the DIP lender's security will materially prejudice other creditors.

(b) Harmonization of *CCAA* and *BIA*

We agree with the proposal that DIP financing be made available in both *CCAA* and *BIA* proceedings. However, the draft statutory language contains several differences between the rules for DIP financing under the *CCAA* and *BIA*, yet there is no obvious rationale for the difference in wording. As noted elsewhere in this report, we believe that the language of the *CCAA* and *BIA* should be consistent unless there is a specific policy reason for the difference.

For example, section 11.2(5)(d) of the proposed amendments to the *CCAA* would direct the court to consider whether the DIP financing will "enhance the prospects of a viable compromise or arrangement being made", but *BIA* section 50.6(4)(d) proposes that the court consider whether the DIP financing will "enhance the debtor's prospects as a going concern if the proposal is approved".

The LRTF believes that in this case, both factors should be considered. The *CCAA* language follows JTF Recommendation 2 and the *BIA* language is consistent with Supplementary Recommendation 2, which suggested that in addition to the factors in Recommendation 2, the court should also consider "whether the DIP loans are necessary for the continuation of the business operations of the debtor or the preservation of its assets."

History of IIC/CAIRP Provisions

The Joint Task Force report made a number of recommendations regarding DIP financing, with the objective of codifying the practices that have developed in the caselaw, and clarifying some areas of continued uncertainty. The recommendations were:

Recommendation 1: Provide in *CCAA* cases for an express statutory power to authorize borrowing ("D.I.P. loans") and grant security in specified amounts for post-filing advances and supplies of goods and services necessary to fund the debtor during the restructuring proceedings, such power to be authorized according to criteria to be specified in the statute.

Recommendation S1: Provide in *BIA* proposals for an express statutory power to authorize borrowing ("D.I.P. loans") and grant security in specified amounts for post-filing advances and supplies of goods and services necessary to fund the debtor during the restructuring proceedings, such power to be authorized according to criteria to be specified in the statute.

Recommendation 2: Provide that in deciding whether or not to authorize a D.I.P. loan, the court should consider amongst other things, the following factors:

(a) what arrangements have been made for the governance of the debtor during the proceedings;

(b) whether management is trustworthy and competent, and has the confidence of significant creditors;

(c) how long will it take to determine whether there is a going concern solution, either through a reorganization or a sale, that creates more value than a liquidation;

(d) whether the D.I.P. loan will enhance the prospects for a going concern solution or rehabilitation;

(e) the nature and value of the assets of the debtor;

(f) whether any creditors will be materially prejudiced during that period as a result of the continued operations of the debtor; and

(g) whether the debtor has provided a detailed cash flow for at least the next 120 days.

Recommendation 3: Provide automatic statutory protection for D.I.P. lenders and debtors against tort damages and other claims for entering into court authorized D.I.P. loans in breach of pre-filing covenants and other obligations.

Recommendation 4: Provide that the court order itself can create the D.I.P. lien on the property of the debtor described therein without the need for security documents.

Recommendation 5: Provide that the D.I.P. lien need not be registered in order to be effective against pre-filing creditors or a trustee in bankruptcy, but notice of the order must be registered under the provincial personal property security laws applicable in the locality of the debtor, and against title to real estate in order to have priority over subsequent purchasers (with protection for purchasers acting in the ordinary course of business) and secured lenders acting for value and without notice of the court order.

Recommendation 6: Provide that the court has jurisdiction to provide that the D.I.P. lien has priority ("prime") over all or such other existing security interests as may be specified by the court (except source deduction deemed trusts).

Recommendation 7: Provide that the court shall not prime a registered or possessory security interest without at least 48 business hours notice to the affected secured creditor.

Recommendation 8: Provide that in deciding whether to exercise the power to prime other security interests, the court should be required to use the existing balancing of prejudices/limited prejudice test developed by the courts when exercising inherent jurisdiction.

Recommendation 9: Provide that at the time a priming D.I.P. lien is authorized, the court be given the statutory power to authorize and create liens to protect the primed secured creditors to the extent that they are prejudiced by reason that upon enforcement the proceeds of the collateral of such secured creditors are used to repay the -D.I.P. loan (with the same rules concerning registration, priority, appeals etc. applying to such liens as apply to D.I.P. liens).

Recommendation 10: Provide that in the event that a priming D.I.P. lien is enforced, the court has the authority to allocate on a just and equitable basis how the burden of the D.I.P. lien is ultimately to be borne by the primed secured creditors.

Recommendation 11: Provide that with respect to advances authorized by a court order and made prior to receipt by the D.I.P. lender of written notice of any subsequent order (whether made by way of appeal or otherwise) varying, staying or rescinding the authorizing order, that the rights of D.I.P. lender under the authorizing order with respect to such advances shall not be affected by such subsequent order.

Senate Committee Report

The Senate Committee generally agreed with the JTF's recommendations regarding DIP financing. The Senate Committee's Recommendation 22 states:

> 22. The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit Debtor-in-Possession financing. The Court should be given the jurisdiction to provide that the lien by the Debtor-in-Possession lender can rank prior to such other existing security interests as it may

> specify. As well, any secured creditor affected by such priority should be given notice of the Court hearing intended to authorize the creation of security ranking prior to its security. In deciding whether to authorize a Debtor-in-Possession loan, the court should be required to consider the seven factors outlined by the Joint Task Force on Business Insolvency Law Reform in its March 2002 report.

The Senate Committee's recommendations dealt with the "big picture" aspects of DIP financing and did not comment on several of the more detailed JTF recommendations.

JTF Draft Supplemental Report

The JTF Draft Supplemental Report made the following two additional recommendations:

> Recommendation S1: Provide in *BIA* proposals for an express statutory power to authorize borrowing ("D.I.P. loans") and grant security in specified amounts for post-filing advances and supplies of goods and services necessary to fund the debtor during the restructuring proceedings, such power to be authorized according to criteria to be specified in the statute.
>
> Recommendation S2: Provide that a further factor be added to Recommendation 2, being whether the D.I.P. loans are necessary for the continuation of the business operations of the debtor or the preservation of its assets.

Bill C-55

Bill C-55 provides the following authority for DIP financing under the *CCAA*:

> **11.2** (1) A court may, on application by a debtor company, make an order, on any conditions that the court considers appropriate, declaring that the property of the company is subject to a security or charge in favour of any person specified in the order who agrees to lend to the company an amount that is approved by the court as being required by the company, having regard to its cash-flow statement,

(a) for the period of 30 days following the initial application in respect of the company if the order is made on the initial application in respect of the company; or

(b) for any period specified in the order if the order is made on any application in respect of a company other than the initial application and notice has been given to the secured creditors likely to be affected by the security or charge.

(2) An order may be made under subsection (1) in respect of any period after the period of 30 days following the initial application in respect of the company only if the monitor has reported to the court under paragraph 23(1)(b) that the company's cash-flow statement is reasonable.

(3) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the company.

(4) The court may specify in the order that the security or charge ranks in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(5) In deciding whether to make an order referred to in subsection (1), the court must consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company is to be governed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan will enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's assets; and

(f) whether any creditor will be materially prejudiced as a result of the company's continued operations.

Bill C-55 also permits DIP financing in *BIA* proposal proceedings. The proposed terms for DIP financing under the *CCAA* and *BIA* are identical, with a few exceptions. Some of the exceptions are understandable, and relate to the different procedures that apply under the *BIA*. However, there are other distinctions as well:

- One of the criteria proposed by the JTF was whether the debtor has provided a cash-flow statement for the period ending 120 days after the making of the application for the order. This criterion was adopted in the *BIA* but not the *CCAA*.

- In the *CCAA* there is a requirement that the monitor have confirmed the reasonableness of the cash flow forecast, before an order can be made authorizing DIP financing beyond the initial 30 day period. The *BIA* requires the debtor to file cash flow forecasts (ss. 50(6)) and 50.4(2)(a)) and requires a trustee to comment on their reasonableness.

- The *BIA* directs the court to consider "how the debtor's business and financial affairs are to be governed during the proceedings". The *CCAA* uses narrower wording, "how the company is to be governed during the proceedings".

- Another criterion in the *BIA* is "whether the loan agreement will enhance the debtor's prospects as a going concern if the proposal is approved". The corresponding factor in the *CCAA* is "whether the loan will enhance the prospects of a viable compromise or arrangement being made in respect of the company." The JTF Recommendations were that the court should consider "whether the DIP loan will enhance the prospects for a going concern solution or rehabilitation" (Recommendation 2) and "whether the DIP loans are necessary for the continuation of the business operations of the debtors or the preservation of its assets" (Recommendation S2).

Issue: As noted elsewhere in this report, we believe that the language of the *BIA* and *CCAA* should be consistent unless there is a specific policy reason for the difference.

The LRTF believes that in the case of the last example above, the factors listed in both the *CCAA* and the *BIA* should be considered. The *CCAA* language follows JTF Recommendation 2 and the *BIA* language is consistent with Supplemental Recommendation S2, which suggested that in addition to the factors in Recommendation 2, the court should also consider "whether the DIP loans are necessary for the continuation of the business operations of the debtor or the preservation of its assets."

The proposals in Bill C-55 follow the Senate Committee recommendations and provide a statutory framework for DIP financing under the *CCAA* and in *BIA* proposal proceedings.

The proposed amendments implement JTF Recommendations 1 (statutory authority for DIP financing), S1 (availability of DIP financing in *BIA* proposals), 2 (criteria that court must consider), 6 (priority of DIP lien over existing security), 7 (notice to affected secured creditors), and 11 (protection of initial DIP financing on subsequent DIP orders), with modifications in some cases.

Issue: The requirement that the court consider whether other creditors will be prejudiced by the continued operation of the debtor is only part of the issue of prejudice to other creditors. The effect of granting priority to DIP security is that there will be less value in the debtor's assets to cover the claims of other creditors. The impact of this priority on other creditors may be quite different than the impact of the debtor's continued operations. The court should also be directed to consider the extent to which the priority granted to the DIP lender's security will materially prejudice other creditors.

The principal modifications in the Recommendations that were followed are:

- The requirements for DIP financing for the period of 30 days following the *CCAA* filing are more lenient than for longer term arrangements. Longer term DIP financing requires notice to the affected secured creditors and may only be approved if the monitor has reported that the company's cash-flow statement is reasonable. These requirements do not apply to DIP financing for the interim period. However, the stipulation at the beginning of section 11.2(1) that the court "may" approve the DIP financing indicates that these matters would still be within the court's discretion in connection with an application for interim financing**.**

Issue: The LRTF anticipates that courts will continue the existing practice of requiring the debtor to give prior notice of an application for interim DIP financing to the secured creditors who will be primarily affected if the DIP financing is approved. If this does not happen, the question of notice to affected secured creditors for initial-period DIP financing should be revisited the next time the *BIA* and *CCAA* are reviewed.

- Recommendation 7 proposes that at least 48 business hours notice be provided to affected secured creditors. The proposals require "notice" to affected secured creditors for DIP financing beyond the interim period, but the length of that notice remains in the court's discretion.

- One of the criteria for the court to consider that was proposed in JTF Recommendation 2 was whether the debtor has provided a detailed cash flow for at least the next 120 days. As noted above, this recommendation was adopted in the *BIA* DIP financing provisions, but not in the *CCAA*. It appears that the requirement for the monitor's approval of the reasonableness of cash flow forecasts was intended to deal with this issue.

JTF Recommendation 3 (statutory protection against tort damage claims for entering into DIP loans that breach pre-filing obligations), 4 (no need for security documents), 5 (no registration required for DIP security to be effective against a trustee in bankruptcy, that required to protect against purchases and secured lenders for value without notice of the court order), 8 (balancing of prejudice test), 9 (power to grant liens to primed secured creditors), 10 (court jurisdiction to allocate burden of the DIP lien among the primed secured creditors).

Another problem that was not addressed is the "bootstrapping" that can occur if a DIP lender agrees to provide financing on terms that provide an advantage for its pre-existing loans to the debtor. This can occur if the DIP priority is extended to also secure existing unsecured or under-secured obligations of the debtor owing to the lender. This practice in effect provides the DIP lender with an unfair preference over other creditors, and should not be permitted. The LRTF recommends that this problem continue to be monitored, and if necessary, prohibited in the next review of the *BIA* and *CCAA*.

Article I. 2. MONITORS

The LRTF commends the government for its recognition of the importance of proper governance of financially troubled businesses. The LRTF strongly supports the increased codification of the role of the monitor and other changes relating to the monitor, which recognize (i) the importance of the role of an independent monitor in ensuring the integrity and fairness of *CCAA* proceedings, (ii) the need to avoid any real or perceived conflict of interest, both in the selection of a monitor and in the monitor's performance of the role and responsibilities, and (iii) the desire for transparency by increased reporting to the court and to all stakeholders on a timely basis.

The proposed new standards being applied to monitors in *CCAA* proceedings are the same as those being applied to trustees who play an analogous role in the context of proceedings under the *BIA,* including the requirements that:

- monitors be licensed as trustees and comply with a code of ethics; and
- the "watchdog role" of the Superintendent of Bankruptcy be extended to *CCAA* proceedings.

The LRTF believes that in the interests of proper governance, the government should provide for monitor approval, unless otherwise ordered by the court, of any disclaimer of executory contracts by the debtor pursuant to proposed *CCAA* section 32 and any proposed asset sale pursuant to proposed *CCAA* section 36.

Section 1.01 History of IIC/CAIRP Positions

The Joint Task Force made the following recommendations:

Recommendation 42: Provide that an interim receiver or a receiver within the meaning of section 243 of the *BIA* (excluding mortgagees in possession and other secured creditors directly enforcing their security) and a *CCAA* monitor must be a licensed trustee in bankruptcy.

Recommendation 43: Provide that a monitor must, prior to its appointment, make written disclosure to the court of its business and legal relationships with the debtor.

The Senate Committee Recommendation 35 on governance concurred with the two recommendations above, but also recommended that (i) the auditor should not be permitted to be the monitor, and (ii) in the event of a failed restructuring, the monitor should not be permitted to become the trustee or a receiver for a secured creditor.

JTF Draft Supplemental Report

Recommendations 42 and 43 remained unchanged in the JTF Draft Supplemental Report, but were expanded as follows to partially implement Senate Committee Recommendation 35 (with specified professionals to include lawyers, accountants, monitors, chief restructuring officers, investment bankers, actuaries and liquidators):

Recommendation S13: Provide that a proposed specified professional be required to file with the court, at the time of application for the *CCAA* initial order in the case of the monitor and other specified professionals retained at that time and at the time of application for confirmation in the case of other professionals, disclosure information with respect to the professional's prior involvement with the debtor.

Recommendation S14: Provide that the *CCAA* and *BIA* require in respect of restructuring proceedings involving more than $5 million in claims that, after reasonable notice, the engagement of all specified professionals other than those acting for the debtor be confirmed by the court within a reasonable period of time after the making of the initial filing in the case of specified professionals retained at that time, and otherwise in advance of being retained.

Recommendation S15: Provide that the *CCAA* and *BIA* require that, after reasonable notice, the engagement of lawyers acting for monitors or trustees under proposals where the aggregate claims of creditors are $5 million or more or that are proposed to act in a representative capacity and be paid by the estate be confirmed by the court in advance of being retained.

Recommendation S16: Provide that the court has the power to remove a specified professional.

Recommendation S17: Provide that the party with the primary obligation to advance a position and adduce evidence before the court should be the applicant and not the monitor.

Recommendation S18: Provide that the monitor, unless otherwise required by the court, should avoid taking any legal position or filing a factum regarding contested legal disputes among other parties.

Recommendation S19: Provide for an amendment to *CCAA* section 11.7 to stipulate that the primary roles of the monitor are (a) to monitor the activities of the debtor for the benefit of all interested parties and the court, and (b) to work impartially with the debtor and all interested parties to facilitate the restructuring process.

Section 1.02 Bill C-55

(a) Companies' Creditors Arrangement Act

Following is a highlight of relevant sections in Bill C-55 relating to the monitor, where there are changes from the current law, and issues considered by the LRTF. The proposed legislation recognizes the importance of the role of an independent monitor in ensuring the integrity, fairness and transparency of *CCAA* proceedings. The new standards being applied to monitors are the same as those being applied to trustees, who play an analogous role in the context of proceedings under the *BIA*.

Amendments to the *CCAA* provide increased codification of the monitor's role, including enhanced reporting requirements, ensure the monitor is properly qualified and free of real or perceived conflicts of interest, and extend the "watchdog role" of the Superintendent of Bankruptcy to *CCAA* proceedings with significant investigative powers. These amendments include the following:

s.11.7(1) Requires a monitor to be a licensed trustee.

s. 11.7(2) Except with permission of the court, prohibits a trustee from being appointed as monitor in a number of circumstances including if acted as the auditor, accountant or legal counsel of the company.

This restriction in terms of acting as an auditor and accountant is consistent with the codes of conduct for CAIRP and provincial accounting institutes as long as the regulations adopt the interpretation of the term “accountant” to mean any member who has prepared unaudited financial statements in accordance with Section 8200 of the CICA Handbook and, to date, has not included acting as a financial advisor.

s.11.7(3) On application by a creditor, the court may replace the monitor with another monitor.

s.23 The monitor shall,

(a) (i) publish, without delay after the initial order, once a week for two consecutive weeks, in one or two newspapers in Canada, a notice of the proceeding

(ii) within five days after the initial order send a notice to every known creditor and prepare and make available a list of creditors (name and address)

(b) review the Company’s cash flow statement as to its reasonableness and file a report

(c) determine with reasonable accuracy the state of the company’s business and financial affairs and cause of its insolvency and file a report

(d) file a report if a material adverse change, seven days before any meeting of creditors, not later than 45 days after the end of each of the company’s fiscal quarters and at any other times the court orders

(e) advise the creditors of the filing of the reports referred to in (b) to (d) above

(f) file with the Superintendent of Bankruptcy a copy of the prescribed documents and pay the prescribed filing fee

(g) attend court proceedings and meetings of creditors if considered necessary by the monitor

(h) if the monitor is of the opinion it would be more beneficial to the company's creditors if proceedings were taken under the *BIA*, advise the court

(i) advise court of reasonableness and fairness of the company's proposed plan of compromise or arrangement

(j) make publicly available all documents filed with the court and all court decisions

(k) carry out any other functions the court may direct

s.25 The monitor must act honestly and in good faith and comply with the Code of Ethics in section 13.5 of the *BIA*

This provision requires monitors to adhere to the same code of ethics as trustees, which is set out in the *BIA* General Rules 34 to 53. The *BIA* code of ethics is similar to the CAIRP code of ethics. CAIRP also includes in its code of ethics a requirement for members of CAIRP, in any court-appointed capacity under the *CCAA*, to disclose to the court any professional involvement with the debtor during the immediately preceding two years.

The extension of the Superintendent of Bankruptcy's role starts with the requirement that monitors be a licensed trustee and continues with the following sections:

s.27 The Superintendent of Bankruptcy may apply to the court to review the appointment or conduct of the monitor

s.28 The Superintendent of Bankruptcy must keep a record of all complaints regarding the conduct of monitors

s.29 The Superintendent of Bankruptcy has full investigative powers regarding the conduct of monitors

Issue: There is a significant increase in mandated reporting and communications with stakeholders that will result in additional professional fees to comply with the stipulated duties; however, such costs will result in enhanced governance. Missing from Bill C-55 is express language specifying monitor consent for certain transactions as a confidence measure for creditors, particularly monitor approval where the debtor is disclaiming executory contracts (proposed *CCAA* section 32) or proposing an asset sale (proposed *CCAA* section 36). The LRTF supports amendments to require such approvals.

The prior written consent of the monitor/trustee to disclaiming executory contracts was part of JTF recommendation 26 and was to protect the estate from abusive conduct and/or bad business judgment of management, not to protect the contractual counterparties; and was not intended to preclude the debtor from seeking court approval to a disclaimer in lieu of monitor/trustee consent.

With respect to proposed *CCAA* section 36 dealing with the disposal of certain business assets, the monitor is being asked to approve the process leading to the proposed sale and to file a report as to whether the sale would be more beneficial to the creditors than if the sale took place under the *BIA*. The monitor should also be asked for an overall recommendation on the proposed sale, unless otherwise ordered by the court. A sale transaction under the *CCAA* may be more beneficial to creditors than under the *BIA,* but may not be the best interest of all stakeholders.

Issue: As part of the extension of the role of the Superintendent of Bankruptcy in supervising monitors in *CCAA* proceedings, the proposed *CCAA* section 27 provides statutory authority for the Superintendent of Bankruptcy to apply to the court to review the appointment or conduct of a monitor. The proposed *CCAA* section 29 provides for the Superintendent of Bankruptcy to initiate any investigation of the conduct of monitors that it considers appropriate, including access to all records in the possession of the monitor and engaging of specialists to assist in the investigation without obtaining court approval. Although the *CCAA* proceedings and the appointment of the monitor is a court-driven process, it is questionable as to whether the Superintendent of Bankruptcy should obtain court approval before initiating an investigation. The LRTF concluded that the Superintendent of Bankruptcy had such powers in any event given the proposed *CCAA* section 11.7(1) requiring monitors to be licenced trustees.

Issue: The LRTF is not recommending any amendments to ensure it is a statutory requirement that the primary obligation to advance a position before the court is the applicant's not the monitor's and that the monitor should avoid taking any legal position. Given the new provisions relating to the monitor's role and independence, the LRTF concluded that these provisions were sufficient. Judges supervising the case can make a determination as to whether the monitor should be taking a position. The proposed *CCAA* section 23(1)(h) does require the monitor to advise the court if it would be more beneficial to the creditors if proceedings were taken under the *BIA* and if the proposed plan of compromise or arrangement is reasonable or fair.

Issue: The LRTF is not recommending any amendments to codify independence requirements of other professionals involved in *CCAA* and *BIA* proceedings, given the provisions in existing professional codes of conduct and access to the courts if any such issues arise. The monitor's role, by definition, is to be the independent overseer of the proceedings on behalf of the court. With the exception of the monitor, other professional advisors, such as the chief restructuring officer, actuaries and legal counsel to the debtor, are not being asked to take on a role that is independent of the debtor.

3. RECEIVERS

The LRTF strongly supports the provisions of Bill C-55 permitting the appointment of a national receiver. The current practice of having receivers appointed only under provincial law is outdated and does not reflect the current commercial reality of increasingly inter-provincial and international transactions. We support uniform insolvency law throughout Canada and the proposed amendments will reduce the uncertainty and additional administrative costs that have arisen with different practices across the country. This amendment is consistent with Bill C-55's objective of harmonizing insolvency law both national and internationally.

The LRTF strongly supports increased codification of the role of a national receiver, in order to create greater certainty in both civil law and common law jurisdictions with respect to the remedies and powers available to a receiver. Bill C-55 is silent on these remedies and powers.

The LRTF strongly supports better defining the role of an interim receiver as interim. This amendment is consistent with the Report of the Senate Standing Committee on Banking, Trade and Commerce (the "Senate Committee") of November 2003, which recommended that the *BIA* be amended to clarify the role of the interim receiver, and the duration and meaning of the term 'interim'.

The LRTF strongly supports the requirement that all *CCAA* monitors and all *BIA* appointed receivers are to be licensed trustees in bankruptcy. These amendments are consistent with the proposed supervisory role for the OSB.

History of the IIC/CAIRP Positions

The LRTF supports the requirement that all monitors be licensed trustees in bankruptcy. There is currently no regulatory supervision of monitors. With the ever increasing complexity and profile of *CCAA* engagements, it is absolutely necessary to ensure that qualified monitors are appointed in order to maintain the integrity of the *CCAA* process. Furthermore, any supervision by the OSB is virtually meaningless unless the monitors are licensed trustees in bankruptcy and come within the supervisory jurisdiction of the OSB.

The LRTF strongly supports the creation of a national receiver. The current Bill provides no statutory guidance on the role and responsibility of a receiver. Different practices have emerged in the various provinces, which has created confusion and uncertainty to various stakeholders. Additional costs are being incurred as a result of having to make multiple applications in order to enforce court orders outside of the province in which the originating order was made. There are differences in the approach of civil and common law courts, and it is sometimes difficult in the civil law courts to obtain court orders that are commonly available in other provinces. Bill C-55 is more closely harmonizing Canada with other treaty countries. The intent of the legislation would be significantly defeated if there is no harmony and predictable consistency within Canada.

Statutory guidance that should be addressed in Bill C-55 includes:

(a) What is the inherent authority of a *BIA* appointed receiver? There is no basic minimum in Bill C-55. A receiver does not even have the sparse authority that is granted to an interim receiver. Is each appointment to be defined by court order on an application by application basis? If so, and with no statutory guidance, differences will arise among the provinces, which in turn may defeat the purpose

of a national receiver with uniform treatment throughout Canada. As differences arise, so will forum shopping.

(b) Does the appointment of a *BIA* receiver supersede provincial legislation and the various reporting requirements? If not, then unnecessary duplication will arise. No parallel reporting currently exists in a bankruptcy, proposal or a *CCAA* filing.

(c) Is it Parliament's intention to have the federal and provincial laws run in parallel, or can a secured creditor choose which statute under which it wishes to proceed? Is it Parliament's intention to supersede existing receivership laws that deal with receivers as defined in the *BIA*?

(d) Can a *BIA* appointed receiver have more authority than was contractually granted to the secured creditor? A secured creditor may have security on only receivables or inventory. A receiver over either of these assets qualifies as a receiver as defined in the *BIA*.

(e) Does a *BIA* appointed receiver have any inherent jurisdiction to do any of the following:

i. Manage the business?
ii. Incur costs for the preservation of the assets?
iii. Sell assets, either in or outside the ordinary course of business?
iv. Pay expenses?
v. Transfer title similar to a trustee in bankruptcy?
vi. Assign leases, contracts, etc. notwithstanding and contractual language to the contrary?

(f) Can a *BIA* appointed receiver rely on other sections of the *BIA,* similar to an interim receiver?

(g) Is there an automatic stay of proceeding on the appointment of a *BIA* receiver?

(h) Can a *BIA* appointed receiver utilize the other sections of the *BIA*; for example, a demand to prove a claim or a property claim, and the ability to send a notice of disallowance?

(i) Do federally and provincially created Crown priorities prevail or does the *BIA* take precedence? Will there still be a necessity to bankrupt a company to standardize Crown claims? No bankruptcy is necessary with an interim receiver.

The LRTF is supportive of the requirement that all *BIA* receivers be licensed trustees in bankruptcy. As is consistent with a similar requirement for monitors, any supervision by the OSB would have little value unless there is a standard for receivers on which the OSB can base its supervision.

Article II. 4. INCOME TRUST/SECURITIZATION PROVISIONS

The LRTF strongly supports the inclusion of provisions in Bill C-55 to deal expressly with commercial trusts in the context of both reorganization and liquidation proceedings under the *CCAA* and *BIA*. These amendments will help bring a significant financing vehicle for commercial activities in Canada under a legislative framework to deal with distressed situations.

Although a good first step, we believe the provisions in Bill C-55 dealing with commercial trusts require amendments in order to ensure that they achieve the policy objectives they are intended to address. In particular, the proposed amendments have not dealt with a number of important aspects relating to insolvencies involving commercial trusts and special purpose financing vehicles such as:

- the relative positions of the trustees, the assets and the creditors of commercial trusts in bankruptcies; and
- the need for liquidation and non-consolidation provisions in respect of special purpose financing vehicles.

Section 2.01 History of IIC/CAIRP Positions

The Report of the Joint Task Force on Business Insolvency Law Reform recommended the following:

Recommendation 77: Provide that a business trust is subject to liquidation under the *BIA*, but cannot be reorganized.

Recommendation 78: Provide that a corporation that is designated as a special purpose vehicle in its constating documents, has no employees and has no assets other than financial assets relating to a specific financing transaction and publicly traded securities, cannot be subject to consolidated reorganization proceedings or a consolidated reorganization plan under the *CCAA* or *BIA*.

These recommendations were based on an assessment that the case for the need to be able to liquidate insolvent business trusts used as financing vehicles had been made, but that provisions should facilitate and insulate the use of "bankruptcy remote" special purpose vehicles as part of pure financing transactions not affecting a going concern business.

The JTF Draft Supplemental Report recommended some modifications and additions to the original report. Recommendation 77 and 78 above were modified by supplemental recommendation S36 as set out below:

Recommendation S36: In order to implement Senate Committee Recommendation 38, provide that the *BIA* and *CCAA* should provide for reorganization, as well as liquidation, of business trusts but the reorganization provision should not apply to securitization trusts and other special purpose financing trusts.

The Draft Supplemental Report suggested that the legislation should make it clear that:

- Where trustees of a business trust are entitled to indemnification out of the trust assets, creditors of the trustee constitute creditors of the trust.

- A bankruptcy of a business trust does not constitute a bankruptcy of the trustee.

- Express non-consolidation provisions should be applicable to securitization trusts and special purpose vehicles relating to specific financing transactions and publicly traded securities.

Section 2.02 Bill C-55

Following is a highlight of relevant sections in Bill C-55 relating to income trusts and special purpose financing vehicles trusts, where there are changes from the current law, and issues for

consideration by the IIC/CAIRP Legislative Review Task Force. The issues may change depending upon the content of the regulations:

a) Amendments to Section 2 of the *BIA* have been made to include an "income trust" and its successors in the definition of "person" and define "income trust" as meaning a trust:
   (i) that has assets in Canada; and
   (ii) the units of which are traded on a prescribed stock exchange.

Although a good first step, the proposed amendments have not dealt with a number of important aspects to the JTF Recommendations.

Issue: The proposed amendments relate only to income trusts that have assets in Canada and which may be traded on a prescribed stock exchange. Although this may have been an attempt to try to insulate special purpose financing vehicles from being captured in the definition of income trust (because they are not typically the issuers of units that are traded on a prescribed stock exchange), it is a insufficient distinction for the purposes of facilitating and insulating the use of "bankruptcy remote" special purpose financing vehicles.

Issue: The proposed amendments do not expressly provide for liquidation or bankruptcy remoteness and the lack of consolidation in respect of securitization trusts and special purpose financing vehicles.

Issue: As has happened elsewhere in the commercial world, private equity interests will ultimately become involved in conjunction with income trusts and the utilization of units traded on a prescribed stock exchange in order to differentiate income trusts that do or do not qualify for *BIA* protection could well be shortsighted.

Issue: The two tests relating to income trusts (i.e., having assets in Canada and units traded on a prescribed stock exchange) may not be sufficiently clear in dealing with income trusts. For example, does an income trust only qualify if its units are trading at the time it seeks to become or is forced into an insolvency proceeding? What about income trusts that are subject to cease trading restrictions?

Issue: The amendments do not provide any clarity in conjunction with the status of trustees of business trusts or the creditors of business trust as contemplated by the Supplementary Explanatory Commentary to Supplementary

Recommendation S36. In particular, it is still possible for a "circular" analysis to result concerning the status of income trust trustees, the assets of the trust and the rights of creditors in respect thereof.

5. ASSET SALES

The LRTF strongly supports the provisions of Bill C-55 that give the court express jurisdiction to authorize a debtor company, both under *CCAA* and *BIA*, to dispose of or sell its assets outside the ordinary course of its business. The LRTF commends the government's move to clarify principles governing the disposal of assets in the context of a debtor's restructuring and the vesting of assets for the purpose of completing disposition transactions.

History of IIC/CAIRP Positions

The Joint Task Force recommended:

Recommendation 11: Provide that in *CCAA* cases the debtor may with the prior approval of the Court sell part of its assets and/or business out of the ordinary course of business in order to downsize and/or raise capital for a restructuring plan.

Recommendation 19: Provide that in *CCAA* cases the debtor may, with the prior approval of the Court, sell all or substantially all of its assets and business on a going concern basis.

Recommendation 20: Provide that in deciding whether or not to exercise its authority to approve a material sale in the course of a *CCAA* proceeding, amongst other considerations, the court shall have regard to whether the sales process has been conducted: (i) in a fair and reasonable manner; (j) by an insolvency administrator; (k) by a credible, independent chief restructuring officer reporting to a credible, independent restructuring committee of the board of directors either with or without the supervision of the court; and/or (d) in consultation with major creditors.

Recommendation 21: Provide that absent exceptional circumstances, the court shall not approve a sale if controlling shareholders, directors, officers or

senior management of the debtor have a significant financial interest in the purchaser or in the sales transaction, unless there was a proper sales process either subject to court supervision or conducted by persons acting independently of such persons.

Recommendation 23: Provide that provincial bulk sales legislation does not apply to sales approved by the court.

Recommendation 24: Provide that in connection with a sale approved by the court, the debtor and the applicable insolvency administrators may provide the purchaser with information subject to privacy laws restrictions, provided that the purchaser agrees to comply with the policies, if any, of the debtor with respect to privacy and with applicable privacy laws.

Recommendation 25: Provide that if the debtor is to cease carrying on business and all or substantially all of its remaining assets are to be realized upon or sold other than on a going concern basis, that unless otherwise agreed by the unsecured creditors of the debtor pursuant to a plan of arrangement or proposal, the debtor is to be placed into bankruptcy or receivership.

The JTF Draft Supplemental Report modified JTF Recommendation 20 as set out below:

Recommendation S3: Provide that another factor to be added to Recommendation 20 should be whether the sales process has been conducted by a qualified independent sales party reporting to an independent committee of the board of directors, either with or without supervision of the court.

The JTF Draft Supplemental Report modified JTF Recommendation 25 as set out below:

Recommendation S4: Provide that in the context of a sale or sale process administered by a debtor or insolvency administrator, the debtor or the insolvency administrator may, with prior approval of the court, enter into agreements that call for the payment of costs or fees,

including, (i) reimbursement of costs incurred by a prospective purchaser or bidder and (ii) break fees payable to a bidder in circumstances where it submits a bid and the debtor subsequently elects to proceed with a higher bid submitted by another party, which is subsequently approved by the court. provided that such fees or costs are reasonable in the circumstances, having regard to the nature of the transaction, the value of the assets in question and such other factors as the court considers appropriate.

Bill C-55

Bill C-55 essentially provides the following with respect to asset sales conducted by a debtor company:

- a debtor company many not sell or dispose of its assets outside the ordinary course of its business without formal court authority to do so;
- notice of the application to be brought by the debtor to obtain the right to sell assets must be given to all secured creditors who are likely to be affected by the proposed sale;
- the court must consider the following non-exhaustive list of criteria in deciding whether to grant the authorization to sell:
    - reasonableness of the process leading to the sale;
    - monitor approval;
    - relative value, in the monitor's opinion, of the assets to be sold if the assets in question were sold in bankruptcy;
    - prior consultation with creditors or other interested parties;
    - the effects of the sale on creditors or other interested parties;
    - fair consideration for the assets in light of their market value.
- where the proposed sale or disposal is to a related person, the court must also be satisfied that (i) good faith efforts were made to sell to unrelated parties and

(ii) the consideration to be received is superior than that which would be received under all other offers actually received;

- express jurisdiction is given to the court to grant vesting orders under which the assets are sold free and clear of any security charge or other restriction and under which the proceeds realized are subject to the security affected by the order;

- the provisions apply, *mutatis mutandis*, both under *BIA* and under *CCAA*.

The LRTF strongly supports the above summarized sections of Bill C-55, which clarify judicial jurisdiction and authority to approve asset sales conducted outside the normal course of business and to grant vesting orders to facilitate such sales. The provisions of Bill C-55 follow the general lines suggested in the report of the JTF on business and insolvency law reform. The provisions setting out the court's capacity to grant formal "vesting orders" will simplify the sales process and will resolve the reluctance by some courts to grant vesting orders in the absence of clear legislative authority.

While Bill C-55 does not contain express provisions regarding stalking horse bidders and the payment of break costs and fees, as was expressly recommended by JTF Supplemental Recommendation S4, the LRTF concluded that practitioners may continue to apply to court to obtain approval as to the manner in which the sale process will be conducted. In the context of such applications, a debtor will continue to be able to obtain necessary approval to pay break fees and costs in the context of a stalking horse bid process. While preferable, it may thus not be strictly necessary to formally codify the court's power to approve the payment of such costs and fees.

6. PREFERENCES

The LRTF strongly supports Bill C-55's movement towards providing uniform, consistent and simplified rules in relation to challenges of certain transactions. While not the complete code or national standard previously recommended by the JTF and supported by the Senate Committee, these proposed amendments support the policy objective of increasing the ability to recover money or property from parties where there has been a diminishment of the value of assets of the debtor to the detriment of creditors.

The LRTF believes that further amendments to the preference provisions are necessary to more effectively achieve the goals of consistency and uniformity:

(a) Remedies

The potential remedies available in respect of transfers at undervalue (TUVs) should include the recovery of the property itself or proceeds in a manner similar to that which applied with respect to settlements.

(b) Form of Transactions Subject to Attack

TUVs should be more broadly defined so as to provide the estate with as much flexibility as possible in terms of challenging transactions or other dealings by the debtor, notwithstanding their form.

(c) Transaction Review under the *CCAA*

The TUV provisions should be included in the *CCAA*. Notwithstanding the JTF recommendations and support of the Senate Committee, Bill C-55 does not propose any amendments to the *CCAA* in respect of preference provisions. We strongly support uniform and consistent rules under both the *CCAA* and the *BIA* in respect of these types of transactions. Many provisions of Bill C-55 seek to harmonize the respective provisions of the *CCAA* and *BIA* and it is therefore unclear why the preference provisions were not part of this effort to ensure consistency between the two statutes.

(d) Who May Challenge Transactions

Currently, creditors in a bankruptcy (under section 38 of the *BIA*), bankruptcy trustees and proposal trustees have rights to attack transactions under the *BIA*. Again, with a view to providing consistent and uniform rules under both the *CCAA* and *BIA*, we recommend that creditors have section 38 type remedies in both *BIA* proposal and *CCAA* proceedings, and that monitors should have the ability to challenge TUVs in *CCAA* proceedings, without limiting the ability of insolvency administrators to settle claims.

History of IIC/CAIRP Positions

The Report of the Joint Task Force on Business Insolvency Law Reform recommended the following:

> Recommendation 63: Provide for uniform rules under both the *CCAA* and *BIA* for challenging fraudulent preferences, conveyances at under-value

and other reviewable transactions (collectively, "reviewable transactions"), with a *CCAA* monitor or a trustee under a proposal being authorized to exercise the same powers as a trustee in bankruptcy.

Recommendation 64: Provide for a complete code in federal insolvency law for challenging reviewable transactions by or on behalf of creditors, so that upon the commencement of insolvency proceedings, provincial laws (including the oppression remedy under corporate law) would no longer apply and a single national standard would be applicable.

Recommendation 65: Provide for the expansion of Section 100 and/or the adoption of an oppression type remedy to create a more flexible mechanism for dealing with reviewable transactions, subject to creating safe harbour provisions.

Recommendation 66: Provide for the continuation of the English subjective test for preference provisions.

Recommendation 67: Provide specific safe harbour provisions for certain transactions involving financiers unrelated to and dealing at arm's length with the debtor, including:

(a) eligible financial contracts;

(b) sales pursuant to securitizations;

(c) security given before, or as condition of, making advances including security delivered on margin calls, unless a material portion of proceeds of advances are used to repay unsecured obligations owed to the lenders or are otherwise received by the lenders or parties related to the lenders; and

(d) guarantees from parent corporations of borrowings by its direct or indirect subsidiaries.

Article III.

Recommendation 68: Provide that the court has the power to reduce or eliminate waiver fees, forbearance fees, work fees,

default interest and other additional compensation paid to lenders and other creditors of the debtor within a specified period prior to the commencement of an insolvency proceeding as a result of defaults or expiry of credit facilities, if the court concludes such compensation was manifestly excessive in relation to additional risk and time being incurred or consideration provided by the creditors.

Article IV. Recommendation 69: Provide that there is no doctrine of equitable subordination in Canada.

Article V. Recommendation 70: Provide for conflict of law rules with respect to reviewable transactions modelled after the PPSA conflict of law rules.

The JTF Draft Supplemental Report recommended some modifications and additions to the original report.

Article VI. Recommendation S23: Provide for the replacement in *BIA* and *CCAA* proceedings of the existing causes of action for settlements (*BIA*, s. 91) and reviewable transactions (*BIA*, s. 100) with a new single cause of action for undervalue transfers, (which would also be used in place of provincial fraudulent conveyance laws). "Undervalue transfers" would be broadly defined to include, without limitation, conveyances of property, the provision of services and the occurrence of obligations by the debtor where the fair market value of the consideration received by the debtor was conspicuously less than the fair market value given by the debtor (e.g. the debtor's estate was conspicuously depleted by the transaction).

Article VII. Recommendation S24: Provide that the time periods for attacking undervalue transactions (referable to the period before the initial bankruptcy event or initial *CCAA* order) should be 5 years with respect to non-arm's length parties and 1 year with respect to arm's length parties.

Article VIII. Recommendation S25: Provide that, with respect to non-arm's length parties, if the undervalue transfer occurred more than one year before the initial bankruptcy event or initial *CCAA* order, in order to attack the transaction it would have to be established that either (a) the debtor was insolvent at the time of, or was rendered insolvent by, the transaction, or (b) the debtor had fraudulent conveyance intent.

Article IX. Recommendation S26: Provide that, with respect to arm's length parties, in order to attack the transaction it would have to be established that both (a) the debtor was insolvent at the time of, or was rendered insolvent, by, the transaction, and (b) the debtor had fraudulent conveyance intent.

Article X. Recommendation S27: Provide that an insolvency administrator, within 5 years before the initial bankruptcy event or initial *CCAA* order for non-arm's length parties, or 1 year for arm's length parties, may challenge the debtor's payment of dividends, return of capital or redemption or buy-back of shares upon proof that the debtor was insolvent at the time or that the transaction rendered the debtor insolvent.

Article XI. Additional Safe Harbour

Article XII. Recommendation S28: Provide, to the extent applicable in a business context (e.g. the debtor is the sole proprietor of a business), similar to protection in the case of a consumer insolvency, for an additional safe harbour for payments made in compliance with a family law court order or pursuant to a *bona fide* agreement between spouses for alimony or support payments that could otherwise have been the subject of a family law court order.

Article XIII. Remedies

Article XIV. Recommendation S29: Provide that, when pursuing a non-arm's length party under one of the foregoing provisions, the plaintiff has the right to recover any share of the improper benefit directly or indirectly received from the transaction by any privy, where

"privy" would be defined as a person not at arm's length to the non-arm's length creditor, transferee, shareholder, financier, director or officer, as the context may require.

Article XV. Recommendation S30: Provide that creditors have *BIA* section 38-type remedies in *BIA* proposal and *CCAA* proceedings, in respect of all causes of action referred to in S15 to S22, inclusive, above (but without limiting the power of insolvency administrators to settle those claims subject to due process).

Article XVI. Recommendation S31: Provide for a limitation period of 3 years from the date of the initial bankruptcy event or initial *CCAA* order to pursue the preference, undervalue transfer, creditor oppression and other related remedies provided for under federal law.

Bill C-55

Article XVII. The relevant sections of Bill C-55 relating to preferences affect only the *BIA* and are:

- The settlement provisions (*BIA* s. 91) are repealed;
- The preference provisions (*BIA* ss. 95 and 96) have now been extended from three months to one year in circumstances where the transaction has the effect of giving a non-arm's length creditor a preference;
- the reviewable transaction provisions (*BIA* s. 100) are repealed;
- the concept of a "transfer at under-value" (TUV) is introduced (*BIA* s. 96.1). Where there is a transaction, the court may inquire as to whether there was a transfer at under value and whether the other party was at arm's length with the debtor. Arm's length transactions may be challenged within one year of the initial bankruptcy event if there was insolvency and the debtor intended to defeat creditors. Non-arm's length transactions may be defeated within one year of the initial bankruptcy event or within five years where there is insolvency or the debtor intended to defeat creditors.

The proposed amendments do not adopt the "complete code" or "national standard" that was originally advocated by the JTF and accepted by the Senate Committee. Nevertheless, the new

concept of a TUV does advance the goal of simplifying and consolidating the basis on which fraudulent transactions can be attacked. In fact, the TUV provisions are substantially in accordance with Recommendations S23 to S27 and S29 of the JTF Draft Supplemental Report.

JTF Recommendations 67 and S28 (safe harbour provisions for certain transactions), 68 (ability of the court to disallow compensation), 69 (equitable subordination), 70 (conflict of law rules re reviewable transactions) and S31 (limitation period of 3 years) were not adopted or dealt with at all in Bill C-55.

Issue: Remedies: The only potential remedy in the event of a TUV is to grant judgment against the other party to the transaction and/or any other person being "privy" to the transactions. This is very restrictive and should be expanded to allow the court to order a recovery of the property itself or proceeds in a manner similar to that which applied with respect to settlements.

Issue: Form of Transactions Subject to Attack: It is only "transactions" that may be attacked and "transactions" is not defined in the Bill C-55. The form of TUVs should be broadly defined so as to provide the estate with as much flexibility as possible in terms of challenging transactions or other dealings by the debtor, notwithstanding their form.

Issue: *CCAA*: None of the proposed amendments affect the *CCAA*, either in terms of proposed new preference provisions in Bill C-55 or an importation of existing provisions found in the *BIA*. It is desirable that the *CCAA* provisions mirror those in the *BIA* so as to harmonize the two statutes.

Issue: Who may Challenge transactions: The proposed amendments do not affect the *CCAA* and therefore, no provisions exist that grant creditors and monitors the ability to challenge fraudulent transactions in *CCAA* proceedings. In addition, the proposed amendments do not grant creditors the ability to challenge fraudulent transactions in *BIA* proposal proceedings, even though that right is currently available to trustees under those same proposal proceedings.

7. CROSS BORDER INSOLVENCIES

The LRTF strongly supports the inclusion of provisions in Bill C-55 to deal expressly with cross border insolvency proceedings. The LRTF views the amendments as striking a reasonable balance between the codification of the "UNCITRAL Model Law on Cross Border Insolvency" (the "Model Law") and retention of the jurisdiction of the laws of Canada and Canadian courts.

The LRTF views the amendments in Bill C-55 as achieving the objectives of the reform to cross border insolvency legislation as set out in the Model Law adopted by the United Nations on May 30, 1997, namely promoting:

- cooperation between the courts and other competent authorities in the local jurisdiction with those of foreign jurisdictions in cases of cross border insolvency;
- greater legal certainty for trade and investment;
- the fair and efficient administration of cross border insolvencies that protect the interests of creditors and other interested persons, and those of the debtors;
- the protection and the maximization of the value of the debtor's property; and
- the rescue of financially troubled businesses to protect investment and preserve employment.

While the LRTF strongly supports the Bill C-55 provisions dealing with cross border insolvency proceedings, the LRTF views certain supplemental amendments as desirable from the perspective of maintaining and enhancing the overall public policy interests of Canada. The following amendments are consistent with this objective, without impeaching Canada's approach to globalization through adoption of the principles of the Model Law:

(a) a reciprocity provision that the adoption of the model law concept and recognition of foreign insolvency proceedings will only be applied in respect of foreign jurisdictions that have adopted the same principles of the Model Law; and
(b) a provision that acknowledges the court's power to appoint a creditors' committee or monitor as a condition of recognizing the foreign proceeding, taking into consideration the circumstances of the case before the court, and on such terms as the court may determine, including a provision that reasonable funding is available to the creditors' committee or monitor, as the case may be.

History of IIC/CAIRP Positions

The Joint Task Force recommended the following:

Recommendation 85: Consider retaining the existing international provisions of the *CCAA* and the *BIA* with minor amendments since in substance they have worked successfully.

Recommendation 86: Whether the existing law is retained or the Model Law is adopted, provide for the new provisions to ensure that Canadian creditors' interests are properly represented in any foreign proceeding by providing that as a condition precedent to the recognition by the court of foreign insolvency proceedings, the court must either appoint a creditor's committee or a licensed trustee as a monitor with the powers stipulated by the court, and ensure provisions are in place to provide the creditors' committee or monitor with reasonable funding.

These recommendations were based on the principle that existing cross border insolvency law in Canada is generally successful in addressing and adapting to the needs of foreign proceedings. However, they recognized the continuing globalization of the Canadian economy and evolution of international insolvency law.

The JTF Draft Supplemental Report recommended some modifications and additions to the original report:

Recommendation S43: Provide that, if the Model Law is adopted, the applicable statutory provisions should include a reciprocity requirement that it will only apply with respect to a foreign insolvency proceeding if the applicable foreign jurisdiction has adopted the Model Law.

Recommendation S44: As an alternative to S43, provide that, if the Model Law is adopted, the applicable statutory provision should not be proclaimed in force unless and until the Model Law is adopted and in force in the United States.

Recommendation S45: Provide that any adoption of the Model Law include a provision granting Canadian courts the discretion to determine, depending upon the circumstances of the case, that dual full insolvency proceedings with respect to the same debtor are appropriate.

Recommendation S46: Provide that in ancillary proceedings, if the Model Law is adopted, the court would have the discretion to appoint a creditor's committee as a condition of recognizing the foreign proceeding, taking into consideration all the circumstances of the case, on such terms as the court may determine.

The recommendations were premised on the concept that adoption of the Model Law prior to the adoption by the United States and/or other of Canada's trading partners could leave Canada in an inequitable position recognizing foreign proceedings in the absence of those foreign jurisdictions rendering the same recognition to proceedings initiated in Canada.

Events subsequent to drafting the JTF Draft Supplemental Report, namely the ratification on April 20, 2005 of the principles of the Model Law by the United States and the codification of such within Chapter 15 to Title 11 of the United States *Bankruptcy Code*, has significantly reduced a requirement for reciprocity amendments to Bill C-55.

The recommendations were further premised on protecting the interests of Canadian creditors and other interested persons in the foreign proceedings; this issue remains.

Bill C-55

The comprehensive amendments in Bill C-55 recognize certain provisions of the Model Law, without adoption of all its provisions. The amendments replace the provisions of Part XIII of the *BIA* and Section 18.6 of the *CCAA* that currently exist, expanding primarily the statutory recognition provisions of the following:

- foreign main proceeding and a foreign non-main proceeding;
- a stay of proceedings of all actions against the debtor and outside the ordinary course asset sale restrictions on recognition of a foreign main proceeding, subject to certain exceptions;
- the Canadian court's authority to issue any order that it considers appropriate for the protection of the debtor's property and the interests of the creditor(s), including,

respecting the investigation of the debtor's property, affairs, debts, liabilities and obligations, and entrusting the administration or realization of the debtor's assets located in Canada to the foreign representative or other person designated by the court;

- authority of the Canadian court to cooperate with the foreign representative and foreign court;
- imposing certain responsibilities on the foreign representative, including reporting to the court of substantial changes in the foreign proceeding or in the foreign representative's authority to act;
- the ability of the court to review any orders granted in respect of the foreign proceeding upon the commencement of an additional or concurrent proceeding in respect of the same debtor;
- the ability of the foreign representative to seek the recognition of the Canadian court in respect of interim proceedings and proceedings subject to appeal or review in the foreign jurisdiction; and
- the Canadian court's ultimate jurisdiction for the making of any order or recognition of any foreign order by ensuring compliance with the laws of Canada.

The comprehensive amendments to the administration and recognition of foreign proceedings on cross border insolvencies are consistent with the central principles recognized previously by IIC and CAIRP, specifically:

- to recognize the globalization of the Canadian economy and the need for insolvency legislation consistent and congruent with the globalization of the world marketplace;
- to enhance the predictability of cross border proceedings, which will aid in attracting foreign investment to Canada;
- to prevent the administration of restructuring proceedings outside Canada of those debtors domiciled within the Canadian borders;
- recognizing the sovereignty of Canada in application of the laws of Canada for restructuring proceedings within its borders; and
- retaining the flexibility of the Canadian system to promote cost effectiveness, pragmatism and timeliness.

The comprehensive amendments to the administration and recognition of cross border insolvency proceedings, while achieving the objectives set out in the Model Law and consistent with the principles adopted by membership of both the IIC and CAIRP, should be amended to address the following issues.

Issue: A reciprocity provision specifying that the adoption of the Model Law concepts and recognition of foreign insolvency proceedings will only be applied in respect of foreign jurisdictions that have adopted the same principles of the Model Law:

a) While Canada's major trading partners, primarily the United States and Mexico, have adopted and codified the Model Law, certain other jurisdictions have not as yet implemented or adopted the principles of the Model Law, thereby leaving Canada at an economic disadvantage in respect of recognition of foreign proceedings from these jurisdictions without a reciprocity requirement.

b) The continuing globalization of the world economy may cause a shift in the relative importance of a reciprocity provision within Canada cross border insolvency legislation; making the inclusion of such a provision forward looking.

A provision that acknowledges the court's power to appoint a creditors' committee or monitor as a condition of recognizing the foreign proceeding, taking into consideration the circumstances of the case before the court, and on such terms as the court may determine, including a provision that reasonable funding is available to the creditors' committee or monitor, as the case may be.

a) While the amendments to Bill C-55 permit the court seized of the foreign proceeding to make an order recognizing the foreign proceeding on any terms or conditions that the court considers appropriate in the circumstances, the LRTF recommends that an explicit provision be added to Bill C-55 that the terms or conditions imposed on the application for recognition of the foreign proceeding may include:

    i. The appointment of a creditors' committee and/or a monitor to represent the interests of the Canadian creditors within the foreign proceedings; and

    ii. a provision for the costs of the creditors' committee and/or monitor to be borne within the foreign proceeding.

    In the absence of such a provision, the applicant for the foreign proceeding may not adequately address Canadian creditor or other interested person representation in the foreign proceeding and/or not

consider this as a means of enticing recognition of the foreign proceeding within the jurisdiction of Canada.

(b) The role of the creditors' committee and monitor would be to ensure that the interests of Canadian creditors and other interested persons are adequately and equitably represented in the foreign proceeding. Where it is determined that such representation is not being equitably applied in the foreign proceeding, the creditors' committee and/or monitor could seek redress through the Canadian court that recognized the foreign proceeding for such order as the court viewed as warranted based on the circumstances.

8. WAGE EARNER PROTECTION PROVISIONS

The LRTF strongly supports the implementation of the Wage Earner Protection Program Act ("WEPP") but recommends the introduction of certain amendments and regulations to help balance the interests of key stakeholders and address some practical concerns to ensure that WEPP achieves its intended results.

The LRTF recognizes that employees are more vulnerable than other creditors who can take steps to register security to protect their credit position and have easier access to information to manage their credit exposure. However, insolvency laws must balance many competing interests (including those of employees, creditors, investors and others) to support a competitive Canadian business environment, access to available capital at reasonable rates and an ability to either restructure or sell insolvent businesses such that some or all of the workforce can find continued employment in a restructured entity.

(a) Need for an Operating Option

WEPP provides for only one process to be followed if there are unpaid wages, including vacation pay, on the date of bankruptcy or receivership. In most commercial insolvencies where employees are terminated upon bankruptcy or receivership, there are unpaid wages. In certain insolvencies where funds are available for access by the receiver or trustee, particularly operating situations, the receiver or trustee pays the outstanding wages in the normal course. The assurance and speed of such payments are often critical to retaining employees, maintaining operations and discouraging vandalism. In a literal reading of WEPP, there is no provision for a

second option, where the receiver or trustee pays the wages (and possibly vacation pay) owing at the date of receivership/bankruptcy.

If the intent of the legislation is to be a backstop for only those circumstances where neither a trustee nor receiver pay the wages, the LRTF recommends that WEPP provide for a second option where unpaid wages may be paid by a receiver or trustee. By encouraging the payment of wages by a receiver/trustee, the underlying policy objectives of WEPP to ensure wages are paid, and as quickly as possible, is more likely to be achieved. In addition, the receiver/trustee can then deal with the administrative requirement of preparing T4s for the employees and submitting employee deductions in the normal course. It is unclear from WEPP as to how T4s would be handled and who would be responsible for remitting employee deductions. With the second option, the receiver/trustee would be exempted from advising the employees of WEPP but would be entitled to file an aggregate claim with WEPP that, once filed, would constitute a super-priority charge against current assets, to the extent of the prescribed limits, and a right to file a claim against the directors.

(b) Quantum Concerns

The LRTF strongly supports the definition of wages to include vacation pay and to exclude severance or termination pay. The LRTF also recommends that in the regulations it be made clear that the definition of wages includes any deductions from an employee's pay that have not been remitted to a third party but excludes any other expenses, including expenses paid by the employer on behalf of the employee group such as medical and dental plan premiums.

The quantum of the payment under WEPP for wages (max. $3,000) and the quantum of the super-priority for wages under the *BIA* (max. $2,000) should be revisited to avoid unintended consequences when the payment of wages is left to WEPP so that only a maximum of $2,000 per employee is paid from estate assets or funded by a secured creditor, and the federal government is left to try to recover the difference from directors who often have no funds or limited funds to pay a variety of claims. The Senate Committee previously recommended an upper limit of $2,000 and the JTF supported this limit. It should also be made clear in Bill C-55 that payments under the WEPP for wages and payments in respect of pension claims do not "double up" when there is both a receivership and a bankruptcy.

(c) All Arms-Length Employees Should be Covered

The LRTF recommends that individuals who are employed for three months or less not be ineligible to receive a payment under WEPP, as such employees are often the most vulnerable to layoffs in operating scenarios and less likely to have any sizeable claims for severance and termination. Surely potential abuses in respect of "last minute" related party hires can be addressed through more equitable means if that is the intent of this aspect of WEPP.

(d) Six Month Limit

The LRTF also recommends revisiting the date for calculating the six-month period to determine the extent of unpaid wages. The date of bankruptcy is the date on which the assignment is made or a receiving order is granted. The phrase "date of initial bankruptcy event" allows for dating back to the filing of the bankruptcy petition in certain situations but is not used in WEPP. There are contested bankruptcy hearings that can go beyond six months to resolve.

(e) Termination of Employment

We understand that the regulations are to define what constitutes termination of employment. The regulations should take into account recent court decisions that have discouraged carrying on the operations of insolvent businesses as a result of successor rights issues, to make it clear that termination of employment is triggered by a bankruptcy.

(f) Payment of Administrative Expenses

There will be time and expenses incurred by the receiver/trustee to comply with WEPP. Although WEPP provides for the recovery of such time and expenses out of the debtor's assets, the trustee/receiver should be entitled to claim reasonable costs from the federal government for helping to administer the WEPP and, where the only recoveries in an estate are the assets that will be primed by the WEPP claims, for the costs of administering the bankruptcy. There is currently a Directive (12R) – Administrative Agreements with Trustees and Receivers, which provides for insolvency administrators, on a case by case basis and with certain restrictions, to recover their costs ahead of the Crown's claims under section 227(5) of the *Income Tax Act* and enhanced garnishments under section 224(1.2) of the *Income Tax Act* or similar legislation. A similar administrative agreement should be in place with respect to the proposed super-priority for

WEPP claims, which are in turn subject to other priorities including section 67(3) of the *BIA* for deemed trusts.

(g) Administrative Protections

WEPP requires a receiver or trustee to determine the amount of wages (and vacation pay) owing to each individual in respect of a six-month period. In certain situations, the books and records of a debtor are either non-existent or not up-do-date such that it is either an impossible task to do the calculation or considerable effort would be required to reconstruct the records. The regulations should provide for a notice period wherein the receiver or trustee would advise the Minister of problems encountered in complying with WEPP and an administrative agreement should be put in place to determine how such claims are to be resolved, how related receiver/trustee fees are to be paid and to ensure the receiver/trustee is not held personally liable for errors or an inability to comply with WEPP.

(h) Balancing Anti-Abuse Protections

There are extensive anti-abuse measures included in WEPP for various offences including criminal sanctions for failure by a trustee and receiver to comply with the requirements of section 21 as described above. These anti-abuse measures are stronger than those commonly found in insolvency legislation and appear to be unduly harsh.

History of IIC/CAIRP Positions

The Joint Task Force recommended the following:

> Recommendation 73: Provide that current priorities with respect to wage claims should be maintained, with clarification that pension contributions are included in wages for the purposes of the *BIA*.

The current priorities referenced above remain the same today and are covered by *BIA* section 136(1)(d), which, subject to the rights of secured creditors, gives employees a preferred claim in a bankruptcy of up to $2,000 for unpaid wages, salaries and like entitlements earned during the six months immediately preceding the bankruptcy and, in the case of a traveling salesperson, an additional $1,000 for expenses incurred during the preceding six months. This recommendation was based on an assessment that the case for elevating wage claims had not been made, particularly where in many cases secured lenders allow the payment of current wages.

Section 137(2) of the *BIA* provides for the postponement of claims of a present or former spouse or common-law partner for wages until all claims of the other creditors have been satisfied. *BIA* s.138 and s.140 provide that the wage claims of certain relatives (other than those covered by *BIA* s.137(2)) and officers and directors are unsecured, not preferred, claims.

The termination of employment by bankruptcy results in a claim by an employee as an unsecured creditor for termination pay (including vacation pay) and severance pay. Vacation pay is considered to be wages or a preferred claim to the extent that it accrues during the six months preceding the bankruptcy.

The JTF Draft Supplemental Report modified Recommendation 73 above by supplemental recommendations S32, S33 and S34 as set out below:

Recommendation S32: In order to implement Senate Committee Recommendation 20, provide that *BIA* section 136 be amended to give employees a super-priority claim for wages and the other matters set out in section 136(1)(d) up to the maximum amount recommended by Senate Committee Recommendation 20 ($2,000), but including a further $1,000 limit for out of pocket expenses incurred by the employee in the conduct of his [or her] duties.

Recommendation S33: Provide that, if S32 is adopted, the super-priority for wage claims should rank ahead of the super-priority for unpaid source deductions (recommendation 72 recommended source deductions should have priority over all secured claims with respect to inventory and accounts receivable, other than purchase money security interests, but not as against other secured claims).

Recommendation S34: Provide that where a secured creditor pays an amount in respect of an employee's super-priority entitlement, the secured creditor is entitled to any preference of priority that such employee would have been entitled to had that amount not been so paid.

The Senate Committee Recommendation 20 included additional wording not covered by JTF Recommendations S32 to S34, specifically: (i) each employee claim was not to exceed the lesser

of $2,000 or one pay period; and (ii) the secured creditor(s) should be able to assume the rights of employees against the directors.

Section 17.01 Bill C-55

Following is a highlight of relevant sections in Bill C-55 relating to wage earner protection, where there are changes from the current law, and issues considered by the LRTF:

a) *Wage Earner Protection Program Act*

The *Wage Earner Protection Program Act* ("WEPP") provides for payments to individuals who have been terminated and who have unpaid wages as at the date of bankruptcy or receivership, with certain restrictions on quantum and eligibility. The main features, with section references, are:

s. 2(1) Wages include same items as *BIA* s.136(1)(d) but provides more clarity by specifically including vacation pay and excluding severance or termination pay.

s. 5(d) Wages must be earned during the six months immediately preceding the date of bankruptcy or first day there is a receiver appointed.

s. 6(1) An individual is ineligible to receive a payment if employed for three months or less.

s. 7(2) The maximum amount payable is the greater of:

(a) $3,000 and
(b) four times the maximum weekly insurable earnings under the *Employment Insurance Act.*

less any deductions applicable under a federal or provincial law.

ss. 8-20, 35 The onus is on the individual to apply to the Minister (details to be provided in the regulations, including the time frame). Any reviews and appeals of the amount to be paid are between the Minister and the individual. Payments by the Minister pursuant to WEPP are to be made out of the federal government's Consolidated Revenue Fund.

s. 21-22 The duties of the trustees and receivers are to:

(i) advise the former employees, who have unpaid wages, of the WEPP;
(ii) determine the wages owing in accordance with WEPP and advise the Minister; and
(iii) inform the Minister when discharged if a trustee or duties completed if a receiver.

The fees and disbursements of the trustee or receiver for performing the requirements of WEPP are to be paid out of the property of the debtor.

There are extensive anti-abuse measures included in WEPP for various offences, including criminal sanctions for failure by a trustee and receiver to comply with the requirements of section 21 as described above. These anti-abuse measures are stronger than found in insolvency legislation and appear to be unduly harsh.

s. 36 The Crown is subrogated to any rights of an individual for amounts paid under WEPP against:

(i) the former employer; and
(ii) the directors.

b) Amendments to the *BIA:*

The proposed amendments to the *BIA* provide for the following:

s. 81.3 Provides for a super-priority for wages in a bankruptcy to the extent of $2,000 and for expenses of a traveling salesperson to the extent of $1,000. (WEPP provides for payment of wages to a maximum of $3,000 and no provision for payment of expenses).

The priority is on all current assets of the bankrupt.

The super-priority for wages and expenses ranks before all other claims except rights under *BIA* 81.1 (unpaid suppliers), *BIA* 81.2

(farmers, fishermen and aquaculturists) and *BIA* 67(3) (source deductions).

s. 81.4 Provides for same provisions as 81.3 but in a receivership.

s. 136(1)(d) The new s136(1)(d) gives preferred status to excess wages not covered by the super-priority and to secured creditors for any payments of wages or pension contributions as a super-priority that the secured creditor would have been entitled to but for the super-priority (as recommended by IIC/CAIRP in S34 above).

The LRTF has identified the following issues; however, these issues may change depending on the content of the regulations:

Issue: WEPP provides for only one process to be followed if there are unpaid wages, including vacation pay, on the date of bankruptcy or receivership. In most commercial insolvencies where employees are terminated upon bankruptcy or receivership, there are unpaid wages. In certain insolvencies where funds are available for access by the receiver or trustee, particularly operating situations, the preference is for the receiver or trustee to pay the current wages in the normal course. The assurance and speed of such payments are often critical to retaining employees and discouraging vandalism. In a literal reading of WEPP, there is no provision for a second option where the receiver or trustee pays the wages (and possibly vacation pay) owing at the date of receivership/bankruptcy, and then receives an exemption from advising employees of the provisions of WEPP. If the intent of the legislation is to be a backstop for only those circumstances where neither a trustee nor receiver pay the wages, should there be the provision of a second option and, when such payments are made by a receiver or trustee, should the receiver or trustee inherit the super-priority for amounts paid against inventory and receivables and against directors?

Issue: The claim for wages under WEPP is $3,000 while the super-priority provided for in the *BIA* is $2,000 for wages and $1,000 for expenses of travelling salespersons with the likelihood that the Minister will pursue the difference against the directors. There may be competing claims against the directors for wages in the event that the wage claims exceed $3,000. How is the recourse against the directors split as between competing claims? Further, there may be

situations where in the past, wages were paid by a receiver and trustee, and now the preference is to allow wages to be paid under WEPP. Hence the estate only funds $2,000, assuming that there are current assets available, and the government is left to fund the balance of up to $1,000 if the claim exceeds $2,000. Should the amount paid under WEPP and the super-priority be kept the same to avoid unintended outcomes ($2,000 recommended by the Standing Senate Committee and the JTF)?

Issue: In Section 6(1) of WEPP, an individual is ineligible to receive a payment if employed for three months or less. Should there be an exception for recently hired staff as they may be the most vulnerable to layoffs in operating scenarios and less likely to have any sizeable claims for severance and termination against directors.

Issue: The date of bankruptcy is the date on which the assignment is made or a receiving order is granted. The phrase “date of initial bankruptcy event” allows for dating back to the filing of a bankruptcy petition in certain situations but is not used in WEPP. There are contested bankruptcy hearings that can go beyond six months to resolve.

Issue: In no asset estates or estates with nominal assets, should the trustee/receiver be entitled to claim reasonable costs from the Crown for helping to administer the WEPP and, where the only recoveries in an estate are the assets that will be primed by the WEPP claims, for the costs of administering the bankruptcy? There is currently a Directive (12R) – Administrative Agreements with Trustees and Receivers, which provides for insolvency practitioners, on a case by case basis and with certain restrictions, to recover their costs ahead of the Crown’s claims under section 227(5) of the *ITC* and enhanced garnishments under section 224(1.2) of the *ITC* or similar legislation. Should a similar administrative agreement be in place with respect to the proposed super-priority for WEPP claims that are in turn subject to other priorities, including 67(3) of the *BIA* for deemed trusts, and a coordination of how these two agreements would interface?

Issue: The decisions in *TCT Logistics* and *Royal Crest Lifecare Group* suggest that employment may not be terminated just because of the occurrence of bankruptcy. The regulations are to define what constitutes termination of

employment and should take into account recent court decisions that have discouraged the carrying on of operations of insolvent businesses with successor rights issues, to make it clear that termination is triggered by a bankruptcy.

Issue: WEPP requires a receiver or trustee to determine the amount of wages (and vacation pay) owing to each individual in respect of a six-month period. In certain situations, the books and records of a debtor are either non-existent or not up-do-date such that it is either an impossible task to do the calculation or considerable fees would be incurred to reconstruct the records. Should the regulations provide for a notice period wherein the receiver or trustee would advise the Minister of problems encountered in complying with WEPP and an administrative agreement be put in place to determine how such claims are to be calculated, how related fees are to be paid and to ensure that the receiver/trustee is not held personally liable for errors or an inability to comply with WEPP?

Issue: There are extensive anti-abuse measures included in WEPP for various offences including criminal sanctions for failure by a trustee and receiver to comply with the requirements of section 21 as described above. These anti-abuse measures are stronger than found in insolvency legislation and appear to be unduly harsh.

9. GOVERNANCE

(a) Replacement of Directors

The LRTF strongly supports the proposed amendments that would give the court the authority to remove any director of a company that is being reorganized under the *CCAA* or *BIA* if the director is unreasonably impairing the possibility of a viable restructuring.

We note that the proposed amendments would also give the court the power to remove a director based on concerns about future conduct of the director, if the court is satisfied that the director is "likely to" unreasonably impair the possibility of a viable restructuring. We hope that the courts will exercise this power cautiously and only in the clearest of cases, considering the predictive nature of the test.

(b) Interim Receiver

LRTF recommends that the court continue to have the discretion to appoint an interim receiver or receiver in appropriate circumstances under a *CCAA* proceeding.

In some cases, replacing one or more of the debtor's directors may not be the most effective means of ensuring that the debtor is able to propose a viable restructuring plan. Occasionally, the role of the monitor in a *CCAA* case has been expanded by having the monitor appointed as interim receiver of the debtor, and the interim receiver then proposed the restructuring plan to the creditors, with the assistance of the debtor's management. While we welcome the recasting of the role of interim receivers generally so that it is once again truly "interim", the LRTF believes that it would be helpful to continue to have the possibility of an interim receiver or receiver appointment of the type described above in restructuring cases.

(c) Due Diligence Defence for Directors

LRTF recommends that a general due diligence defence be made available for directors.

The JTF had previously recommended, as did the Senate Committee, that directors be provided with a general due diligence defence against personal liabilities. The proposed amendments do not provide equivalent protection and continue to leave directors open to the risk of personal liability even if they have taken whatever steps they are in a position to control to ensure that payments are made. Other aspects of the proposed amendments, such as the government's subrogated rights in connection with amounts paid under the WEPP, will make claims against directors more likely. We expect that this will make it harder to persuade qualified independent directors to remain on or join the boards of troubled companies, at the time when they are needed most. A general due diligence defence would address this issue.

The proposed amendments would permit a company being reorganized under the *CCAA* or *BIA* to provide an indemnity to directors and officers for post-filing liabilities, and provide that the court can secure the indemnity with a priority charge over the debtor's assets. This will provide some protection to directors and officers, but the value of the protection will be limited by (a) the creation or ranking of priority charges and (b) the value of the security granted over the debtor's assets, and is provided at the expense of the debtor's secured creditors.

History of IIC/CAIRP Provisions

The Joint Task Force made the following recommendations regarding the governance of the debtor:

Recommendation 38: Provide statutory authority during *CCAA* and *BIA* proposal cases for the court to appoint an interim receiver and manager (being a licensed trustee in bankruptcy) in order to protect the debtor's estate or the claims of creditors, with such authority as the court may determine including the authority to manage the reorganization proceedings.

Recommendation 39: Provide that during the course of a *CCAA* or *BIA* proposal case, the court has the authority to replace some or all of the existing directors of the debtor if the governance structure of the debtor is impairing or could impair the process of developing and implementing a going concern solution.

Recommendation 40: Provide that the directors and officers, and applicable insolvency administrators, have a duty to notify the court on a timely basis if they have actual knowledge that there is a material risk that the debtor will be unable to pay wages or other debts being incurred during the course of a restructuring proceeding.

Recommendation 41: Provide that in exercising their duties during the course of a reorganization proceeding, the debtor's directors and officers and the applicable insolvency administrators shall take into account the priority of the claims of creditors and equity holders, and the apparent value of those claims in light of the likely range of values of the business and assets of the debtor.

Recommendation 46: Provide that service of the initial *CCAA* order or of notice of the commencement of a *BIA* proposal case on an insurer that provides unexpired directors' and officers' insurance, shall be deemed to be notice within the policy period of all claims that are subsequently made against the directors and officers relating to the failure of the debtor to pay pre-filing claims or the insolvency of the debtor.

Recommendation 47: Provide that during the course of *CCAA* or *BIA* proposal cases, the court has the authority to grant a court-ordered lien up to a fixed amount in favour of the debtor's directors and officers to indemnify them against third party liability for post-filing conduct to the extent that insurance is not available on reasonable terms for such liability, with exclusions for wilful misconduct and gross negligence.

Recommendation 49: Provide that when deciding whether or not to grant a charge in favour of the directors and officers, particularly in *CCAA* cases, the court shall consider whether the debtor's board has established appropriate governance mechanisms, whether by establishing an independent board committee, retaining a CRO or other means, for the proper management of the debtor's affairs during the course of the restructuring proceedings.

Recommendation 50: Provide that during the course of a restructuring proceeding the debtor shall not pay, or enter into an agreement to pay, retention bonuses, success fees, severance or termination pay or other extraordinary remuneration to its senior management, officers and directors without prior court approval, but that if so approved, the court shall have the discretion to provide that payment of all or part of those amounts are secured by a directors' and officers' charge.

Recommendation 51: Provide that the debtor's independent directors have protection from any personal statutory liability otherwise arising from the debtor's failure to pay pre-filing debts (e.g. wages, vacation pay, GST, etc.) so long as the debt is not more than seven (7) days overdue at the time of the commencement of a *CCAA* or *BIA* proposal case.

Recommendation 52: Provide that directors and officers shall have no personal liability for severance and termination pay claims arising during the course of a reorganization proceeding.

Senate Committee

The Senate Committee made the following recommendations in connection with corporate governance and director liability:

> 25: The *Bankruptcy and Insolvency Act* be amended to include a generally applicable due diligence defence against personal liability for directors.
>
> 35: The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit the Court to replace some or all of the debtor's directors during proposals or reorganizations if the governance structure is impairing the process of developing and implementing a going concern solution.[1]

JTF Draft Supplemental Report

The JTF Draft Supplemental Report made the following recommendations:

> Recommendation S10: In order to implement Senate Committee Recommendation 25, provide for a general due diligence defence with respect to pre-filing statutory claims, in addition to specifying the matters for which independent directors (Recommendation 51) and directors and officers (Recommendation 52) are exonerated from personal liability.
>
> Recommendation S12: Provide that shareholder meetings of public companies during the restructuring process are not required unless authorized by the court.

Bill C-55 follows Senate Committee Recommendation 35 and JTF Recommendation 39 by giving the court the authority to replace directors. It also goes one step further by giving the court the authority to remove a director if the court is satisfied that person is likely to unreasonably impair the possibility of a viable reorganization or is likely to act inappropriately as a director in the circumstances.

[1] Note: Recommendations re trustee/monitor independence omitted.

Issue: While the LRTF hopes that the courts would exercise this power cautiously and only in the clearest of cases, we had reservations about whether it is appropriate as a matter of public policy to give a court the power and responsibility for making predictions about possible future behaviour of directors.

Bill C-55 also implements JTF Recommendation 47 (directors' charge). The Bill does not adopt Recommendations 38 (appointment of interim receiver in *CCAA*/*BIA* proposal cases), 40 (duty to give notice if there is a material risk that wages will not be paid), 41 (duty to take in account priority and value of stakeholder claims), 46 (deemed notice to insurers), 49 (criteria to be considered in approving a directors charge), 50 (retention payments and success fees), 51 (protection of independent directors from personal liability), 52 (no personal liability for severance and termination pay claims arising during the proceeding), S10 (due diligence defence) and S12 (dispensing with shareholder meetings for public companies).

Issue: In some cases, replacing one or more of the debtor's directors may not be the most effective means of ensuring that the debtor is able to propose a viable restructuring plan. Sometimes the role of the monitor in a *CCAA* case has been expanded by having the monitor appointed as interim receiver of the debtor, and the interim receiver then proposes the restructuring plan to the creditors, with the assistance of the debtor's management. While we welcome the recasting of the role of interim receivers generally so that it is once again truly "interim", we believe that it would be helpful to continue to have the possibility of an interim receiver or receiver appointment of the type described above in restructuring cases.

Issue: We had previously recommended, as did the Senate Committee, that directors be provided with a general due diligence defence against personal liabilities. The proposed amendments do not provide equivalent protection and continue to leave directors open to the risk of personal liability even if they have taken whatever steps they are in a position to control to ensure that the payment is made. Other aspects of the proposed amendments, such as the government's subrogated rights in connection with amounts paid under the WEPP, will make claims against directors more likely. We expect that this will make it harder to persuade qualified independent directors to remain on the boards of troubled

companies, when they are needed most. We strongly recommend that a general due diligence defence be made available for directors.

II. ISSUES THAT HAVE BEEN UNDER-TREATED OR REQUIRE SUBSTANTIAL AMENDMENT

1. COLLECTIVE AGREEMENTS AND NOTICE TO BARGAIN

The provisions of Bill C-55 specify that a collective agreement may not be altered except where the parties to the collective agreement have agreed to revise it, following service by the company of a "notice to bargain" and bargaining under the laws of the jurisdiction governing collective bargaining between the parties. These proposed amendments are not sufficient and require recourse to a final solution to impasse.

Where a debtor company and the union representing its employees fail to reach a voluntary agreement to revise provisions of the collective agreement, Bill C-55 gives the court jurisdiction to grant an order authorizing the company to serve a "notice to bargain" on the bargaining agent. While the "notice to bargain" constitutes a good first step in forcing the parties to come to a negotiated compromise regarding provisions of the collective agreement, the LRTF believes that the provisions of Bill C-55 are insufficient in that they fail to provide a timely process to arrive at a final solution to the collective bargaining issues, issues that are often critical to the successful outcome of the *CCAA* proceeding.

The Senate Committee recognized and the JTF recommended that implementing a comprehensive solution to address a protracted impassed over labour issues in a restructuring was necessary. For whatever reason, Bill C-55 fails to adopt such a comprehensive solutions. The LRTF recommends that Bill C-55 be amended to grant to the court express authority to implement some comprehensive solution to a labour impasse (whether it be by way of court supervised modification to collective bargaining agreements or through some other process) where, after a reasonable period, negotiations entered into pursuant to the service of a "notice to bargain" prove to be unsuccessful. The LRTF suggests that, apart from any other relevant criteria, the court's authority to do so should be subject to the court being satisfied that (i) a viable compromise or arrangement could not be made, taking into account the terms of the collective agreement, (ii) the company has made good faith efforts to renegotiate the provisions of the collective agreement, and (iii) failure to adopt a comprehensive solution could result in irreparable damage to the company.

History of IIC/CAIRP Positions

The Joint Task Force recommended the following:

> Recommendation 30: Provide that trustees in bankruptcy and court-appointed receivers should have the power to assign executory contracts (not including eligible financial contracts) both in connection with going concern transactions and on a liquidation basis**.**

This recommendation was modified in the JTF Draft Supplemental Report:

> Recommendation S8: In order to implement Senate Committee Recommendation 30, provide that special provision should be made, along the lines of section 1113 of the United States *Bankruptcy Code,* for the disclaimer and modification of collective bargaining agreements.

Bill C-55

Bill C-55 essentially provides the following with respect to collective agreements binding a debtor company:

- as a general principle, any collective agreement entered into by a debtor company, both under *CCAA* and *BIA*, remains in force and may not be altered except as provided in the *CCAA* and *BIA* or under the laws of the jurisdiction governing collective bargaining between the parties;

- a debtor company that is unable to reach a voluntary agreement with the bargaining agent to revise any of the provisions of the collective agreement may apply to the court for an order authorizing it to serve a notice to bargain;

- the court may issue the order only if it is satisfied that

    (a) a viable compromise or arrangement could not be made, taking into account the terms of the collective agreement;

    (b) the company has made good faith efforts to renegotiate the provisions of the collective agreement; and

    (c) a failure to issue the order is likely to result in irreparable damage to the company;

- the bargaining agent is deemed to have a claim, as an unsecured creditor, for an amount equal to the value of concessions granted with respect to the remaining term of the collective agreement.

Issue: The LRTF does not support the above summarized sections of Bill C-55 as they do not strike a fair balance that would force parties to come to a compromise where such compromise is essential to a successful restructuring. While the LRTF does not believe that it is essential that a debtor company be formally authorized to repudiate collective agreements in certain circumstances, we believe that the provisions of Bill C-55 are insufficient as they fail to regulate what happens where the parties forced to bargain are unable to come to a mutually acceptable compromise. Contrary to the model proposed in section 1113 of the U.S. *Bankruptcy Code*, the tendering of a reasonable collective agreement by the debtor company does not authorize it to formally repudiate the collective agreement, nor to force any form of binding arbitration process.

The LRTF thus recommends that Bill C-55 be amended to grant the court express authority to submit the parties to a formal binding arbitration process where, after a reasonable period, negotiations entered into pursuant to the service of a "notice to bargain" prove to be unsuccessful. The LRTF suggests that the court's authority to submit the parties to a binding arbitration process should be subject to the court being satisfied that (i) a viable compromise or arrangement could not be made, taking into account the terms of the collective agreement, (ii) the company has made good faith efforts to renegotiate the provisions of the collective agreement, and (iii) failure to force the parties to a binding arbitration process could result in irreparable damage to the company. These criteria should thus apply to justify the court imposing a binding arbitration process on the parties and should not just apply to justify the court order authorizing the debtor company to serve a "notice to bargain", as we believe that the criteria are too stringent to justify the mere service of a notice to bargain.

2. INSUFFICIENT ALIGNMENT OF THE *CCAA* AND *BIA* PROVISIONS

The LRTF generally recognizes and supports the intent of Bill C-55 to align certain provisions of Part III – Section I of the *BIA* and the *CCAA*. The LRTF views the objectives of such alignment to promote the following:

- greater consistency between the treatment of creditors and other interested persons under the two regimes;
- greater public awareness and regulatory oversight to the Office of the Superintendent of Bankruptcy in respect of *CCAA* proceedings;
- the two statute approach to restructuring debtor companies based on the size and nature of the respective entity, (i.e., retain the flexible *CCAA* statute for larger debtor companies requiring more complex reorganization strategies and the Division I proposal regime for smaller debtor companies able to deal better with a more detailed procedural restructuring framework); and
- a codified structure to the *CCAA* restructuring framework and greater consistency with a *BIA* Division I proposal without removing the progressive nature of the *CCAA* statute that permits the unrivalled speed, cost effectiveness, flexibility and pragmatism of the Canadian restructuring system.

The LRTF supports efforts to align the legislation and notes there are certain deficiencies in Bill C-55 that should be addressed prior to its enactment. These alignment deficiencies can be summarized as follows:

Structural Alignment:

(a) The capacity of the regulator is clarified in a *CCAA* proceeding (ss. 11.1 (1) to (5)), whereas similar clarification is not provided within the *BIA* Division I proposal provisions.

(b) Critical supplier provisions as provided for in the framework of the *CCAA* (ss. 11.4 (1) to (4)) are not provided for in the framework of a *BIA* Division I proposal.

(c) The provisions of the *BIA* Division I proposal (ss. 65.2(1) to (7)) that define the methodology and landlord rights resulting from the repudiation of commercial real property leases should be incorporated into the provisions of the *CCAA*. Assuming an amendment similar to section 65.2 of the *BIA* is incorporated into the *CCAA*, certain ancillary amendments to other sections of the *CCAA* will be required to align the provisions, including an amendment to section 11.3(3), which would be inconsistent with *BIA* section 84.1(3)(b).

(d) Related party creditor entitlement to vote under a *BIA* proposal (section 54(3)) is inconsistent with the *CCAA*. To align the two proposal regimes we recommend a similar restriction be added to the provisions of the *CCAA*.

Consistency Alignment:

(a) Timing of payment of pension amounts under a *BIA* Division I proposal (s. 60(1.5)(a)) and *CCAA* plan (s. 6(5)(a)) are inconsistent.
(b) The language recognizing the enforceability of collective agreements on the commencement of a restructuring proceeding is substantively different under a *BIA* Division I proposal (s. 65.12(6)) and *CCAA* (s. 33(1)).
(c) The test to be considered by the court prior to ordering an assignment of an agreement under the *BIA* (s. 84.1(5)) and *CCAA* (s. 11.3(5)) are inconsistent. To align the two proposal regimes, we recommend that the *BIA* be amended to be consistent with the *CCAA*.

History of IIC/CAIRP Positions

The Joint Task Force recommended:

Recommendation 81: Provide that there shall continue to be two reorganization systems, one for big companies (*CCAA*) and one for smaller corporations (*BIA* Proposals).

Recommendation 82: Provide that a *CCAA* monitor shall make the following filings with the Superintendent's Office for record keeping purposes:

(a) initial *CCAA* order within 10 days;
(b) debtor's initial list of creditors within 30 days;
(c) if a reorganization plan is consummated, a copy of the plan, the sanction order and a brief statement of affairs within 30 days; and
(d) if all or substantially all of the debtor's business is sold during the course of the proceeding, a brief statement of affairs within 30 days of closing.

These recommendations were principles on the relative success of Canada's two insolvency restructuring regimes to meet the needs of the current debtor constituents based on the nature and complexity of the filings. Additionally, the recommendation recognized the need for greater oversight within the context of a *CCAA* by the Office of the Superintendent of Bankruptcy.

The Draft Supplemental Report of the Joint Task Force on Business Insolvency Law Reform did not make any further recommendations.

Bill C-55

The amendments set out in Bill C-55 align in many respects certain provisions of Part III – Section I of the *BIA* and the *CCAA*. These areas of alignment, in many instances, are discussed elsewhere in this report. Notwithstanding the intent of alignment between the two restructuring regimes, the LRTF has identified certain deficiencies in such alignment that should be addressed in future amendments to Bill C-55, prior to its enactment. These deficiencies are identified below:

	BIA		***CCAA***		**Comment/Inconsistency**
	Section	**Statute**	**Section**	**Statute**	**I**
1	60(1.5)(a)	The proposal provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:	6(5)(a)	The compromise or arrangement provides for the payment, immediately after the court sanction, of the following amounts that are unpaid to the fund established for the purpose of the pension plan:	*CCAA* contemplates immediate payment, *BIA* contemplates provision for payment in plan; for wage priority payment, both *CCAA* and *BIA* contemplate payment immediately following court approval
2			11.1(1) to (5)	Subject to subsection (3), no order made under section 11.02 affects the rights of the regulatory body with respect to any investigation in respect of the company or any action, suit or proceeding taken by it against the company, except when it is seeking to enforce any of its rights as a secured creditor or an unsecured creditor. In addition to the foregoing, the provisions of subsections (2) through (5) inclusive	Clarifying the role and authority of regulators to act in the face of the stay of proceedings should be incorporated into the *BIA*
3			11.4(1) to (4)	On application of the debtor company, the court make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and	The same critical supplier issues exist in the context of a *BIA* restructuring and should be provided for to ensure consistency of treatment

				that these goods and services are critical to the company's continued operation. In addition to the foregoing, the provisions of subsections (2) through (4) inclusive	
4	65.2(1) to (7)	At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial tenant under a lease of real property, the insolvent person may disclaim the lease on giving 30 days notice to the landlord in the prescribed manner, subject to subsection (2) In addition to the foregoing, the provisions of subsections (2) through (7) inclusive			Methodology and rights of landlord pursuant to a repudiation of a commercial real property leases should also be included in *CCAA* for consistency purposes. LRTF suggests inclusion of *BIA* Section 65.2 (1) through (7) inclusive, within the amendments, to the *CCAA*
5	65.12 (6)	For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force	33 (1)	If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this Act or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent	Proposed amendments to *CCAA* are much more explicit than proposed amendments in the *BIA*; should be consistent
6	54(3)	A creditor that is related to the debtor may vote against but not for the acceptance of the proposal			LRTF recommends inclusion of *BIA* Sec 54(3) in the amendments to the *CCAA*.
7	84.1(3)(b)	Subsection (1) does not apply in respect of rights and obligations … under a lease referred to in subsection 65.2 (1)			To the extent a commercial lease amendment is made to the *CCAA*, the assignment exception clause will need to be amended for consistency within the *CCAA*

8	84.1(5)	The court may not make the assignment if the court is satisfied that the insolvent person is in default under the agreement	11.3 (5)	The court may not make an order assigning an agreement unless it is satisfied that all financial defaults in relation to the agreement will be remedied	Amendments to *BIA* not limited to financial defaults as under *CCAA*. The *BIA* should be amended to be consistent with *CCAA* Additionally, the provisions of *CCAA* are forward looking as to the remedy of financial defaults, whereas *BIA* contemplated remedy of defaults prior to assignment, *BIA* should be amended to be consistent with the *CCAA*

While the LRTF has attempted to identify the key alignment deficiencies, having regard to the time limitations of this response to the relevant governing bodies, it recommends that a technical review of the restructuring provisions of the *CCAA* and Part III-Section I of the *BIA* be undertaken to ensure that the intent of the legislation is consistent amongst the two restructuring regimes, where such alignment was intended.

Article XVIII. 3. EQUITY INTEREST PROVISIONS

The LRTF supports the inclusion of provisions in Bill C-55 to deal expressly with equity interests comprehensively. Regrettably, the LRTF does not believe that Bill C-55 adequately addresses issues relating to equity interests in an insolvency context. Nor do the proposed amendments deal with equity interests uniformly in the *CCAA* and the *BIA*.

The LRTF believes that amendments should be made to Bill C-55 in order to ensure that they achieve the policy objectives they are intended to address. In particular, amendments should be made to:

(a) expressly permit the court supervising a reorganization effort to dispense with any form of "equity" approval and deal in all respects with equity interests;

(b) uniformly treat equity interests in *BIA* and *CCAA* reorganization cases and expressly provide for their subordination and non-voting status; and

(c) ensure that the provisions apply to all forms of equity interests.

Section 18.01

Section 18.02 History of IIC/CAIRP Positions

The Joint Task Force recommended:

> Recommendation 61: Provide that a court approving a reorganization plan has the power to approve a reorganization of the equity of the debtor, either with or without shareholder approval.
>
> Recommendation 62: Provide that all claims against a debtor in an insolvency proceeding that arise under or relate to an instrument that is in the form of equity, including claims for payment of dividends, redemption or retraction or repurchase of shares, and damages (including securities fraud claims) are to be treated as equity claims subordinate to all other secured and unsecured claims against the debtor, and which can be extinguished as against the debtor, in the discretion of the court, in connection with the approval of a reorganization plan either with or without the approval of the parties asserting such claims.

These recommendations address the need to be able to deal expressly with equity interests comprehensively in an insolvency proceeding. Not all manner of corporate reorganizations involving share capital could be effected in combination with an insolvency proceeding and that prospect could give rise to a veto on the part of equity holders with no remaining economic interest in the debtor corporation. The JTF also concluded that Canadian reorganization proceedings did not effectively subordinate "shareholder damage claims" to the interests of creditors and that Canadian corporations were seeking to effect reorganizations under U.S. law as a result.

No specific supplemental recommendation was made dealing with Recommendations 61 and 62, although the JTF Draft Supplemental Report made Recommendation S12, set out below:

> Recommendation S12: Provide that shareholder meetings of public companies during the restructuring process are not required unless authorized by the court.

Section 18.03 Bill C-55

Following is a highlight of relevant sections in Bill C-55 relating to equity interests, where there are changes from the current law, and issues for consideration:

(a) Proposed Section 140.1 of the *BIA*

Proposed Section 140.1 of the *BIA* provides that a creditor is not entitled to claim a dividend arising from the rescission of a purchase or sale of shares or units of a bankrupt - or in respect of a claim for damages arising from the purchase or sale of a share or unit of a bankrupt - until all claims of other creditors have been satisfied.

Issue: The proposed amendment does not expressly permit the court supervising a reorganization effort to dispense with any form of "equity" approval such that where certain corporate statutes may be read to require such approval or where doubt exists in respect of the ability of the court to dispense with such approval, equity interests may continue to influence the outcome of a reorganization attempt, even in circumstances where they hold no continuing economic interest.

Issue: No effort has been made to disentitle an equity "claimant" from voting as a creditor in respect of a proposal proceeding under the *BIA* and the value of such equity claims could well affect the outcome of the reorganization attempt.

Issue: The scope of the equity interests identified as being "claims" is quite narrow and does not achieve the same breadth as the scope of Recommendation 62 for any and all "equity" interests that "arise under or relate to an instrument that is in the form of equity".

Issue: The proposed amendment only subordinates equity claims without expressly providing the ability to be able to extinguish same without consideration.

(b) Proposed Section 22(3) of the *CCAA*

Proposed Section 22(3) of the *CCAA* provides that creditors having a claim against a debtor company arising from the rescission of a purchase or sale of shares or units of the company - or a claim for damages arising from the

purchase or sale of a share or unit of the company – must be in the same class of creditors in relation to those claims and may not, as members of that class, vote at a meeting to be held under section 4 in respect of a compromise or an arrangement relating to the company.

Issue: The proposed amendment does not expressly permit the court supervising a reorganization effort to dispense with any form of "equity" approval such that where certain corporate statutes may be read to require such approval or where doubt exists in respect of the ability of the court to dispense with such approval, equity interests may continue to influence the outcome of a reorganization attempt, even in circumstances where they hold no continuing economic interest.

Issue: The scope of the equity interests identified as being "claims" is quite narrow and does not achieve the same breadth as the scope of Recommendation 62 for any and all "equity" interests that "arise under or relate to an instrument that is in the form of equity".

Issue: The proposed amendment does not expressly subordinate and merely seeks to separately classify equity claims and disentitle them from voting in conjunction with the unsecured creditor class. The proposed amendment also does not expressly provide that a plan may be approved that binds members of the equity class without their approval or that consideration need not be provided to members of the equity class or that their claims may be extinguished.

4. PRIORITY OF CHARGES IN *BIA* AND *CCAA* PROCEEDINGS

(a) Priority of Charges

The LRTF recommends that Bill C-55 should specify the court's express authority to make orders to rank priorities of the charges created by court order, unless otherwise expressly stipulated by a statutory priority.

The LRTF also recommends that Bill C-55 should be amended to provide for the statutory priority of charges in respect of the fees and expenses of professionals and other advisors providing services to or in respect of the debtor's affairs that the court determines are necessary to the debtor's ability to attempt or effect a reorganization attempt, or take possession or control of the debtor's assets or undertaking, in priority to all other statutory priorities.

Bill C-55 codifies a number of super-priority charges, some of which have statutory priority in bankruptcy and others that may be granted by court orders against the current and fixed assets of a debtor during a re-organization attempt; and all such charges can rank in priority to the claims of existing secured lenders. These newly created charges relate to employee wage and expense claims, certain unremitted pension plan contributions, DIP loans, administrative expenses and D&O liabilities. These charges are in addition to the deemed trust for employee source deductions and the rights of suppliers.

Current practice permits judicial discretion to rank these competing charges on a case by case basis. This preserves the speed, cost-effectiveness, flexibility and pragmatism of court-supervised restructurings generally in Canada. The statutory ranking of some or all of these charges (e.g., to expressly state that the security or charges granted for DIP loans, the administrative expenses and D&O liabilities are to rank behind the statutory priority charges for employee source deductions, employee wage and expense claims and the pension plan claims as defined) will have an impact on the ability to effect restructurings and administer insolvent estates in Canada.

The LRTF does not object to the creation of statutory priorities for some employee claims but believes that the courts should continue to have the discretion to make orders ranking the various priorities created by court order on a case by case basis, unless expressly prohibited by statute. As such, the LRTF believes that Bill C-55 should expressly state that the court can specifically make orders to rank priorities of court ordered charges, unless otherwise expressly stipulated by a statutory priority. The LRTF also believes that unless a form of statutory priority is established for administrative expenses, above any and all other statutory priorities, there will be many circumstances where: (a) insolvent debtors will be unable to attract and retain qualified advisors to assist in accomplishing a restructuring; or (b) assets will be abandoned.

(b) No Set-off of Pre-Filing Claims against Post-Filing Obligations

The LRTF recommends that there should be a specific prohibition against the set off of pre-filing claims against post-filing obligations of creditors, to assist the court in resolving these issues.

Bill C-55 does not incorporate the JTF recommendations providing that in a reorganization proceeding: i) the counter-party to an executory contract should have the right to set off pre-filing claims against pre-filing obligations, but not against post-filing obligations; and ii) that the court be

given the power to stay the legal set-off of pre-filing claims against post-filing obligations of the creditor.

History of IIC/CAIRP Positions

The Joint Task Force recommended the following in its original and Draft Supplemental Reports:

Recommendation 6: Provide that the court has jurisdiction to provide that the DIP lien has priority ("prime") over all such other existing security interests as may be specified by the court (except source deduction deemed trusts).

Recommendation 8: Provide that in deciding whether to exercise the power to prime other security interests, the court should be required to use the existing balancing of prejudices/limited prejudice test developed by the courts when exercising inherent jurisdiction.

Recommendation 10: Provide that in the event that a priming DIP lien is enforced, the court has the authority to allocate on a just and equitable basis how the burden of the DIP lien is ultimately to be borne by the primed secured creditors.

Recommendation 44: Provide that during the course of a *CCAA* or *BIA* proposal case, the court has the authority to grant a court-ordered charge in favour of interim receivers and managers, monitors, trustees and other insolvency administrators up to a fixed amount to secure their reasonable fees and expenses, subject to assessment, and up to another fixed amount to indemnify them against third party liability to the extent that insurance is not available on reasonable terms for such liability, with exclusions for willful misconduct and gross negligence.

Recommendation S9: Provide that, in addition to granting the court authority to grant a charge to secure fees and expenses of insolvency administrators, the court should also have the authority to grant a similar charge to secure fees and expenses of counsel to insolvency professionals and the debtor.

Recommendation 47: Provide that during the course of a *CCAA* or *BIA* proposal case, the court has the authority to grant a court-ordered lien up to a fixed amount in favour of the debtor's directors and officers to indemnify them against third party liability for post-filing conduct to the extent that insurance is not available on reasonable terms for such liability, with exclusions for willful misconduct and gross negligence.

Recommendation 71: Provide that the *BIA* priority rules should apply in *BIA* and *CCAA* proceedings and also in the receiverships of insolvent entities.

Recommendation 72: Provide that source deductions should have automatic priority over all secured claims with respect to inventory and accounts receivable, other than PMSIs, but not as against other secured claims.

Recommendation 73: Provide that current priorities with respect to wage claims should be maintained, with clarification that pension contributions are included in wages for the purposes of the *BIA*.

Recommendation S32: …provide that *BIA* section 136 be amended to give employees a super-priority claim for wages and other matters set out in section 136(1)(d) up to $2,000, but including a further $1,000 limit for out of pocket expenses incurred by the employee in the conduct of his [or her] duties.

Recommendation S33: Provide that, if Recommendation S32 is adopted, the super-priority for wage claims should rank ahead of the super-priority for unpaid source deductions.

Recommendation S34: Provide that where a secured creditor pays an amount in respect of an employee's super-priority entitlement, the secured creditor is entitled to any preference of priority that such employee would have been entitled to had that amount not been so paid.

Bill C-55

Bill C-55 codifies the practice of granting court-ordered charges and specifically provides that the security or charge can rank in priority over the claim of any secured creditor of the company.

Bill C-55 does not affect section 81.1(6) of the *BIA,* which provides that a supplier's right to repossess goods pursuant to this section ranks ahead of any other claim, including the claims of secured creditors. Further, s. 81.3(4) regarding wages (up to $2,000) and salesperson expenses (up to $1,000) in a bankruptcy, and s. 81.4(4) regarding wages and expenses (also up to $2,000 and $1,000) in a receivership, provide that except for the existing, amended, ss. 81.1 and 81.2 claims and employee source deductions in 67(3), the security granted to the employee wage and expense claims ranks above every other claim, right, charge or security against the person's current assets.

Subordinate to these prior ranking secured charges, new ss. 81.5(2) and 81.6(2) create a security interest, ranking above every other claim, right, charge or security, regardless or when that charge arose, except for the section 81 and section 67(3) charges noted above, on all the person's assets in both bankruptcy and receivership situations respectively for certain pension plan liabilities.

In *BIA* Part III, Division 1 proposals and *CCAA* reorganizations, Bill C-55 reinforces these liquidation priorities by requiring that no proposal or plan of arrangement shall be approved by the court unless it provides for the payment of unremitted employee source deductions, employees' preferred (now secured) claims, and the pension plan amounts outlined in ss. 81.5 and 81.6. There is provision to waive this requirement if an agreement otherwise is reached and approved by the relevant pension regulator.

Further, in *BIA* Part III, Division 1 proposals and *CCAA* reorganizations, Bill C-55 codifies the practice of permitting secured charges against the assets of the insolvent, which can rank in priority to the claims of existing secured lenders. These charges are:

(a) *BIA* s. 50.6(1) – the court may make an order declaring that the debtor's property is subject to a security or charge in favour of a lender and the court may specify that the security or charge ranks in priority over any secured creditor of the debtor.

(b) *CCAA* s. 11.2 – as above ((a) and (b) collectively "DIP loans").

(c) *BIA* s. 64.2 – the court may make an order declaring that property is subject to a security or charge for: costs of the interim receiver, the receiver-manager and the trustee, including their legal costs; the debtor's costs for financial, legal or other experts; and/or the financial, legal or other expert costs of any interested party. This security or charge may be ordered to rank in priority over the claim of any secured creditor.

(d) *CCAA* s. 11.52 – as above, replacing insolvency administrator with monitor; ((c) and (d), collectively "administrative charge").

(e) *BIA* s. 64.1 – the court may make an order declaring that the assets of a person are subject to a security or charge in favour of any director or officer against post-filing obligations and liabilities incurred as a director or officer. The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the person. Restrictions are noted for available insurance, and gross negligence or wilful misconduct of the director or officer, or in Québec, the director's gross or intentional fault.

(f) *CCAA* s. 11.51 - as above, ((e) and (f) collectively "D&O Charge")

For the most part, Bill C-55 adopts the recommendations of the Joint Task Force relating to the establishment of new super-priorities;

Issue: Bill C-55 leaves discretion to the court to rank the relative priorities of these charges. Bill C-55 should be amended to expressly grant the court authority to rank these charges.

Issue: Bill C-55 should be amended to provide that where a secured creditor pays an amount in respect of an employee's super-priority entitlement, the secured creditor is entitled to any preference of priority that such employee would have been entitled to.

Bill C-55 sets out a limited statutory scheme to rank the relative priorities of the following items in descending order: existing supplier rights, statutory deemed trusts relating to source deductions, the newly created super-priority charges for employee related claims and existing secured claims. It does not, however, provide clarity on the relative priorities of court ordered charges that may be granted in respect of DIP loans, administrative expenses and D&O liabilities, nor does it adequately provide for the cost of administration to be secured above any and all other statutory

priorities, so that insolvent debtors can attract and retain qualified advisors to assist in accomplishing a restructuring or to avoid assets being abandoned.

Issue: **No Set-off of Pre-Filing Claims against Post-Filing Obligations**

Bill C-55 does not incorporate the recommendations of the 2002 JTF Report regarding set off of pre-filing claims against post-filing obligations of creditors. The LRTF recommends that there should be a specific prohibition against the set off of pre-filing claims against post-filing obligations of creditors to assist the court in resolving these issues.

History of IIC/CAIRP Position

The Joint Task Force Report recommended:

> Recommendation 28: Provide that in a reorganization proceeding, the counter-party to an executory contract should have the right to set off pre-filing claims against pre-filing obligations, but not against post-filing obligations.

The JTF Draft Supplemental Report recommended:

> Recommendation S6: Provide that the court has the power to stay the legal set-off of pre-filing claims against post-filing obligations of the creditor.

Bill C-55

Bill C-55 does not specifically prohibit set off of pre-filing claims against post-filing obligations of creditors.

Issue: In reorganization proceedings, the determination of material set off issues can be complex and require court determination. While it is appropriate that the set off rights of parties to contracts, including eligible financial contracts, be permitted to set off pre-filing claims against pre-filing obligations, we believe that it would assist the judiciary and practitioners if a specific statutory prohibition were included in the *BIA* and *CCAA* against set off of pre-filing claims against post-filing obligations.

5. PENSION PLAN PRIORITY

Bill C-55 creates a super-priority for amounts deducted from employees for pension plan contributions that were not remitted to the plan, and for unremitted 'normal cost' plan contributions outstanding as of the date of filing. Normal cost liabilities exclude special payment obligations, which are generally required to be made by an employer-sponsor of a defined benefit plan to fund, over a period of time, unfunded plan liabilities or solvency deficiencies.

Bill C-55 creates a security interest for those amounts, ranking above every other claim, right, charge or security, regardless of when that charge arose on all the debtor's assets in both bankruptcy and receivership situations. This charge ranks behind the deemed trust for employee source deductions, supplier rights to repossess goods, and the super-priority charge against current assets for the limited employee wage and expense claims of $2,000 and $1,000, respectively.

The LRTF supports the super-priority for outstanding amounts that were withheld from employees' remuneration and not remitted to pension plans.

The LRTF believes that the super-priority granted for pension obligations should create a charge against only the current assets of a debtor.

The LRTF believes that the priority amount should be limited to unpaid amounts accruing during the six-month period immediately preceding the bankruptcy or receivership.

The LRTF supports the exclusion of 'special payment' obligations and defined benefit plan deficiencies from the proposed super-priority.

The LRTF supports the provisions in Bill C-55 that permit a proposal or plan to be approved by the court without providing for the payment of outstanding pension plan liabilities if the relevant parties agree and the relevant pension regulator has approved the agreement.

History of IIC/CAIRP Positions

The pension plan super-priority proposed in Bill C-55 cannot be directly associated with specific recommendations of the predecessor IIC/CAIRP Joint Task Force.

The Joint Task Force recommended:

> Recommendation 73: Provide that current priorities with respect to wage claims should be maintained, with clarification that pension contributions are included in wages for the purposes of the *BIA*.

Bill C-55

Discussion points have been split into three sections addressing the amendments as they relate to bankruptcy and receivership liquidations, *BIA* Part III, Division 1 proposals, and *CCAA* administrations.

Section 18.04 (a) Liquidation Scenarios - Bankruptcy and Receivership

The proposals amend the *BIA* by granting super-priorities for s. 81.3 (security for unpaid wages - bankruptcy), s. 81.4 (security for unpaid wages -receivership) and s. 81.5 (security for unpaid pension plan -bankruptcy) and s. 81.6 (security for unpaid pension plan -receivership). We understand that the intention of Bill C-55 is to rank these newly established priorities ahead of the claims of existing lenders who hold security on after-acquired property (i.e. current assets) in the case of wages, etc. and ahead of all secured creditors (including fixed asset or term lenders) in the case of the proposed pension plan priorities.

Proposed *BIA* section 81.5 specifies:

> **81.5 (1)** If the bankruptcy is an employer who participated or participates in a prescribed pension plan for the benefit of the bankrupt's employees, the following amounts that are unpaid on the date of bankruptcy to the fund established for the purpose of the pension plan are secured by security on all assets of the bankrupt:
>
> (a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;
>
> (b) if the prescribed pension plan is regulated by an Act of Parliament,
>
> (i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985,* that was required to be paid by the employer to the fund, and
>
> (ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a

> defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*…

The proposed provision suggests that the amount of pension plan secured should be an amount equal to the sum of all amounts that were deducted from the employees, plus accrued "normal cost" as defined in subsection 2(1) in the *Pension Benefits Standards Regulations, 1985.* Excerpts follow:

> "Normal cost" means the cost of benefits, excluding special payments, that are to accrue during a plan year, as determined on the basis of a going concern valuation. [2]
>
> "special payment" means a payment or one of a series of payments
>
> > (a) that, after December 31, 1986, is determined in accordance with section 9 for the purpose of liquidating an initial unfunded liability or solvency deficiency, or
> >
> > (b) that, before January 1, 1987, was determined in accordance with section 12 of the *Pension Benefits Standards Regulations*, as those Regulations read on December 31, 1986, for the purpose of liquidating an initial unfunded liability or an experience deficiency as defined in those Regulations. [3]
>
> "initial unfunded liability" means the increase on or after January 1, 1987 in the going concern liabilities of a plan or the decrease on or after January 1, 1987 in the going concern assets of a plan as a result of
>
> > (a) the establishment of the plan,
> >
> > (b) an amendment to the plan,
> >
> > (c) a change in the methods or bases of valuation of the plan, or
> >
> > (d) an experience loss [4]
>
> "solvency deficiency" means the extent to which the liabilities of a plan, determined on the basis that the plan is terminated, or on a basis that is certified by an actuary to be reasonably approximate thereto, and that takes into account any significant increases or decreases in benefits to the plan members as a result of the termination, exceed the aggregate of

[2] Subsection 2(1) of the *Pension Benefits Standards Regulations, 1985.*
[3] Subsection 2(1) of the *Pension Benefits Standards Regulations, 1985.*
[4] Subsection 9(1) of the *Pension Benefits Standards Regulations, 1985.*

(a) the value of the assets of the plan, determined on the basis of market value or of a value related to the market value by means of a method using market values over a period of not more than five years to stabilize short-term fluctuations,

(b) the present value of a special payment established pursuant to the *Pension Benefits Standards Regulations*, as those Regulations read on December 31, 1986,

(c) the present value of a special payment in respect of an initial unfunded liability that emerged after December 31, 1986 as a result of benefits granted for a period of employment prior to the effective date of the plan, where such employment had not previously been recognized by the plan,

(d) the present value of any other special payment due in the next five years; and

(e) in respect of a plan that becomes subject to the Act after January 1, 1987, the present value of special payments with respect to an initial unfunded liability that emerged before the plan became subject to the Act, established in a valuation report that has been filed with the Superintendent and, in the Superintendent's opinion, has been prepared

(i) on the basis of actuarial assumptions or methods that are adequate and appropriate,

(ii) in accordance with paragraph 12(3.1)(a) of the Act, and

(iii) prior to the plan becoming subject to the Act. [5]

Proposed section 81.5 (2) of the *BIA* states that the rank of security for pension plan liabilities is subordinate to s. 81.1 (unpaid suppliers) and s. 81.2 (unpaid farmers and fishers), s. 67(3) (employee source deductions), s. 81.3 (security for unpaid wages -bankruptcy), and s. 81.4 (security for unpaid wages -receivership).

Article XIX. **Issue:** Given the special nature of the contract between employees and an employer, the LRTF supports the super-priority for a limited amount of wages, and it is consistent that the LRTF support some pension contribution super-priority for these contractual components of an employee's wage or salary.

The amendments propose establishing a super-priority for certain pension plan liabilities over all assets rather than current assets in the bankruptcy or

[5] Subsection 9(1) of the *Pension Benefits Standards Regulations, 1985*

receivership, which is inconsistent with the statutory security granted for unpaid wages, salaries, commissions in the proposed section 81.3(4). Like unpaid wages, pension plan deductions and contributions are of an operating or current nature and there is no reason in principle why the priority for pension plan liabilities should be extended to attach to fixed or long-term assets.

Bill C-55 does not affect section 81.1(6) of the *BIA,* which provides that a supplier's right to repossess goods pursuant to this section ranks ahead of any other claim, including the claims of secured creditors. Further, ss. 81.3(4) regarding wages (up to $2,000) and salesperson expenses (up to $1,000) in a bankruptcy, and section 81.4(4) regarding wages and expenses (also up to $2,000 and $1,000) in a receivership, provide that except for the existing ss. 81.1 and 81.2 supplier claims and s. 67(3) employee source deduction claims, the security granted to the employee wage and expense claims ranks above every other claim, right, charge or security against the person's current assets.

We note, for analysis purposes only, that such statutory super-priorities will have the effect of potentially reducing available credit to companies from operating lenders (particularly for mature companies with significant defined benefit plans) and will add further uncertainty generally for operating and term lenders in valuing their collateral.

Unlike the super-priority for wages and expenses, there is no time or dollar limit proposed for the amount of the normal cost super-priority. We suggest that this may create a situation where the insolvent debtor chooses to pay other (i.e. D&O) obligations in a cash flow crisis, as these pension liabilities will rank in priority to the claims of existing secured creditors.

If a priority for pension plan liabilities is to be imposed, which will rank ahead of the claims of existing secured creditors, we propose the following amendments to the proposed ss. 81.3 – 81.6 for the purpose of adding certainty for stakeholders in connection with these liabilities, while at the same time balancing the interests of competing creditor groups.

- Any super-priority granted for pension obligations should be against the current assets of a business. Current assets should include those assets ordinarily realizable within one year from the date of the balance sheet or within the normal operating cycle when that is longer than a year. Investments should be classified as current only when capable of reasonably prompt liquidation.[6]

[6] Source: CICA Handbook, S 1510.

- The LRTF supports the super-priority for outstanding amounts that were withheld from employees' remuneration and not remitted to the pension fund.
- The LRTF does not conceptually support the super-priority for employer normal cost contributions owing as of the date of bankruptcy or receivership; however, if normal cost arrears are to be included as a super-priority, we believe the priority amount should be limited to unpaid amounts accruing during the six-month period immediately preceding the bankruptcy or receivership.

Section 19.01 (b) *BIA* Proposals

The *BIA* is amended by adding sections 60(1.5) and (1.6) (unpaid pension plan liabilities in proposal) after section 60(1.1) – (1.4) (pre-requisites for approval of proposal).

Proposed provisions *BIA* sections 60(1.5) and (1.6) specify:

> **60(1.5)** No proposal in respect of an employer who participates in a prescribed pension plan for the benefit of its employees shall be approved by the court unless
>
> (a) the proposal provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:
>
> (i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,
>
> (ii) if the prescribed pension plan is regulated by an Act of Parliament,
>
> (A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985,* that was required to be paid by the employer to the fund, and
>
> (B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985…*

60(1.6) Despite subsection (1.5), the court may approve a proposal that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

The analysis in the *BIA* or receivership liquidation section above is relevant to this proposal. In addition, the LRTF has the following recommendations:

- The LRTF concurs with Bill C-55 that no proposal should be approved by the court unless it provides for payment of outstanding pension plan amounts deducted from employees' remuneration.

- Conceptually, the LRTF believes that the issue of past and future pension obligations in their entirety should be open to negotiation between the parties, with subsequent regulatory approval of amendments if necessary. However, if a super-priority for contribution arrears is to be granted, such priority should be limited to normal cost contributions in arrears up to a maximum of six months.

Section 19.02 **(c) *CCAA* Proceedings**

Section 6 of the *CCAA* is renumbered section 6(1) and is amended by adding sections 6(2) and 6(3) (employee source deductions), section 6(4) (wages), and sections 6(5) and 6(6) (pension plan liabilities).

Proposed ss. 6(5) and 6(6) are:

6(5) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment, immediately after the court sanction, of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985,* that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985…*

6(6) Despite subsection (5), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

The analysis above in the *BIA* or receivership liquidation section, and the comments on *BIA* proposals above are relevant. In addition,

- The liquidating *CCAA* scenario needs to be addressed such that the priorities established in the *BIA* liquidation or receivership are mandated.

6. ACCESS TO INDEPENDENT LEGAL COUNSEL

Section 13.4(1) of the *BIA* provides that a trustee of an estate cannot also act for or assist a secured creditor of the estate without having received a written opinion from a solicitor who does not act for the secured creditor that the security is valid and enforceable against the estate. Section 12 of Bill C-55 expands on section 13.4(1) by effectively defining a solicitor who does not act for the secured creditor as someone who has not acted for the secured creditor in the previous two years and is not related to the trustee.

The objective of section 13.4(1) of the *BIA* appears to be to ensure that the security opinion obtained by the trustee has been provided by an independent professional. However, by defining independence so broadly, it may be difficult in some markets and circumstances for trustees to find a solicitor that would qualify as being independent under the new provision. Further, there

appears to be an unintended differentiation in the standard applied to counsel for a trustee who is also acting as a receiver (who would be subject to the scrutiny of section 13.4(1)), versus counsel who is acting for the trustee only (who may have acted for the secured creditor in the previous two years but would not be subject to section 13.4(1)).

The LRTF supports the objective of the proposed amendments to section 13.4(1) of the *BIA*. However, the LRTF is of the view that the amendments will be awkward in practice and need to be more practically oriented so as to not unduly limit a trustee's access to qualified counsel. The LRTF recommends that Bill C-55 be amended to provide for the ability of the Official Receiver or a court to waive the restriction on the provision of legal services to the secured creditor within the prior two year period, if satisfied that it is necessary to permit the trustee to obtain the benefit of qualified counsel.

7. SUCCESSOR PROTECTIONS

The LRTF strongly supports the provisions in Bill C-55 designed to further clarify the protections currently afforded insolvency administrators from the personal assumption of liabilities that could arise in continuing the business of a debtor, including through the employment of the debtor's former staff members following an appointment.

However, the LRTF recommends that Bill C-55 be amended to clarify the protections provided to insolvency administrators from potential employment related liabilities relating in any way to the pre-appointment period.

The LRTF believes that the objective of insolvency reform in protecting insolvency administrators from successor employer obligations is vitally important and should be designed to:

- promote the continued operation of an insolvent enterprise under the control of insolvency administrators on a going concern basis, where viable, to improve realizations to creditors and sustain employment for the employees;
- permit insolvency administrators to maintain the standard terms and conditions of employment to which employees were accustomed prior to the appointment of the insolvency administrator, where viable, including the payment of wages, vacation pay, pension amounts and other benefits without the risk of assuming liabilities for other claims;

- permit the insolvency administrators to interact in a cooperative and proactive manner with employee representatives in cases involving organized labour;
- insulate insolvency administrators from termination and severance obligations of employees dismissed subsequent to the date of appointment of the insolvency administrator;
- encourage competent individuals to serve as insolvency administrators by providing protection that ensures the potential risks to be assumed through the provision of services do not act as a deterrent;
- promote trade and investment in Canada by providing several potential avenues of recovery in the event that enterprises become financially troubled; and
- ensure the priority of pre-appointment claims is not, in effect, re-ordered by exposing insolvency administrators to claims relating in any way to pre-appointment employment.

The LRTF views the above stated objectives as consistent with public policy objectives directed toward providing sustainable long term employment for individuals. The LRTF believes that amendments to Bill C-55 should be made to apply the following principles, consistent with the above stated objectives:

(a) a clear and unequivocal recognition of the protection afforded insolvency administrators in the exercise of their duties relative to potential successor employer obligations, which would include specification of the potential obligations and liabilities to which the exoneration would be extended; and

(b) an absolute bar of third party leave applications before courts supervising insolvency proceedings seeking determinative declarations of employer status of an insolvency administrator before a labour relations board or tribunal in respect of the role of the insolvency administrator within an insolvency proceeding.

History of IIC/CAIRP Positions

The Joint Task Force recommended the following:

> Recommendation 53: Provide that insolvency administrators shall have no personal liability for vacation pay, severance and termination pay claims arising upon the commencement of, or during the course of,

> insolvency proceedings, and that insolvency administrators shall have no personal liability for unfunded pension plan liabilities.

This recommendation was consistent with the objective of promoting the continuation of operating entities during insolvency proceedings while exploring the possible sale of the insolvent enterprise on a going concern basis, thereby maximizing recovery to the creditors and preserving employment.

The JTF Draft Supplemental Report recommended:

> Recommendation S11: In order to implement Senate Committee Recommendation 29, provide that personal liability of insolvency administrators should be clearly separated from liability of the debtor in addition to specifying the matters in respect of which insolvency administrators are exonerated from personal liability pursuant to recommendation 53.

The recommendation of the Joint Task Force expanded on recommendation 29 included in the Report of the Standing Senate Committee on Banking, Trade and Commerce dated November 2003, which stated:

> The *Bankruptcy and Insolvency Act* be amended to separate clearly the personal liability of an insolvency practitioner from the liability of the debtors' estate.

The recommendation of the Joint Task Force contemplated a listing of the obligations to which the insolvency administrator was protected and otherwise exonerated from personal liability.

Bill C-55

Section 14.06(1.2) of the *BIA* was amended to read (underlined text indicates proposed amendments):

> **(1.2)** Despite anything in any federal or provincial law, if a trustee carries on in that position the business of the debtor or continues the employment of the debtors' employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount if the

claim is in relation to a debt or liability, present or future, to which the debtor is subject on the day on which the trustee is appointed.

This amendment expands upon the existing provision of Section 14.06(1.2) of the *BIA* in a non-comprehensive fashion. The amendments fail to specify the matters in respect of which the insolvency administrator is exonerated from personal liability and, in many respects, does not clarify in any substantive manner a separation of the obligations between the debtors' estate and the insolvency administrator. The LRTF believes that clarification and separation of the potential liabilities and obligations can only be achieved through specification of the potential liabilities and obligations and the relevant nature and period of exoneration relative to each.

Issue: The potential successor employer obligations to which an insolvency administrator may become exposed from the continuation of a debtor's business and retention of the debtor's former employees perversely affects the ability of an insolvency administrator to promote the fundamental intent of most insolvency proceedings, which is to maximize the recovery to the creditors while preserving the underlying business enterprise and employment. The LRTF has identified below many of the substantive potential liabilities and obligations to which an insolvency administrator may become exposed immediately following its appointment and/or during the course of an insolvency proceeding. It is likely that the myriad of potential liabilities and obligations may require more substantial and creative amendments to Bill C-55 than currently proposed, to protect the insolvency administrator from the risk of attracting successor employer obligations and in order to meet the objectives set out above.

Nature of Obligation	Potential Successor Employer Liability
Wages	➢ Unpaid arrears
Vacation Pay	➢ Unpaid arrears
Pension Plans / Savings Plans ➢ Multi-employer ➢ Defined benefit	➢ Employee contributions: ▪ Deducted and unremitted amounts ▪ Contributions not made during insolvency period ➢ Employer contributions: ▪ Unpaid arrear amounts ▪ Contributions not made during insolvency period ➢ Solvency deficiencies on partial or full wind up and/or special payments following actuarial determination of pension plan assets and liabilities.
➢ Defined contribution ➢ Group RRSP	➢ Employee contributions: ▪ Deducted and unremitted amounts ▪ Contributions not made during insolvency period ➢ Employer contributions: ▪ Unpaid arrear amounts ▪ Contributions not made during insolvency period
Termination and Severance Pay	➢ Employee entitlement based on recognition of years of service, including mass termination provisions in certain provinces
Pay Equity Adjustments	➢ Unpaid arrears
Collective Agreement specific: ➢ Individual grievances ➢ Policy grievances ➢ Retroactive pay adjustments ➢ Mediation and arbitration: ▪ proceedings ▪ awards	 ➢ Assumed obligation ➢ Assumed obligation ➢ Assumed obligation ➢ Assumed obligation ➢ Unpaid amounts
Human Right Complaints	➢ Assumed only in exceptional circumstances

A clear and unequivocal recognition of the protection afforded insolvency administrators in the exercise of their duties, relative to potential successor employer obligations, would permit the insolvency administrator an opportunity to exercise a sound principle of reorganization of a company with an organized labour force; the ability to re-negotiate with the employees' labour representative the terms of employment and compromise of outstanding pre-appointment claims

to which a purchaser may become subject. This re-negotiation may ultimately result in preserving employment through the establishment of a viable business entity.

- These negotiations could only be undertaken if there was an absolute bar of third party leave applications before the court supervising the insolvency proceeding for a determinative declaration of the employer status of the insolvency administrator before a labour relations board or tribunal in respect of the role of the insolvency administrator within the insolvency proceeding, as the mere act of negotiating terms of employment may create grounds for a leave application and a determinative review of employer status.

- The practice of insolvency administrators to date has been too sever the employment of the employees immediately following the appointment, which in many instances occurs simply by the operation of law. The insolvency administrator then immediately offers engagement to those employees, on a day to day basis and on terms and conditions to which the insolvency administrator determines appropriate, necessary to assist the insolvency administrator in fulfilling its mandate. This process offers limited comfort to an insolvency administrator that a third party leave application to the court for leave to bring an application to a labour relations board or other tribunal will not follow the appointment and cause the insolvency administrator to be subject to many of the liabilities and obligations highlighted above. In these circumstances the insolvency administrator has primarily sought the protection of the court from granting the leave application, where the insolvency administrator is retaining the employees incidental to fulfilling its mandate of realizing upon the assets for the benefit of the creditors. The insolvency administrator derives limited comfort from the protection when, as a result of market conditions or otherwise, the realization proceedings become protracted.

The LRTF would seek specific clarification within the legislation to address two key fundamental areas of employment legislation to which successor employer obligation could arise: pension plans, and termination and severance obligations. In addition, the LRTF offers potential conceptual remedies with respect to these areas, without defining the amendment, which would permit an effective means of enhancing post insolvency administrator engagement of the former employees. The conceptual remedies are outlined below:

- Pension Plan Payments – The LRTF advocates amendments that would permit the insolvency administrator to contribute a defined amount to a pension plan, defined benefit or otherwise, without attracting the “employer” status that attaches to the

insolvency administrator on the making of the payment. The LRTF is, in essence, seeking a remedy to correct what many in the professional insolvency community view as an error of public policy in the court's decision in *Re St. Marys Paper Inc*. (1994), 26 CBR (3d) 273. The outcome of such an amendment would be to permit on-going contributions towards an employees' pension plan, without attracting potential successor employer liabilities for solvency deficiencies that may exist before the insolvency proceeding commenced or arose during the insolvency period.

- Termination and Severance Obligations – The LRTF advocates amendments that clearly separate the period of service of employees that occurred prior to the appointment of the insolvency administrator with service that accrued during the period of the insolvency proceeding. Current practice, as outlined above, is to terminate and re-engage the employees of the debtor for purpose of fulfilling the mandate of the insolvency administrator, attempting to limit the termination and severance obligations that may arise on future terminations of employee(s), which could include the closure of the operating enterprise if it is subsequently determined that a financially viable entity does not exist, and which obligations could include a mass termination provision. The amendment would recognize that in calculating the termination and severance entitlement of severed employees subsequent to the engagement by an insolvency administrator, only the period of service subsequent to the appointment of the insolvency administrator would be considered for purposes of calculating termination and severance pay in accordance with the provincial employment legislation.

The LRTF is not advocating for the amendment of legislation that would in any way limit successor employer liability to purchasers of the operating entity. Purchasers of the operating entities will address the potential exposure through adjustments to the purchase price or otherwise; thereby the potential successor employer obligations are a manageable liability to a purchaser, reflected in the forefront of their thinking when balancing the risks of purchase with the potential of an equity investment.

Schedule C

COMPARATIVE CHARTS OF JTF RECOMMENDATIONS AND BILL C-55

The Legislative Review Task Force (Commercial)

of

The Insolvency Institute of Canada

and

The Canadian Association of Insolvency and Restructuring Professionals

CONSOLIDATED COMPARATIVE CHART
BILL C-55 & RECOMMENDATIONS OF THE IIC/CAIRP JOINT TASK FORCE

(COMMERCIAL)

August 2005

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
INTERIM FINANCING						
1	Provide in CCAA cases for an express statutory power to authorize borrowing ("D.I.P. loans") and grant security in specified amounts for post-filing advances and supplies of goods and services necessary to fund the debtor during the restructuring proceedings, such power to be authorized according to criteria to be specified in the statute.	128	N/A	N/A	11.2, 11.4	**Recommendation wholly adopted**
S1	Provide in BIA proposals for an express statutory power to authorize borrowing ("D.I.P. loans") and grant security in specified	36	50.6(1)	**Recommendation partially adopted** New BIA section 50.6(1) provides	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	amounts for post-filing advances and supplies of goods and services necessary to fund the debtor during the restructuring proceedings, such power to be authorized according to criteria to be specified in the statute.			for a statutory power to authorize borrowing and grant security in specified amounts for post-filing advances. There is no provision that specifically provides for granting security for supplies of goods and services necessary to fund the debtor during the restructuring proceedings (as provided in the CCAA)		
2	Provide that in deciding whether or not to authorize a D.I.P. loan, the court should consider amongst other things, the following factors: (a) what arrangements have been made for the governance of the debtor during the proceedings; (b) whether management is trustworthy and competent, and has the confidence of significant creditors; (c) how long will it take to	36, 128	50.6(4)	**Recommendation partially adopted** Paragraph (b) of the recommendation is replaced by: (c) whether the company's management has the confidence of its major creditors. Paragraph (c) of the recommendation is replaced by:	11.2(5)	**Recommendation partially adopted** Paragraph (b) of the recommendation is replaced by: (c) whether the company's management has the confidence of its major creditors. Paragraph (c) of the recommendation is replaced by: (a) the period during

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	determine whether there is a going concern solution, either through a reorganization or a sale, that creates more value than a liquidation; (d) whether the D.I.P. loan will enhance the prospects for a going concern solution or rehabilitation; (e) the nature and value of the assets of the debtor; (f) whether any creditors will be materially prejudiced during that period as a result of the continued operations of the debtor; and (g) whether the debtor has provided a detailed cash flow for at least the next 120 days.			(a) the period during which the company is expected to be subject to proceedings under this Act.		which the company is expected to be subject to proceedings under this Act. Paragraph (g) of the recommendation is omitted. New CCAA section 11.2(1) provides that the court's decision to approve financing should have regard to the cash flow statement filed by the company pursuant to new CCAA section 10(2)(a) (see Bill C-55 section 127). The cash flow statement is not required to cover any specified period.
S2	Provide that a further factor be added to Recommendation 2, being whether the D.I.P. loans are necessary for the continuation of the business operations of the debtor or the	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	preservation of its assets.					
3	Provide automatic statutory protection for D.I.P. lenders and debtors against tort damages and other claims for entering into court authorized D.I.P. loans in breach of pre-filing covenants and other obligations.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
4	Provide that the court order itself can create the D.I.P. lien on the property of the debtor described therein without the need for security documents.	-	-	**Recommendation not expressly adopted**	-	**Recommendation not expressly adopted**
5	Provide that the D.I.P. lien need not be registered in order to be effective against pre-filing creditors or a trustee in bankruptcy, but notice of the order must be registered under the provincial personal property security laws applicable in the locality of the debtor, and against title to real estate in order to have priority over subsequent purchasers (with protection for purchasers acting in the ordinary course of business) and secured lenders acting for value and without notice of the court order.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
6	Provide that the court has jurisdiction to provide that the D.I.P. lien has priority ("prime") over all or such other existing	36, 128	50.6(2)	**Recommendation adopted** The court is given authority to	11.2(3), 11.4(4)	**Recommendation adopted** The court is given authority to

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	security interests as may be specified by the court (except source deduction deemed trusts).			specify that a security or charge granted in favour of a D.I.P. lender ranks in priority over the claim of any secured creditor. No express exception is made for source deduction deemed trusts.		specify that a security or charge granted in favour of a D.I.P. lender ranks in priority over the claim of any secured creditor. No express exception is made for source deduction deemed trusts.
7	Provide that the court shall not prime a registered or possessory security interest without at least 48 business hours notice to the affected secured creditor.	36, 128	50.6(1)(c)	**Recommendation partially adopted** When granting a security interest or charge in favour of a D.I.P. lender (other than a temporary charge effective for 30 days from the filing of a notice of intention or a proposal) the court must give prior notice to secured creditors likely to be affected by the security or charge. There is no stipulation as to when such notice must be given.	11.2(1)(b)	**Recommendation partially adopted** When granting a security interest or charge in favour of a D.I.P. lender (on an application in respect of a company other than the initial application) the court must give prior notice to secured creditors likely to be affected by the security or charge. There is no stipulation as to when such notice must be given.
8	Provide that in deciding whether to exercise the power to prime other security interests, the court should be required to use the existing balancing of prejudices/limited prejudice test developed by the courts when exercising	-	-	**Recommendation not adopted** **[Material prejudice to creditors is, however, listed as a factor for the court's consideration**	-	**Recommendation not adopted** **[Material prejudice to creditors is, however, listed as a factor for the court's consideration when deciding**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	inherent jurisdiction.			**when deciding whether to make an order creating a charge in favour of a D.I.P. lender (see new BIA section 50.6(4)(f)).]**		**whether to make an order creating a charge in favour of a D.I.P. lender (see new CCAA section 11.2(5)(f)).]**
9	Provide that at the time a priming D.I.P. lien is authorized, the court be given the statutory power to authorize and create liens to protect the primed secured creditors to the extent that they are prejudiced by reason that upon enforcement the proceeds of the collateral of such secured creditors are used to repay the D.I.P. loan (with the same rules concerning registration, priority, appeals etc. applying to such liens as apply to D.I.P. liens).	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
10	Provide that in the event that a priming D.I.P. lien is enforced, the court has the authority to allocate on a just and equitable basis how the burden of the D.I.P. lien is ultimately to be borne by the primed secured creditors.	-	-	**Recommendation not expressly adopted**	-	**Recommendation not expressly adopted**
11	Provide that with respect to advances authorized by a court order and made prior to receipt by the D.I.P. lender of written notice of any subsequent order (whether made by way	-	-	**Recommendation not expressly adopted** **[Further clarification is**	-	**Recommendation not expressly adopted** **[Further clarification is**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	of appeal or otherwise) varying, staying or rescinding the authorizing order, that the rights of D.I.P. lender under the authorizing order with respect to such advances shall not be affected by such subsequent order.			**needed regarding the priority of liens granted by the court.]**		**needed regarding the priority of liens granted by the court.]**
12	Provide (in both CCAA and BIA proposal cases) that unsecured claims for goods and services (including real property and true personal property leases) provided (in the ordinary course of business and consistent with the statutes and any court orders) post-filing have priority over pre-filing unsecured claims.	128	-	**Recommendation not adopted**	11.4(3)	**Recommendation partially adopted** If the court declares a person to be a "critical supplier" of the debtor company, and orders that person to supply goods or services to the debtor company, the court must declare that the debtor company's property is subject to a security interest or charge in favour of the critical supplier in respect of goods or services supplied by that person.
13	Provide (in both the CCAA and BIA proposal cases) that after filing, the debtor should not obtain additional credit from any person, including a supplier or a lender, without first giving the person appropriate notice of the proceeding.	131	-	**Recommendation not adopted**	23(1)(a)(i)	**Recommendation partially adopted** The monitor must publish, in one or more newspapers, a notice containing prescribed information relating to a debtor company's initial application once each week for two consecutive weeks.

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
14	Provide that the court shall not permit a CCAA or BIA proposal case to continue if it is not satisfied that adequate arrangements have been made for payment for post-filing goods and services.	-	-	**Recommendation not expressly adopted** **[Bill C-55 does, however, provide for mechanisms by which the court may police a debtor's cashflow (see, for example, new BIA section 50.4(7)(c).]**	-	**Recommendation not expressly adopted** **[Bill C-55 does, however, provide for mechanisms by which the court may police a debtor's cashflow (see, for example, new CCAA section 23(1)(d)).]**
15	Provide (in both CCAA and BIA proposal cases) that no payments are to be made or security granted with respect to pre-filing unsecured claims without prior court approval (obtained after the initial order), except that with the prior written consent of the monitor/trustee (unless otherwise ordered by the court) the following pre-filing claims can be paid: (a) source deductions; (b) wages (including accrued vacation pay), benefits and sales tax remittances not yet due or not more than seven (7) days overdue at the date of	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	filing; and (c) reasonable professional fees (subject to subsequent assessment) incurred with respect to the filing.					
16	Provide (in both CCAA and BIA proposal cases) that no payments are to be made or additional security granted with respect to pre-filing secured claims (including security leases) that are subject to the stay without the prior approval of the court.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
17	Provide that during a reorganization proceeding if there is no readily available alternative source of reasonably equivalent supply, then in order to prevent hostage payments the court has jurisdiction, on notice to the affected persons, to order any existing critical suppliers of goods and services (even though not under pre-filing contractual obligation to provide goods or services) to supply the debtor during the reorganization proceeding on normal pricing terms so long as effective arrangements are made to assure payment for post-filing supplies.	128	-	**Recommendation not adopted**	11.4	**Recommendation wholly adopted** (see new CCAA section 11.4) **[No provision for "effective arrangements…to assure payment for post-filing supplies." Only provision that court must grant security interest to critical supplier.]**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
GOING CONCERN AND ASSET SALES *****Please Note: Recommendations 18 to S4 apply to CCAA proceedings and not BIA proposal proceedings. There is a division of views and no consensus on whether it is advantageous to give the debtor the same powers in a BIA proposal proceeding as in a CCAA proceeding.*****						
18	Provide that in CCAA cases the debtor may with the prior approval of the court sell part of its assets and/or business out of the ordinary course of business in order to downsize and/or raise capital for a restructuring plan.	131	N/A	N/A	36	**Recommendation partially adopted** New CCAA section 36 permits a court to authorize a sale of a debtor's assets out of the ordinary course of the debtor's business. No express limitation restricts the court's ability to authorize such a sale in connection with purposes other than downsizing or capital raising.
19	Provide that in CCAA cases the debtor may with the prior approval of the court sell all or substantially all of its assets and business on a going concern basis.	131	N/A	N/A	36	**Recommendation wholly adopted**
20	Provide that in deciding whether or not to exercise its authority to approve a material sale in the course of a CCAA proceeding, amongst other considerations, the court shall have regard to whether the sales process has been	131	N/A	N/A	36(3)	**Recommendation partially adopted with additions** New CCAA section 36(3) includes all of the factors for the court's

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	conducted: (a) in a fair and reasonable manner; (b) by an insolvency administrator; (c) by a credible, independent chief restructuring officer reporting to a credible, independent restructuring committee of the board of directors either with or without supervision of the court; and/or (d) in consultation with major creditors.					consideration enumerated in the recommendation. The list of factors included in section 36(3) is non-exhaustive and includes the following additional factors: (c) whether the monitor has filed with the court a report stating that in his or her opinion the sale or disposal of the assets would be more beneficial to the creditors than if the sale or disposal took place under the *Bankruptcy and Insolvency Act*; (e) the effects of the proposed sale or disposal on the creditors and other interested parties; and (f) whether the consideration to be

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
						received for the assets is reasonable and fair, taking into account the market value of the assets.
S3	Provide that another factor to be added to Recommendation 20 should be whether the sales process has been conducted by a qualified independent sales party reporting to an independent committee of the board of directors, either with or without supervision of the court.	-	N/A	N/A	-	**Recommendation not adopted**
21	Provide that absent exceptional circumstances, the court shall not approve a sale if controlling shareholders, directors, officers or senior management of the debtor have a significant financial interest in the purchaser or in the sales transaction, unless there was a proper sales process either subject to court supervision or conducted by persons acting independently of such persons.	131	N/A	N/A	36(4)	**Recommendation partially adopted** Under new CCAA section 36(4), factors for the court's consideration when authorizing the sale or disposal of assets to a person related to the debtor company are as follows: (a) good faith efforts were made to sell or dispose of the assets to person who are not related to the company or who are

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
						neither directors or officers of the company nor individuals who control it; and (b) the consideration to be received is superior to the consideration that would be received under all other offers actually received in respect of the assets.
22	Provide that the court has the power to vest assets (and to make any ancillary orders necessary to give effect thereto) wherever located, that are subject to a court approved sale, in the purchaser free of any interest of the debtor or of persons (including the debtor's secured creditors) claiming through the debtor, with the proceeds of such sale being automatically subject to the same secured claims in the same priorities as the assets were immediately before the time of vesting.	131	N/A	N/A	36(5)	**Recommendation wholly adopted**
23	Provide that provincial bulk sales legislation	-	N/A	N/A	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	does not apply to sales approved by the court.					
24	Provide that in connection with a sale approved by the court, the debtor and the applicable insolvency administrators may provide the purchaser with information subject to privacy laws restrictions, provided that the purchaser agrees to comply with the policies, if any, of the debtor with respect to privacy and with applicable privacy laws.	-	N/A	N/A	-	**Recommendation not adopted**
25	Provide that if the debtor is to cease carrying on business and all or substantially all of its remaining assets are to be realized upon or sold other than on a going concern basis, that unless otherwise agreed by the unsecured creditors of the debtor pursuant to a plan of arrangement or proposal, the debtor is to be placed into bankruptcy or receivership.	-	N/A	N/A	-	**Recommendation not adopted**
S4	Provide that in the context of a sale or sale process administered by a debtor or insolvency administrator, the debtor or the insolvency administrator may, with prior approval of the court, enter into agreements that call for the payment of costs or fees, including,	-	N/A	N/A	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	(i) reimbursement of costs incurred by a prospective purchaser or bidder and (ii) break fees payable to a bidder in circumstances where it submits a bid and the debtor subsequently elects to proceed with a higher bid submitted by another party, which is subsequently approved by the court. provided that such fees or costs are reasonable in the circumstances, having regard to the nature of the transaction, the value of the assets in question and such other factors as the court considers appropriate.					

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
EXECUTORY CONTRACTS (INCLUDING COLLECTIVE BARGAINING AGREEMENTS)						
26	Provide that in CCAA proceedings, BIA proposals and BIA liquidation proceedings, the debtor (with the prior written consent of the monitor/trustee) or the trustee in bankruptcy should have the power to disclaim executory contracts (including real property leases) existing as of the date of commencement of proceedings subject to the following limitations: (a) the right of disclaimer should not apply to eligible financial contracts, or to other financing agreements including security leases where the debtor is the borrower or lessee; (b) where the debtor is the lessor of real or personal property, or the licensor of intellectual property, the disclaimer should not affect the rights of the counter-party to maintain possession and use of the leased or licensed	44, 131	65.11	**Recommendation partially adopted** The recommendation is not adopted with respect to BIA liquidation proceedings. New BIA section 65.11 permits a debtor company in respect of whom a notice of intention or proposal has been filed, to disclaim certain contracts by giving 30 days notice, in the prescribed manner, to the other parties to such contracts. Prior written consent of the trustee is not expressly required. The debtor company is not permitted to disclaim a lease referred to in Subsection 65.2(1) of the BIA. The debtor company is not	32	**Recommendation partially adopted** New CCAA section 32 permits a debtor company to disclaim certain contracts by giving 30 days notice to the other parties to such contracts. Prior written consent of the monitor is not expressly required. The debtor company is not permitted to disclaim a real property lease if the debtor is the lessor under any circumstances (see new CCAA section 32(2)(d)). Paragraph (c) of the recommendation is not adopted.

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	property, subject to the counter-party continuing to perform its obligations under the applicable lease or licence except to the extent that its payment obligations thereunder would have been released (but for the disclaimer) by it setting off valid claims for damages for the debtor's failure to perform its obligations after the date of a disclaimer; and (c) to the extent that any payments made pre-filing pursuant to an executory contract for the purchase of property created a lien or ownership rights in certain assets of the debtor according to the law applicable to the assets, upon disclaimer of the executory contract the purchaser should have a lien on those assets subject to any security interests or other claims having priority over such pre-filing lien or			permitted to disclaim a real property lease if the debtor is the lessor under any circumstances (see new BIA section 65.11(2)(e)). Paragraph (c) of the recommendation is not adopted.		

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	ownership rights.					
S5	Provide that, upon request, the debtor must give the counterparty and/or the court an explanation of the business reason for the disclaimer of the counterparty's contract.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
27	Provide that if such disclaimer rights are exercised in the course of a CCAA or BIA proposal case, the counter-party should have a provable pre-filing unsecured claim in the proceedings for any termination damages (determined according to existing formula in the case of real property leases) but no set-off rights with respect thereto.	44, 131	65.11(6)	**Recommendation partially adopted** No explicit restriction of set-off rights is included.	32(6)	**<u>CCAA</u>** **Recommendation partially adopted** No explicit restriction of set-off rights is included. Calculation of termination damages for real property leases is not explicitly determined.
28	Provide that in a reorganization proceeding, the counter-party to an executory contract should have the right to set off pre-filing claims against pre-filing obligations, but not against post-filing obligations.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S6	Provide that the court has the power to stay the legal set-off of pre-filing claims against post-filing obligations of the creditor.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
29	Provide that in connection with a court approved going concern sale of all or any part	68, 128	84.1	**Recommendation partially**	11.3	**Recommendation partially adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	of the debtor's business, the purchaser may receive an assignment of any executory operating contracts (for greater certainty, not including eligible financial contracts) applicable to such business.			**adopted** The court may make an order assigning a debtor rights and obligations under any agreement. Such an assignment need not necessarily be made in connection with a going concern sale of all or a part of the debtor's business. A collective agreement may not be assigned (see new BIA section 84.1(3)(c)). An agreement may not be assigned if it is not assignable by reason of its nature (see new BIA section 84.1(3)(d)). Bill C-55 does not expressly authorize the court to assign an executory contract despite a provision in the contract itself prohibiting such an assignment.		The court may make an order assigning a debtor company's rights and obligations. Such an assignment need not necessarily be made in connection with a going concern sale of all or a part of the debtor's business. A collective agreement may not be assigned (see new CCAA section 11.3(3)(b)). An agreement may not be assigned if it is not assignable by reason of its nature (see new CCAA section 11.3(3)(c)). Bill C-55 does not expressly authorize the court to assign an executory contract despite a provision in the contract itself prohibiting such an assignment.
30	Provide that trustees in bankruptcy and court-appointed receivers should have the power to assign executory contracts (not including	68	84.1	**Recommendation partially adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	eligible financial contracts) both in connection with going concern transactions and on a liquidation basis.			On application of the debtor or a trustee, the court may make an order assigning a debtor's rights and obligations under any agreement. A collective agreement may not be assigned (see new BIA section 84.1(3)(c)). An agreement may not be assigned if it is not assignable by reason of its nature (see new BIA section 84.1(3)(d)). Bill C-55 does not expressly authorize the court to assign an executory contract despite a provision in the contract itself prohibiting such an assignment.		
S7	In order to partially implement Senate Committee Recommendation 31, provide that assignments of executory contracts are conditional on payment of debts due and owing up to the date of the assignment and the assignee becoming responsible for performance of the debtor's obligations	68, 128	84.1(4), 84.1(5)	**Recommendation partially adopted** New BIA section 84.1(5) provides that the court may not make an assignment if it "is satisfied that the insolvent person is in default	11.3(4), 11.3(5)	**Recommendation partially adopted** New CCAA section 11.3(5) provides that the "court may not make an order assigning an agreement unless it is satisfied that all financial defaults in relation to the agreement will be

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	following the assignment.			under the agreement." **[Whereas new CCAA section 11.3(5) provides that an assignment may not be made unless the court is satisfied that all <u>financial</u> defaults will be remedied, default is not limited to financial default under new BIA section 84.1(5).]** Section 84.1(4) provides that in deciding whether to make an assignment, the court must consider, among other things, (a) whether the assignee would be able to perform the obligations; and (b) whether it would be appropriate to assign the rights and obligations to		remedied." Section 11.3(4) provides that in deciding whether to make an assignment, the court must consider, among other things, (a) whether the assignee would be able to perform the obligations; and (b) whether it would be appropriate to assign the rights and obligations to that person.

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
				that person.		
31	Provide that the foregoing rights to assign should not be limited by any prohibition on assignment contained in the executory contract, but should not be applicable to any executory contract which under the general law applicable to the contract is not by its nature assignable.	68, 128	84.1(3)(d)	**Recommendation partially adopted** No explicit provision authorizes the court to assign an executory contract despite the existence of a contractual restriction against such assignment.	11.3(3)(c)	**Recommendation partially adopted** No explicit provision authorizes the court to assign an executory contract despite the existence of a contractual restriction against such assignment.
32	Provide that the court may prohibit the assignment of an executory contract if the counter-party establishes that either: (a) the proposed assignee does not meet, in a material way, lawful criteria reasonably applied by the counter-party before entering into similar agreements (e.g. franchise agreements); or (b) the proposed assignee is less credit worthy than the debtor was when the executory contract was entered into, and	68, 128	84.1(4)	**Recommendation partially adopted** In deciding whether to authorize the assignment of an executory contract, the court must consider, among other things: (a) whether to whom the rights and obligations are to be assigned would be able to perform the obligations; and (b) whether it would be appropriate to	11.3(4)	**Recommendation partially adopted** In deciding whether to authorize the assignment of an executory contract, the court must consider, among other things: (a) whether to whom the rights and obligations are to be assigned would be able to perform the obligations; and (b) whether it would be appropriate to assign the rights and

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	(c) reasonable assurances of payment have not been provided with respect to any credit required to be extended to the assignee by the counter-party under the executory contract after the assignment.			assign the rights and obligations to that person. New BIA section 66(1.1) requires that, when deciding whether to authorize the assignment of a contract in connection with a BIA proposal, the court must also consider whether the insolvent person would not be able to make a viable proposal without the assignment.		obligations to that person.
33	Provide that in the event of a CCAA filing, an executory contract (other than an eligible financial contract or financing agreement) should not be subject to termination by reason of the proceedings or the insolvency of the debtor.	131	N/A	N/A	34	**Recommendation partially adopted** No exception is made for financing agreements. The section only applies when an order has been made under the CCAA in respect of a debtor company. The section does not apply where the debtor company is simply insolvent. **[New CCAA section 11.05 provides, however, that no order of the court under**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
						new CCAA section 11.02 may be made that stays or restrains any right to terminate, amend, claim an accelerated payment under or forfeit an eligible financial contract.]
34	Provide that in the event of a CCAA or BIA proposal case, any provision in an executory contract (other than an eligible financial contract) that by reason of the proceeding or the insolvency of the debtor changes the provisions of the executory contract in a manner that is materially adverse to the debtor's interests is void.	68, 131	84.2	**Recommendation partially adopted** The section only applies in a bankruptcy.	34(5)	**Recommendation partially adopted** The section only applies when an order has been made under the CCAA in respect of a debtor company. The section does not apply where the debtor company is simply insolvent. **[New CCAA section 11.05 provides, however, that no order of the court under new CCAA section 11.02 may be made that stays or restrains any right to terminate, amend, claim an accelerated payment under or forfeit an eligible financial contract.]**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
35	Provide that in the event of any insolvency proceeding with respect to a debtor, any provision in an executory contract (other than an eligible financial contract) that entitles the counter-party by reason of the proceedings or the insolvency of the debtor to purchase property of the debtor for a total consideration that is less than current fair market value is void.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
36	Provide that in connection with the approval of a plan of arrangement or proposal or of a sale in the course of a CCAA proceeding, the court has summary jurisdiction to declare an executory contract to be in full force and effect so long as there is no material uncured default other than the failure to pay pre-filing monetary claims.	-	N/A	N/A	-	**Recommendation not adopted**
37	Provide for express statutory recognition in the CCAA and BIA of the distinction between security leases and true leases of personal property, with security leases being treated as secured financings.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S8	In order to implement Senate Committee Recommendation 30, provide that special provision should be made, along the lines of	-	-	**Recommendation not adopted** Unlike section 1113 of the United	-	**Recommendation not adopted** Unlike section 1113 of the United

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	section 1113 of the United States Bankruptcy Code (see Appendix A), for the disclaimer and modification of collective bargaining agreements.			States Bankruptcy Code, the BIA does not provide for disclaiming of collective bargaining agreements. However, pursuant to section 65.12 of the new BIA, an insolvent person in respect of whom a notice of intention is filed or a proposal is filed who is a party to a collective agreement and who is unable to reach a voluntary agreement with the bargaining agent, may apply to the court for an order authorizing the insolvent person to serve a notice to bargain. Any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.		State Bankruptcy Code, there is no provision for disclaiming of collective bargaining agreements. Pursuant to section 33 of the new CCAA, a debtor company to a collective agreement and that is unable to reach a voluntary agreement with the bargaining agent, may apply to the court for an order authorizing the company to serve a notice to bargain. Any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
GOVERNANCE (INCLUDING INDEPENDENCE ISSUES/ROLE OF THE MONITOR)						
38	Provide statutory authority during CCAA and BIA proposal cases for the court to appoint an interim receiver and manager (being a licensed trustee in bankruptcy) in order to protect the debtor's estate or the claims of creditors, with such authority as the court may determine including the authority to manage the reorganization proceedings.	30	47	**Recommendation partially adopted** New BIA section 47(1) gives the court the authority to appoint an interim receiver. An interim receiver must be a trustee (see new BIA section 47(4)).	-	**Recommendation not adopted**
39	Provide that during the course of a CCAA or BIA proposal case, the court has the authority to replace some or all of the existing directors of the debtor if the governance structure of the debtor is impairing or could impair the process of developing and implementing a going concern solution.	42, 128	64	**Recommendation wholly adopted with additions** The court may remove any director of a debtor if the court is satisfied that the director is unreasonably impairing, or is likely to unreasonably impair, the possibility of a viable proposal being made, or is likely to act inappropriately as a director in the circumstances (see new BIA section 64(1)). The court is authorized to fill any	11.5	**Recommendation wholly adopted with additions** The court is authorized to fill any vacancy on a debtor company's board of directors created by the court's decision to remove a director (see new CCAA section 11.5(2)).

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
				vacancy on a debtor company's board of directors created by the court's decision to remove a director (see new BIA section 64(2)).		
40	Provide that the directors and officers, and applicable insolvency administrators, have a duty to notify the court on a timely basis if they have actual knowledge that there is a material risk that the debtor will be unable to pay wages or other debts being incurred during the course of a restructuring proceeding.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted** **[New CCAA section 23(1)(d)(i) does, however, obligate a monitor to file a report with the court on the state of the debtor company's business and financial affairs after ascertaining any material adverse change to the company's projected cashflow or financial circumstances.]**
41	Provide that in exercising their duties during the course of a reorganization proceeding, the debtor's directors and officers and the applicable insolvency administrators shall take into account the priority of the claims of	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	creditors and equity holders, and the apparent value of those claims in light of the likely range of values of the business and assets of the debtor.					
42	Provide that an interim receiver or a receiver within the meaning of section 243 of the BIA (excluding mortgagees in possession and other secured creditors directly enforcing their security) and a CCAA monitor must be a licensed trustee in bankruptcy.	31, 115, 129	47(1), 243(4)	**Recommendation wholly adopted**	11.7(1)	**Recommendation wholly adopted**
43	Provide that a monitor must, prior to its appointment, make written disclosure to the court of its business and legal relationships with the debtor.	-	N/A	N/A	-	**Recommendation not adopted**
44	Provide that during the course of a CCAA or BIA proposal case, the court has the authority to grant a court-ordered charge in favour of interim receivers and managers, monitors, trustees and other insolvency administrators up to a fixed amount to secure their reasonable fees and expenses, subject to assessment, and, up to another fixed amount to indemnify them against third party liability to the extent that insurance is not available on reasonable terms for such liability, with exclusions for wilful	44, 128	64.2	**Recommendation partially adopted** New BIA section 64.2 permits the court to subject the debtor company's property to a security or charge in respect of the costs of the interim receiver, receiver and trustee (and the legal costs of each), and costs associated with financial, legal, and other experts	11.52	**Recommendation partially adopted** New CCAA section 11.52 permits the court to subject the debtor company's property to a security or charge in respect of the costs of the monitor and costs associated with financial, legal, and other experts retained by the monitor or the company. The section also allows for the creation of a charge in favour of

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	misconduct and gross negligence.			retained by the debtor. The section also allows for the creation of a charge in favour of an interested party in some circumstances for costs incurred by that interested party. No express provision is made for a charge securing a fixed amount to indemnify insolvency administrators although the court is permitted to create such a charge in favour of the debtor company's directors and officers (see Bill C-55 section 42, new BIA section 64.1).		an interested party in some circumstances for costs incurred by that interested party. No express provision is made for a charge securing a fixed amount to indemnify insolvency administrators although the court is permitted to create such a charge in favour of the debtor company's directors and officers (see Bill C-55 section 128, new CCAA section 11.51).
S9	Provide that, in addition to granting the court authority to grant a charge to secure fees and expenses of insolvency administrators, the court should also have authority to grant a similar charge to secure fees and expenses of counsel to insolvency professionals and the debtor.	42, 128	64.2	**Recommendation wholly adopted**	11.52	**Recommendation wholly adopted**
45	Provide that the same rules concerning registration, priority, appeals, etc. shall apply to charges in favour of insolvency	-	-	**Recommendation not adopted** The court is authorized, however,	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	administrators as apply to D.I.P. liens.			to specify that a charge created for costs ranks in priority over the claim of any secured creditor (see new BIA section 64.2(2)).		
46	Provide that service of the initial CCAA order or of notice of the commencement of a BIA proposal case on an insurer that provides unexpired directors' and officers' insurance, shall be deemed to be notice within the policy period of all claims that are subsequently made against the directors and officers relating to the failure of the debtor to pay pre-filing claims or the insolvency of the debtor.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
47	Provide that during the course of CCAA or BIA proposal cases, the court has the authority to grant a court-ordered lien up to a fixed amount in favour of the debtor's directors and officers to indemnify them against third party liability for post-filing conduct to the extent that insurance is not available on reasonable terms for such liability, with exclusions for wilful misconduct and gross negligence.	42, 128	64.1	**Recommendation wholly adopted**	11.51	**Recommendation wholly adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
48	Provide that the same rules concerning registration, priority, appeals, etc. shall apply to charges in favour of directors and officers as apply to D.I.P. liens.	-	-	**Recommendation not expressly adopted** **[Further clarification is needed regarding the priority of liens granted by the court.]**	-	**Recommendation not expressly adopted** **[Further clarification is needed regarding the priority of liens granted by the court.]**
49	Provide that when deciding whether or not to grant a charge in favour of the directors and officers, particularly in CCAA cases, the court shall consider whether the debtor's board has established appropriate governance mechanisms, whether by establishing an independent board committee, retaining a CRO or other means, for the proper management of the debtor's affairs during the course of the restructuring proceedings.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
50	Provide that during the course of a restructuring proceeding the debtor shall not pay, or enter into an agreement to pay, retention bonuses, success fees, severance or termination pay or other extraordinary remuneration to its senior management, officers and directors without prior court approval, but that if so approved, the court shall have the discretion to provide that	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	payment of all or part of those amounts are secured by a directors' and officers' charge.					
51	Provide that the debtor's independent directors have protection from any personal statutory liability otherwise arising from the debtor's failure to pay pre-filing debts (e.g. wages, vacation pay, GST, etc.) so long as the debt is not more than seven (7) days overdue at the time of the commencement of a CCAA or BIA proposal case.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
52	Provide that directors and officers shall have no personal liability for severance and termination pay claims arising during the course of a reorganization proceeding.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S10	In order to implement Senate Committee Recommendation 25, provide for a general due diligence defence with respect to pre-filing statutory claims, in addition to specifying the matters for which independent directors (Recommendation 51) and directors and officers (Recommendation 52) are exonerated from personal liability.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
53	Provide that insolvency administrators shall have no personal liability for vacation,	17	14.06(1.2)	**Recommendation partially**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	severance and termination pay claims arising upon the commencement of, or during the course of, insolvency proceedings, and that insolvency administrators shall have no personal liability for unfunded pension plan liabilities.			**adopted** A trustee is not personally liable for any claim against the debtor or related to a requirement imposed on the debtor to pay an amount if the claim is in relation to a debt or liability, present or future, to which the debtor is subject on the day on which the trustee is appointed.		
S11	In order to implement Senate Committee Recommendation 29, provide that personal liability of insolvency administrators should be clearly separated from liability of the debtor in addition to specifying the matters in respect of which insolvency administrators are exonerated from personal liability pursuant to Recommendation 53.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
54	Provide that the court has the statutory authority to establish claims bar processes with respect to court created indemnity charges to facilitate the timely reduction of those charges during the course of the proceeding and their timely release at the end of the proceeding.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
S12	Provide that shareholder meetings of public companies during the restructuring process are not required unless authorized by the court.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S13	In order to partially implement Senate Committee Recommendation 35, provide that a proposed specified professional be required to file with the court, at the time of application for the CCAA initial order in the case of the monitor and other specified professionals retained at that time and at the time of application for confirmation in the case of other professionals, disclosure information with respect to the professional's prior involvement with the debtor.	-	N/A	N/A	-	**Recommendation not adopted** **[But note that new CCAA section 11.7(2) provides restrictions on who may be a monitor based on the trustee's prior involvement with the debtor.]**
S14	In order to partially implement Senate Committee Recommendation 35, provide that the CCAA and BIA require in respect of restructuring proceedings involving more than $5 million in claims that, after reasonable notice, the engagement of all specified professionals other than those acting for the debtor be confirmed by the court within a reasonable period of time after the making of the initial filing in the case of specified professionals retained at that time, and	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	otherwise in advance of being retained.					
S15	In order to partially implement Senate Committee Recommendation 35, provide that the CCAA and BIA require that, after reasonable notice, the engagement of lawyers acting for monitors or trustees under proposals where the aggregate claims of creditors are $5 million or more or that are proposed to act in a representative capacity and be paid by the estate be confirmed by the court in advance of being retained.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S16	Provide that the court has the power to remove a specified professional.	129	-	**Recommendation not expressly adopted** **[But note that under current BIA section 14.04, the court, on the application of any interested person, may for cause remove a trustee and appoint another licensed trustee in the trustee's place.]**	11.7(3)	**Recommendation partially adopted** New CCAA section 11.7(3) authorizes the court to replace a monitor where the court considers it appropriate in the circumstances to do so.
S17	Provide that the party with the primary obligation to advance a position and adduce	-	N/A	N/A	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	evidence before the court should be the applicant and not the monitor.					
S18	Provide that the monitor, unless otherwise required by the court, should avoid taking any legal position or filing a factum regarding contested legal disputes among other parties.	-	N/A	N/A	-	**Recommendation not adopted**
S19	Provide for an amendment to CCAA section 11.7 to stipulate that the primary roles of the monitor are (a) to monitor the activities of the debtor for the benefit of all interested parties and the court, and (b) to work impartially with the debtor and all interested parties to facilitate the restructuring process.	-	N/A	N/A	-	**Recommendation not adopted**
PLAN APPROVALS						
55	Provide expressly for the court to have the authority to establish claims bar dates for voting and/or distribution purposes under the CCAA, and for appropriate summary proceedings to resolve disputes.	130	N/A	N/A	12	**Recommendation partially adopted** New CCAA section 12 authorizes the court to establish claims bar dates for voting purposes. No express provision authorizes the court to establish claims bar dates for

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
						distributions.
56	Provide that the proof of claim date for CCAA plans shall be the date of the initial order.	131	N/A	N/A	19	**Recommendation wholly adopted with additions** New CCAA section 19 provides that the only claims that may be dealt with by a compromise or arrangement under the CCAA are claims relating to liabilities (including contingent liabilities) to which the debtor company was subject on the earlier of: (a) the date of the initial application; and (b) if the company filed a notice of intention under the BIA or an application was made under the CCAA with the consent of inspectors under the BIA, the date of the initial bankruptcy event under the BIA.

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
57	Provide that in a CCAA proceeding, the debtor is required to obtain court approval of the classification of creditors proposed in its plan of arrangement before the plan is circulated to the creditors for voting purposes.	131	N/A	N/A	22	**Recommendation wholly adopted**
58	Provide that the "head count" test provided for with respect to creditor class approval for a reorganization be eliminated to reflect the development of vulture capital markets, and provide for the repeal of section 110 of the BIA.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
59	Provide that the rule contained in section 54(3) of the BIA should apply in CCAA cases.	-	N/A	N/A	-	**Recommendation not adopted**
60	Provide that in connection with the court application to approve a reorganization plan, the applicable insolvency administrator be required to provide an opinion that it is reasonable to expect that any dissenting creditors will not receive less under the plan that they would receive in a liquidation.	-	-	**Recommendation not adopted** **[A trustee under a proposal is, however, currently obligated to circulate a report to creditors in advance of a meeting to consider the proposal.]**	-	**Recommendation not adopted** **[A monitor must, however, promptly advise the court if it is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the BIA (see new CCAA section 23(1)(h)).**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
						A monitor must also advise the court on the reasonableness and fairness of any compromise or arrangement proposed between the company and its creditors (see new CCAA section 23(1)(i)).]
61	Provide that a court approving a reorganization plan has the power to approve a reorganization of the equity of the debtor, either with or without shareholder approval.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
62	Provide that all claims against a debtor in an insolvency proceeding that arise under or relate to an instrument that is in the form of equity, including claims for payment of dividends, redemption or retraction or repurchase of shares, and damages (including securities fraud claims) are to be treated as equity claims subordinate to all other secured and unsecured claims against the debtor, and which can be extinguished as against the debtor, in the discretion of the court, in connection with the approval of a reorganization plan either with or without the	90	140.1	**Recommendation partially adopted** A creditor is not entitled to claim a dividend payment in respect of a claim related to the creditor's role as shareholder until all claims of the other creditors have been satisfied.	-	**Recommendation not adopted** **[New CCAA section 22(3) does, however, provide that creditors having a claim against the debtor arising in connection with damages for, or rescission of, a purchase or sale of a share or unit of the debtor must be placed in the same class and may not vote at a meeting of creditors.]**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	approval of the parties asserting such claims.					
PREFERENCES						
63	Provide for uniform rules under both the CCAA and BIA for challenging fraudulent preferences, conveyances at under-value and other reviewable transactions (collectively, "reviewable transactions"), with a CCAA monitor or a trustee under a proposal being authorized to exercise the same powers as a trustee in bankruptcy.	73	96, 96.1	**Recommendation partially adopted** New BIA section 96.1 provides for treatment of "undervalue transactions". Bill C-55 includes no comparable provisions relating to the CCAA.	-	**Recommendation not adopted**
64	Provide for a complete code in federal insolvency law for challenging reviewable transactions by or on behalf of creditors, so that upon the commencement of insolvency proceedings, provincial laws (including the oppression remedy under corporate law) would no longer apply and a single national standard would be applicable.	73	96.1	**Recommendation partially adopted** New BIA section 96.1 provides for the treatment of undervalue transactions. Bill C-55 includes no similar provisions relating to the CCAA.	-	**Recommendation not adopted**
S20	Provide generally for more effective remedies with respect to payments, conveyances and	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	other transactions involving non-arm's length parties that reduced the value of the debtor's estate.					
S21	Provide that the existing preference periods under federal law (which would apply both to the BIA and the CCAA) be extended to 5 years with respect to non-arm's length parties, and 1 year for arm's length parties.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S22	Provide with respect to preference actions that the existing presumption of debtor intent cannot be rebutted by non-arm's length creditors with respect to preferential transactions occurring within the 1 year period before the date of the initial bankruptcy event or initial CCAA order.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S23	Provide for the replacement in BIA and CCAA proceedings of the existing causes of action for settlements (BIA, s. 91) and reviewable transactions (BIA, s. 100) with a new single cause of action for undervalue transfers (which would also be used in place of provincial fraudulent conveyance laws). "Undervalue transfers" would be broadly defined to include, without limitation, conveyances of property, the provision of services and the occurrence of	2, 73	2, 96.1	**Recommendation partially adopted** BIA sections 91 and 100 are repealed. The definition of "transfer at undervalue" is added to the definitions in s. 2 of the BIA:	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	obligations by the debtor where the fair market value of the consideration received by the debtor was conspicuously less than the fair market value given by the debtor (e.g. the debtor's estate was conspicuously depleted by the transaction).			"transfer at undervalue" means a transaction in which the consideration received by a person is conspicuously less than the fair market value of the property or services sold or disposed of by the person in the transaction; New BIA subsections 96.1(2) & (3) provide where there is a transfer at undervalue, the court may give judgment to the trustee against the other party to the transaction for the difference between the actual consideration received by the debtor and the fair market value (2) for transactions at arm's length, if the transaction occurred within one year of the initial bankruptcy event, and the debtor was insolvent at the time of (or rendered insolvent by) the transaction, and the debtor intended to defeat the interests of		

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
				creditors. (3) for a transaction not at arm's length, if the transaction occurred within one year of the initial bankruptcy event; OR if the transaction occurred within 5 years of the initial bankruptcy where the debtor was insolvent at the time of (or rendered insolvent by) the transaction, and the debtor intended to defeat the interests of creditors.		
S24	Provide that the time periods for attacking undervalue transactions (referable to the period before the initial bankruptcy event or initial CCAA order) should be 5 years with respect to non-arm's length parties and 1 year with respect to arm's length parties.	73	96.1	**Recommendation wholly adopted with additions** The time period for attacking undervalue transactions for non-arm's length transactions is 5 years if the debtor was insolvent at the time of the transaction (or was rendered insolvent by the transaction) or the debtor intended to defeat the interests of creditors.	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
S25	Provide that, with respect to non-arm's length parties, if the undervalue transfer occurred more than one year before the initial bankruptcy event or initial CCAA order, in order to attack the transaction it would have to be established that either (a) the debtor was insolvent at the time of, or was rendered insolvent by, the transaction, or (b) the debtor had fraudulent conveyance intent.	73	96.1(3)	**Recommendation wholly adopted**	-	**Recommendation not adopted**
S26	Provide that, with respect to arm's length parties, in order to attack the transaction it would have to be established that both (a) the debtor was insolvent at the time of, or was rendered insolvent, by, the transaction, and (b) the debtor had fraudulent conveyance intent.	73	96.1(2)	**Recommendation wholly adopted**	-	**Recommendation not adopted**
S27	Provide that an insolvency administrator, within 5 years before the initial bankruptcy event or initial CCAA order for non-arm's length parties, or 1 year for arm's length parties, may challenge the debtor's payment of dividends, return of capital or redemption or buy-back of shares upon proof that the debtor was insolvent at the time or that the transaction rendered the debtor insolvent.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
S28	Provide, to the extent applicable in a business context (e.g. the debtor is the sole proprietor of a business), similar to protection in the case of a consumer insolvency, for an additional safe harbour for payments made in compliance with a family law court order or pursuant to a bona fide agreement between spouses for alimony or support payments that could otherwise have been the subject of a family law court order.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S29	Provide that, when pursuing a non-arm's length party under one of the foregoing provisions, the plaintiff has the right to recover any share of the improper benefit directly or indirectly received from the transaction by any privy, where "privy" would be defined as a person not at arm's length to the non-arm's length creditor, transferee, shareholder, financier, director or officer, as the context may require.	73	96.1	**Recommendation partially adopted** New BIA subsections 96.1(2) & (3) provide where there is a transfer at undervalue, the court may give judgment to the trustee against the other party privy to the transaction for the difference between the actual consideration received by the debtor and the fair market value.	-	**Recommendation not adopted**
S30	Provide that creditors have BIA section 38-type remedies in BIA proposal and CCAA proceedings in respect of all causes of action	-	-	**Recommendation not adopted**	-	

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	referred to in S15 to S22, inclusive, above (but without limiting the power of insolvency administrators to settle those claims subject to due process).					
S31	Provide for a limitation period of 3 years from the date of the initial bankruptcy event or initial CCAA order to pursue the preference, undervalue transfer, creditor oppression and other related remedies provided for under federal law.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
65	Provide for the expansion of section 100 and/or the adoption of an oppression type remedy to create a more flexible mechanism for dealing with reviewable transactions, subject to creating safe harbour provisions.	73	96.1	**Recommendation partially adopted** New BIA section 96.1 provides for the treatment of undervalue transactions.	-	**Recommendation not adopted**
66	Provide for the continuation of the English subjective test for preference provisions.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
67	Provide specific safe harbour provisions for certain transactions involving financiers unrelated to and dealing at arm's length with the debtor, including:	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	(a) eligible financial contracts; (b) sales pursuant to securitizations; (c) security given before, or as condition of, making advances including security delivered on margin calls, unless a material portion of proceeds of advances are used to repay unsecured obligations owed to the lenders or are otherwise received by the lenders or parties related to the lenders; and (d) guarantees from parent corporations of borrowings by its direct or indirect subsidiaries.					
68	Provide that the court has the power to reduce or eliminate waiver fees, forbearance fees, work fees, default interest and other additional compensation paid to lenders and other creditors of the debtor within a specified period prior to the commencement of an insolvency proceeding as a result of defaults or	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	expiry of credit facilities, if the court concludes such compensation was manifestly excessive in relation to additional risk and time being incurred or consideration provided by the creditors.					
69	Provide that there is no doctrine of equitable subordination in Canada.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
70	Provide for conflict of law rules with respect to reviewable transactions modelled after the PPSA conflict of law rules.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
PRIORITIES						
71	Provide that the BIA priority rules should apply in BIA and CCAA proceedings and also in the receiverships of insolvent entities.	-	-	**Recommendation not adopted** **[Further clarification is needed regarding the priority of liens granted by the court.]**	-	**Recommendation not adopted** **[Further clarification is needed regarding the priority of liens granted by the court.]**
72	Provide that source deductions should have automatic priority over all secured claims with respect to inventory and accounts receivable, other than purchase money security interests,	-	-	**Recommendation not adopted** **[Further clarification is needed regarding the**	-	**Recommendation not adopted** **[Further clarification is needed regarding the**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	but not as against other secured claims.			**priority of liens granted by the court.]**		**priority of liens granted by the court.]**
73	Provide that current priorities with respect to wage claims should be maintained, with clarification that pension contributions are included in wages for the purposes of the BIA.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S32	In order to implement Senate Committee Recommendation 20, provide that BIA section 136 be amended to give employees a super-priority claim for wages and the other matters set out in section 136(1)(d) up to the maximum amount recommended by Senate Committee Recommendation 20 ($2,000), but including a further $1,000 limit for out of pocket expenses incurred by the employee in the conduct of his duties.	67	81.3, 81.4	**Recommendation partially adopted** New BIA section 81.3 specifies that the super-priority claim for wages is for claims of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation for services rendered during the six months immediately before the date of bankruptcy is secured. New BIA section 81.4 provides that the further $1,000 limit is for the claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
				bankrupt's business during the six months immediately before the date of bankruptcy is secured.		
S33	Provide that, if S32 is adopted, the super-priority for wage claims should rank ahead of the super-priority for unpaid source deductions.	-	-	**Recommendation not adopted**	N/A	N/A
S34	Provide that where a secured creditor pays an amount in respect of an employee's super-priority entitlement, the secured creditor is entitled to any preference of priority that such employee would have been entitled to had that amount not been so paid.	-	-	**Recommendation not expressly adopted** **[But note the treatment of secured creditors under new BIA sections 136(1)(d.01) and 136(1)(d.02).]**	-	N/A
74	Provide that existing 30-day suppliers' rights should be repealed entirely.	-	-	**Recommendation not adopted** **[Existing 30-day suppliers' rights are preserved in Bill C-55 section 66.]**	N/A	N/A
75	Provide that if the existing 30-day rights are retained, the existing provisions should be left unamended except to foreclose the possibility			**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	of greater revendication and resolution rights arising under provincial law during the course of insolvency proceedings.					
76	Provide that the insolvency statutes should expressly recognize voluntary contractual subordination and provide that subordination can be enforced during the course of insolvency proceedings by the debtor, applicable insolvency administrators or other creditors notwithstanding third party beneficiary/privity of contract rules.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S35	Provide that the legislation should be amended to specifically provide that the court should be permitted to approve a proposal or sanction a plan of arrangement notwithstanding that any class of creditors ranking, either by statute law or by agreement, subordinate to all or part of the body of general unsecured creditors may have voted against the plan or proposal.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
BANKRUPTCY REMOTENESS/RISK MANAGEMENT						
77	Provide that a business trust is subject to liquidation under the BIA, but cannot be	2	2	**Recommendation partially**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	reorganized.			**adopted** New BIA section 2 amends the definition of "person" to include an "income trust". An "income trust" is defined as a trust that has assets in Canada and the units of which are traded on a prescribed stock exchange. No provision expressly prohibits the reorganization of an income trust under the BIA.		
S36	In order to implement Senate Committee Recommendation 38, provide that the BIA and CCAA should provide for reorganization, as well as liquidation, of business trusts, but the reorganization provision should not apply to securitization trusts and other special purpose financing trusts.	-	-	**Recommendation not expressly adopted** **[But note treatment of Recommendation 77]**	-	**Recommendation not expressly adopted** **[But note treatment of Recommendation 77]**
78	Provide that a corporation that is designated as a special purpose vehicle in its constating documents, has no employees and has no assets other than financial assets relating to a specific financing transaction and publicly	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	traded securities, cannot be subject to consolidated reorganization proceedings or a consolidated reorganization plan under the CCAA or BIA.					
79	Provide that financiers unrelated to and dealing at arm's length with the debtor are not stayed in reorganization proceedings from enforcing security over marketable securities for amounts owing under an eligible financial contract.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
80	Provide that an agreement between a senior creditor and a subordinate creditor entered into at the time of the subordinate creditor's financing giving the senior creditor the power to control the vote of the subordinate creditor in a reorganization is enforceable, unless the subordinate creditor satisfies the court that the terms of the reorganization plan with respect to the subordinate creditor are manifestly unjust.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S37	Provide that Recommendation 80 be generalized so as to be applicable to any voting agreements entered into between creditors, whether or not entered into at the moment of a new financing, or whether or not	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	in respect of a priority arrangement.					
ONE STATUTE OR TWO?						
81	Provide that there shall continue to be two reorganization systems, one for big companies (CCAA) and one for smaller corporations and other entities (BIA proposals).	125	-	**Recommendation not expressly adopted**	3	**Recommendation wholly adopted with additions** New CCAA section 3 provides that the CCAA is to apply in respect of a debtor having liabilities in excess of $5,000,000 or any other prescribed amount.
82	Provide that a CCAA monitor shall make the following filings with the Superintendent's Office for record keeping purposes: (a) initial CCAA order within 10 days; (b) debtor's initial list of creditors within 30 days; (c) if a reorganization plan is	131	N/A	N/A	23	**Recommendation partially adopted** New CCAA section 23(1)(f) requires the monitor to file with the Superintendent of Bankruptcy a copy of each document specified by regulation.

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	consummated, a copy of the plan, the sanction order and a brief statement of affairs within 30 days; and (d) if all or substantially all of the debtor's business is sold during the course of the proceeding, a brief statement of affairs within 30 days of closing.					
INCOME TAX						
83	Provide that distress preferred share treatment for tax purposes can be afforded for a specified period of time to qualifying debt by simply filing a notice of election without any need to actually convert the debt into preferred shares.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
84	Provide that upon consummation of a plan of arrangement, the debtor can elect to use fresh start accounting for tax purposes as if it were a new taxpayer (including valuing its assets at fair market value), with prior tax obligations being dealt with as pre-filing claims.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
S38	Provide that a new provision be added to section 244 of the BIA specifically providing that Canada Revenue Agency provide 10 days advance notice of its intention to issue an enhanced requirement to pay under section 224 of the *Income Tax Act* or section 317 of the *Excise Tax Act.*	-	-	**Recommendation not adopted**	N/A	N/A
S39	Provide that upon commencement of an insolvency proceeding, accounts receivable that have vested in the Crown pursuant to an enhanced requirement to pay but that have not been collected should revest in the estate.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S40	Provide that, in the case of accounts receivable collected pursuant to an enhanced requirement to pay issued pursuant to section 317 of the *Excise Tax Act* in the interval between the date of a petition and the date of a receiving order, the Crown should remit the amounts so collected to the estate.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S41	Provide, if Recommendations S39 and S40 are adopted, that the GST component of accounts receivable should be subject to a deemed trust claim securing GST notwithstanding the commencement of insolvency proceedings.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
S42	Provide that the existing deemed trust under section 222 of the *Excise Tax Act* is terminated by the commencement of proceedings under the CCAA as well as under the BIA.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
INTERNATIONAL INSOLVENCIES						
85	Consider retaining the existing international provisions of the CCAA and the BIA with minor amendments since in substance they have worked successfully.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
86	Whether the existing law is retained or the Model Law is adopted, provide for new provisions to ensure that Canadian creditors' interests are properly represented in any foreign proceeding by providing that as a condition precedent to the recognition by the court of foreign insolvency proceedings, the court must either appoint a creditor's committee or a licensed trustee as a monitor with the powers stipulated by the court, and ensure provisions are in place to provide the creditors' committee or monitor with reasonable funding.	-	-	**Recommendation not expressly adopted** (see new BIA section 272(1)(d)) **[But note that new BIA section 272(1)(d) authorizes the court to appoint a trustee as receiver of the debtor's property in Canada if an order recognizing a foreign proceeding is made.]**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
S43	Provide that, if the Model Law is adopted, the applicable statutory provisions should include a reciprocity requirement that it will only apply with respect to a foreign insolvency proceeding if the applicable foreign jurisdiction has adopted the Model Law.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S44	As an alternative to S43, provide that, if the Model Law is adopted, the applicable statutory provisions should not be proclaimed in force unless and until the Model Law is adopted and is in force in the United States.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S45	Provide that any adoption of the Model Law include a provision granting Canadian courts the discretion to determine, depending upon the circumstances of a case, that dual full insolvency proceedings with respect to the same debtor are appropriate.	-	-	**Recommendation not expressly adopted**	-	**Recommendation not expressly adopted**
S46	Provide that in ancillary proceedings, if the Model Law is adopted, the court would have the discretion to appoint a creditors committee as a condition of recognizing the foreign proceeding, taking into consideration all the circumstances of the case, on such terms as the court may determine.	-	-	**Recommendation not expressly adopted**	-	**Recommendation not expressly adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
OTHER ISSUES						
S47	Provide for amendments to the BIA and the CCAA to grant the court discretion to facilitate, approve and assist in the implementation of settlements of significant contingent mass tort claims that if realized would render the debtor corporation insolvent including, without limitation, providing the courts with the express power for that purpose to grant channelling injunctions.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
S48	Provide that Senate Committee Recommendation 28 be implemented.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
TECHNICAL RECOMMENDATIONS						
T1	**Amendments to the definition of "Secured Creditor"** **Recommendation.** Provide for amended definitions of "secured creditor" in the *CCAA* and *BIA* so that both read as follows (the following is blacklined against the existing	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	BIA definition): "**secured creditor**" means a person holding a right that creates in substance a security interest in property of the debtor, without regard to its form or to the person who has title to property, including a person holding a mortgage, hypothec, pledge, charge or lien, on or against the property of the debtor or any part of that property, as security for a debt due or accruing due, or for the performance of any other obligation owed, to the person from the debtor or any other person, including debts or obligations owed jointly or jointly and severally, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the Civil Code of Quebec or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, and (b) any of (i) the vendor of any					

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	property sold to the debtor under a conditional or instalment sale, (ii) the purchaser of any property from the debtor subject to a right of redemption, or (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation, if the exercise of the person's rights is subject to the provisions of Book Six of the Civil Code of Quebec entitled Prior Claims and Hypothecs that deal with the exercise of hypothecary rights;					
T2	**Amendment to the definition of "Insolvent Person"** **Recommendation.** Provide for an increase in the minimum level of indebtedness for a person to fall within the definition of insolvent person from $1,000 to $5,000.	-	-	**Recommendation not adopted**	N/A	N/A
T3	**Delivery of validity and enforceability opinion by trustee** **Recommendation.** Provide that the period of time specified in section 13.4(2) of the *BIA* within which a trustee that also acts for a secured creditor must provide the	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	Superintendent with a legal opinion as to the validity and enforceability of such secured creditor's security as against the estate of the bankrupt be lengthened from two to five days.					
T4	**Environmental liability of receivers** **Recommendation.** Provide that the class of persons who may benefit from the limitation of liability for certain environmental matters provided under section 14.06(1.1) of the *BIA* be extended.	17	14.06(1.1)	**Recommendation wholly adopted** The class of persons that may benefit from the limitation of liability provisions includes "a trustee in a bankruptcy or proposal…an interim receiver…a receiver within the meaning of subsection 243(2)", and has been extended to include: > any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
				insolvent person or bankrupt.		
T5	**Disclaimer of environmentally contaminated real property** **Recommendation.** Provide for an amendment to section 14.06(4)(c) of the *BIA* whereby real property affected by an order of a regulatory body should be abandoned or released to the party who issued the order or, if it is a court order, the party who applied for the order. **Recommendation.** Provide for an amendment to section 14.06(4) of the *BIA* so that, if a trustee incurs costs in connection with real property prior to the making of an order, the trustee would be entitled to a first ranking charge against the real property or any proceeds of disposition of the real property in the amount of the costs incurred.	-	-	**Recommendation not adopted**	N/A	N/A
T6	**Trustee's obligation to make returns** **Recommendation.** Provide for an amendment to section 22 of the *BIA* that the trustee is responsible for making any return that the bankrupt was required to make during the	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	period that commences one year prior to the commencement of the calendar year or at the commencement of the fiscal year of the bankrupt where that is different from the calendar year in which he became a bankrupt. **Recommendation.** Provide for an amendment to section 149(4) of the *BIA* to clarify that the section refers to the duty of a trustee to make returns in accordance with section 22 of the *BIA*.					
T7	**Short-term investments.** **Recommendation.** Provide for an amendment to section 25 of the *BIA* to authorize inspectors or the court to allow investments of substantial funds in a large bankruptcy in short term government backed securities.	20(3)	25(1.4)	**Recommendation wholly adopted with additions** (1.4) A trustee may, with the permission of the court, invest the funds in short-term securities of the Government of Canada or the government of a province held in trust for the estate.	N/A	N/A
T8	**Payments by cheque**	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	Recommendation. Provide that section 25(2) of the *BIA* which requires that payments by a trustee out an estate trust account be made by cheque be repealed.					
T9	**Limitation of trustee fees** **Recommendation.** Provide that section 39 of the *BIA* which limits the remuneration that a trustee may receive to 7½ % of the value of unencumbered assets be repealed.	-	-	**Recommendation not adopted**	N/A	N/A
T10	**Partnership provisions** **Recommendation.** Provide for an amendment to sections 43(15), 43(16) and 142 of the *BIA* to make clear that the bankruptcy of a partnership does not result in the bankruptcy of the partners.	-	-	**Recommendation not adopted**	N/A	N/A
T11	**Proposal-related documents** **Recommendation.** Provide for an amendment to section 50(2) of the *BIA* that a trustee to whom documents relating to a proposal are provided is required to file such documents with the Official Receiver.	34	50(2.1)	**Recommendation wholly adopted** (2.1) Copies of the document referred to in subsection (2) must, at the time the proposal is filed under subsection 62(1),	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
				also be filed by the trustee with the official receiver in the locality of the debtor.		
T12	**Cash-flow statements** **Recommendation.** Provide for an amendment to section 50(6) of the *BIA* that the projected cash-flow statement filed by a trustee in accordance with section 50(6)(a) should cover the period of time from the beginning of the proceedings until the estimated date on which court approval of the proposal will be granted. **Recommendation.** Provide for an amendment to section 50.4(9) of the *BIA* to require the filing of a revised or updated cash-flow statement in connection with an application to extend the period within which an insolvent person may file a proposal.	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
T13	**Harmonization of the *BIA* and *CCAA*** **Recommendation**. Provide for an amendment to sections 50(15) and 50.4(7)(b) of the *BIA* to harmonize these provisions with those similar provisions that apply in *CCAA* proceedings.	-	-	**Recommendation not adopted** **[Note: Section 11.7(3) of the CCAA was replaced. The duties of monitors to file adverse change reports is now in section 23(d) of the CCAA (See Bill C-55, section 131).]**	N/A	N/A
T14	**Filing requirements** **Recommendation.** Provide for amendments to the applicable sections of the *BIA* to require the filing with a licensed trustee to implement the following: When — There should also be filed — Applicable Section of the *BIA* a) filing a Notice of Intention; — a resolution of the board of directors of the insolvent person authorizing the filing of the Notice of Intention. — 50.4 b) filing a notice of assignment; and — a resolution of the board of directors of the insolvent person authorizing the filing of the assignment. — 49 c) filing a proposal — (i)a resolution of the board of directors of the insolvent person authorizing the filing of the proposal; and (ii)a sworn statement of affairs — 62(1)	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	of the insolvent person.					
T15	**Recipients of Notice of Intention materials** **Recommendation.** Provide for an amendment to section 50.4(6) of the *BIA* to made it clear that all documents filed with a licensed trustee in connection with the filing of a Notice of Intention should be sent to every known creditor.	35	50.4(6)	**Recommendation wholly adopted**	N/A	N/A
T16	**Material adverse change reports** **Recommendation.** Provide for an amendment to section 50.4 (7) of the *BIA* to require a trustee to distribute a report to every known creditor where the trustee ascertains a material adverse change in the insolvent person's projected cash-flow or financial circumstances.	35	50.4(7)	**Recommendation wholly adopted** Section 50.4(7)(c) adds that the trustee under a notice of intention (c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change	N/A	N/A
T17	**Court approval of proposals and plans** **Recommendation.** Provide for an amendment to section 58(b) of the *BIA* to reduce the 15-day notice period in respect of an application for Court approval of a proposal approved by	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	the creditors.					
T18	**Deemed trust proofs of claim** **Recommendation.** Provide for an amendment to section 81 of the *BIA* to expressly provide for the filing of a Proof of Claim by Canada Revenue Agency for a deemed trust. The provision should provide that the trustee has 60 days from receiving the Proof of Claim to admit or reject the claim. Canada Revenue Agency will then have 30 days to respond to a disallowance.	-	-	**Recommendation not adopted**	N/A	N/A
T19	**Registration of general assignment of book debts** **Recommendation.** Provide that section 94 of the *BIA* be repealed to eliminate the requirement for the registration of general assignments of book debts.	-	-	**Recommendation not adopted**	N/A	N/A
T20	**Minutes of creditors meetings** **Recommendation.** Provide for an amendment to section 105(4) of the *BIA* that minutes of meetings of creditors be retained as part of the	79	105(4)	**Recommendation wholly adopted** New BIA section 105(4) provides that minutes "shall be retained as part of the books, records and	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	records of proceedings of an estate.			documents referred to in section 26 relating to the administration of the estate."		
T21	**Workers' wage claims** **Recommendation.** Amend section 126 of the *BIA* to authorize the Court to appoint a representative to file claims on behalf of employees.	87	126(2)	**Recommendation wholly adopted**	N/A	N/A
T22	**Failure to file proof of security** **Recommendation.** Provide for an amendment to section 128 of the *BIA* to clarify that when a secured creditor fails to timely file a proof of security in response to a request from the trustee, and the trustee sells the property subject to the security, the fees and expenses of the trustee should be a charge on the proceeds ranking in priority to such secured creditor.	-	-	**Recommendation not adopted**	N/A	N/A
T23	**Voting rights of creditors appealing disallowances** **Recommendation.** Provide for an amendment to section 54 of the *BIA* that a vote on a	37	54(5)	**Recommendation wholly adopted** 54(5) Unless the court orders otherwise, a vote on	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	proposal shall not be finalized until all disallowances of claims by the trustee have either been dealt with by the Court or the 30 day appeal period following all disallowances has elapsed.			a proposal may not be held until all disallowances of claims that could have an impact on the outcome of the vote have been dealt with by the court or until all appeal periods have elapsed.		
T24	**Obsolete transitional provision** **Recommendation.** Provide that section 136(j) of the *BIA* which confers preferred status on Crown claims against the estates of persons that became bankrupt prior to a prescribed date be repealed.	-	-	**Recommendation not adopted**	N/A	N/A
T25	**Examination notes available to creditors** **Recommendation.** Provide for an amendment to section 161(2.1) of the *BIA* that the notes of an examination before the first meeting of creditors shall be made available at the first meeting of creditors and to any creditor who requests them.	-	-	**Recommendation not adopted**	N/A	N/A
T26	**Unopposed discharges where fact(s) proven**	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	Recommendation. Provide for an amendment to section 173 of the *BIA* that when no creditor opposes the discharge of a bankrupt, the trustee is not obligated to oppose the discharge.					
T27	**Discharge of interim receivers** **Recommendation.** Provide for an amendment to section 79 of the Bankruptcy and Insolvency General Rules so as to limit the application of this provision to interim receivers appointed under section 46 or 47.1 of the *BIA* but not those appointed under section 47 of the *BIA*. Interim receivers appointed under section 47 of the *BIA* should only be obligated to provide the reports that are mandated by section 246 and should be required to apply for their discharge as soon as reasonably practicable following completion of their duties or as otherwise provided under the terms of the appointment order or other order of the Court.	-	-	**Recommendation not adopted**	N/A	N/A
T28	**Court ordered extensions and reductions of time periods** **Recommendation.** Provide for an amendment to section 187(11) of the *BIA* to allow a Court	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	to abridge time periods prescribed by the *BIA* unless abridgement is specifically prohibited.					
T29	**Expediting of appeals** **Recommendation.** Provide for an amendment to section 193 of the *BIA* to allow any party to bring a motion to expedite an appeal whether or not the party is an appellant, at least for proposal, receiver and interim receiver matters.	-	-	**Recommendation not adopted**	N/A	N/A
T30	**Costs** **Recommendation.** Provide that sections 197 (5), (7) and (8) of the *BIA* which respectively, (i) provide a tariff for legal fees, (ii) limit costs to 10% of gross receipts less amounts paid to secured creditors, and (iii) abate fees in smaller estates be repealed.	110	197(6.1) to (7)	**Recommendation wholly adopted with additions** Sections 197(5) is repealed. Sections 197(6.1) to (8) are replaced. New BIA sections (6.1) to (7): - Clarify that award costs pursuant to subsection(6.1) include legal costs; and - Provide that costs may be ordered where opposition is found to be	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
				frivolous or vexatious		
T31	**Failure to disclose fact of being undischarged** **Recommendation.** Provide for an amendment to section 199(a) of the *BIA* that undischarged bankrupts are required to disclose their status as an undischarged bankrupt only in circumstances where they are entering into a transaction with a value of $5,000 or more. **Recommendation.** Provide for an amendment to section 199(b) of the *BIA* to increase from $500 to $5,000 the amount of credit that an undischarged bankrupt may obtain without disclosing his/her/its status as an undischarged bankrupt to the prospective lender.	111	199(a)	**Recommendation partially adopted** Section 199(a) is not amended. Section 199(b) is amended to increase from $500 to $1,000 the amount of credit that an undischarged bankrupt may obtain without disclosing his/her/its status as an undischarged bankrupt to the prospective lender.	N/A	N/A
T32	**Recognition of orders of courts of other provinces** **Recommendation.** Provide for an amendment to section 188(1) of the *BIA* that the orders of courts of other provinces are to be given full force and effect and are to be enforced by the	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	forum court.					
T33	**Mailings** **Recommendation.** Provide for an amendment to the *BIA* that documents may be distributed by fax or email.	-	-	**Recommendation not adopted**	N/A	N/A
T34	**Notice of first dividend payment** **Recommendation.** Provide for an amendment to section 149(1) of the *BIA* so that the first two lines thereof read as follows: "The trustee shall, after the first meeting of the creditors and when the trustee has determined to pay a dividend, give notice…" In addition, the requirement should be that the notice is sent by regular mail, not registered or certified mail as is the current stipulation in section 149(1).	92	149(1)	**Recommendation partially adopted** In the new BIA, the first lines of section 149(1) read as follows: 149(1) The trustee may, after the first meeting of the creditors, send a notice, in the prescribed manner, to every person with a claim of which the trustee has notice or knowledge but whose claim has not been proved.	N/A	N/A
T35	**Interim distributions** **Recommendation.** Provide for an amendment	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	to section 155 of the *BIA* to allow interim distributions in summary administration proceedings.					
T36	**Arbitration and mediation procedures** **Recommendation.** Provide for an amendment to section 170.1 of the *BIA* that the Court may direct mediation procedures.	-	-	**Recommendation not adopted**	N/A	N/A
T37	**Notice to Canada Revenue Agency** **Recommendation.** Provide for an amendment to the *BIA* to create a central register to keep Canada Revenue Agency apprised by trustees of bankruptcies so that trustees can no longer pick and choose where they are sending notices.	-	-	**Recommendation not adopted**	N/A	N/A
T38	**Service upon a trust** **Recommendation.** Provide for an amendment to the *BIA* that personal service of a petition for a receiving order or other documents may be made upon a trust by leaving a copy of the document in question with a trustee of the trust.	-	-	**Recommendation not adopted**	N/A	N/A

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
T39	**Claims bars** **Recommendation.** In implementing JTF 2002 Recommendation 55 provide for: (1) formalizing the use of negative creditor confirmation for both the *BIA* and *CCAA*; (2) rationalizing the time periods for filing between both statutes; (3) standardizing proof of claim documentation and codify penalties consistent with those prescribed under the *BIA* for false claims under the *CCAA*; and (4) specifying the conditions under which judicial discretion to permit late filing may be exercised under both the *BIA* and the *CCAA*.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**
T40	**Listing of existing creditors** **Recommendation.** Provide for an amendment to section 11 of the *CCAA* to require that a company seeking relief file with its material a listing of the **[25]** creditors with the largest claims against it.	-	N/A	N/A	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
T41	**Access to filed materials and orders in a proceedings** **Recommendation.** Provide for an amendment to section 11 of the *CCAA* to require the debtor or monitor to establish a web-based electronic location in which copies of all of the proceedings taken in the case shall be maintained, absent an efficient information storage and retrieval system maintained by the court. The court should have the power to suspend or reduce the requirement in appropriate cases.	-	N/A	N/A	-	**Recommendation not adopted**
T42	**Regular operations reports by monitor** **Recommendation.** Provide for an amendment to section 11.7(3) of the *CCAA* that the monitor shall provide monthly reports on the financial operations of the debtor to the Court.	-	N/A	N/A	-	**Recommendation not adopted**
T43	**Appeals** **Recommendation.** Provide for amendments to sections 13 and 14 of the *CCAA* that appeals shall be governed exclusively by provisions in the *CCAA* to the exclusion of provincial rules.	-	N/A	N/A	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	Recommendation. Provide for an amendment to section 14 of the *CCAA* to allow any party to bring a motion to expedite an appeal whether or not the party is an appellant.					
T44	**Foreign currency exchange rule** **Recommendation.** Provide for an amendment to the *CCAA* to adopt the foreign currency exchange rule in section 275 of the *BIA*.	131	N/A	N/A	43	**Recommendation partially adopted** 43. If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the initial application in respect of the company unless otherwise provided in the proposed compromise or arrangement.
T45	**Mailings** **Recommendation.** Provide for an amendment to the *CCAA* that documents may be distributed by fax or email.	-	N/A	N/A	-	**Recommendation not adopted**
T46	**Assignments of Crown debts**	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

Recommendation No.	Recommendation	Bill C-55 Section No(s).	BIA		CCAA	
			New Section No(s).	Treatment	New Section No(s).	Treatment
	Recommendation. Provide for an amendment to the *Excise Tax Act* to provide express authorization to validate an assignment of a Crown debt payable to a corporation. Such a provision would be similar to sections 220(6) and (7) of the *Income Tax Act*.					
T47	**Deduction from employee dividends** **Recommendation.** Provide for an amendment to section 46(1) of the *Employment Insurance Act* requiring a flat deduction of 15% (after the Superintendent's levy) from each dividend cheque payable for employment benefits to cover both source deductions payable as well as overpayments of EI. An additional line should be added to the Proof of Claim where employees are asked to differentiate between wages and expenses. In implementing this change, language in the amendment should make clear that when the trustee withholds this amount the trustee is not deemed to be the employer and corresponding liability does not attach.	-	-	**Recommendation not adopted**	-	**Recommendation not adopted**

OSLER

BILL C-55
PROVISIONS NOT RELATED TO RECOMMENDATIONS
OF THE
ICC / CAIRP JOINT TASK FORCE
(COMMERCIAL)

August 2005

****Please Note: Sections 2-123 of Bill C-55 relate to the *Bankruptcy and Insolvency Act.* Sections 124-141 relate to the *Companies Creditors Arrangement Act.*****

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
Wage Earner Protection Program	1	• Establishment of the Wage Earner Protection Plan • Conditions for eligibility and amounts covered • Procedures for review and appeal • General administrative provisions including financial provisions • Offences and punishment
	67	• Creation of security for unpaid wage claims and pension plan contributions in bankruptcy and receivership • Establishment of limited superpriority for security
Office of the Superintendent of Bankruptcy ("OSB") – Governance & Administration	6	• Superintendent appointed for 5 year term and may be removed from office for cause • OSB may make inquiries into the conduct of trustees, receivers and interim receivers from time to time • OSB may make rules governing hearings for the purposes of BIA section 14.02
	7	• OSB is authorized to engage advisors in connection with investigations

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
		• Costs of persons engaged by the OSB are payable from appropriation for OSB
	8	• OSB authorized to conduct investigations into the conduct of trustees, receivers and interim receivers
	9	• OSB may refuse to issue a trustee licence to insolvent persons and persons convicted of certain offences
Office of the Superintendent of Bankruptcy ("OSB") - Governance & Administration (CCAA)	131	• OSB must keep a public record of prescribed information, and must provide such information on request • OSB may apply to the court to review the appointment or conduct of a monitor and may intervene as though a party. • OSB may make any inquiry or investigation regarding the conduct of a monitors as he considers appropriate. • OSB may cancel or suspend the monitor's licence as a trustee under the BIA, or place other conditions or limitations as the OSB considers appropriate. The OSB must afford the monitor a reasonable opportunity for a hearing. • The record of the hearing is public unless decided against by the OSB • The decision (and reasons) of the hearing must be given in writing to the monitor within 3 months after the conclusion of the hearing. • OSB may authorize any person to exercise or perform any of the powers,

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
		duties or functions of the OSB.
Monitor - CCAA	129	• Enumerated restrictions on appointment of monitor • The court may replace a monitor if appropriate • The monitor shall: review the company's cash-flow statements; make any appraisal or investigation the monitor considers necessary to determine the state of the company's business and financial affairs; advise creditors of the filing of reports to the court; file with the OSB a copy of the documents specified by the regulations; attend proceedings that relate to the company; advise the court on the reasonableness and fairness of any proposed compromise or arrangement; make publicly available, all documents filed with the court; and carry out any other functions that the court may direct. • If the monitor acts in good faith and takes reasonable care, he is not liable for loss or damage to any person resulting from that person's reliance on a report. • The monitor shall have access to the company's property for the purpose of monitoring the company's business and financial affairs • The monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.4 of the BIA.
	131	• A debtor company shall provide the monitor assistance. • A debtor company shall perform the duties set out in section 158 of the BIA.

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
Duties and Powers of Trustees	12	• Trustee is not permitted to act for secured creditor without opinion of independent legal counsel (who has not acted for secured creditor within the previous two years) that security is valid and enforceable
	13	• Trustee must comply with prescribed Code of Ethics
	15	• OSB may issue subpoena for witnesses in connection with hearing related to trustee's conduct
	18	• BIA section 19(3) repealed
	19	• Trustee shall verify bankrupt's statement of affairs
	22	• BIA section 29(2) repealed
	24	• Trustee permitted to incur indebtedness and grant security for advances with court authorization
	25	• Court may authorize sale of estate assets to reimburse trustee
	26	• Trustee must notify OSB of application to court for directions
	28	• On appointment of a substituted trustee, original trustee must prepare and deliver, without delay, to the substituted trustee a statement of receipts and disbursements
Sales Out of the Ordinary Course of the Debtor's Business	23	• Court authorization required for sales to persons related to the bankrupt • Factors for court consideration enumerated

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
Appointment of Interim Receivers	31	• Appointment and duration of interim receivership
	32	• Form of statement of receipts and disbursements for interim receivers will be prescribed
Claims	131	• A compromise or arrangement may not deal with claims that relate to any of the following debts or liabilities unless it explicitly provides for the claim's compromise and the relevant creditor has agreed to the compromise or arrangement: orders imposed by a court in respect of an offence; awards of damages by a court in civil proceedings; debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity; debt or liability for obtaining property or services by false pretences; debt for interest owed in relation to any of the above. • Determination of amounts of claims to be determined by proof made in accordance with similar legislation • A company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes. • No person is entitled to vote on a claim acquired after the initial application in respect of the company, unless the entire claim is acquitted.
	41	• Proposal accepted by creditors and approved by court does not release debtor from debts and liabilities under BIA section 178(1) unless proposal explicitly provides for compromise of such claims and relevant creditor has assented to proposal
Crown Claims	131	• Property of a debtor shall not be regarded as being held in trust for Her Majesty solely because federal or provincial legislation deems that property

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
		to be held in trust for Her Majesty. This does not apply in respect of amounts deemed to be held in trust under certain sections of the Income Tax Act, Canada Pension Plan, Employment Insurance Act, or certain amounts deemed to be held in trust under provincial laws. • All claims of Her Majesty rank as unsecured claims, except for enumerated exceptions. • Statutory claim securities are valid only if the security is registered before the date of the filing of the initial applications.
Proposals	35	• Cash flow filed in connection with filing of notice of intention must be prepared on a weekly basis • Court may direct notification of interested persons in connection with order extending time for filing proposal
	39(2)	• Proposals relating to employers participating in prescribed pension plans may not be approved by court unless such proposals provide for payment of certain amounts • Court may approve proposal despite requirement to pay certain amounts if court is satisfied that parties have entered into an agreement, approved by pension regulator, respecting payments of these amounts
Special Provisions regarding Aircraft Objects	43(2)	• Parties to contracts relating to aircraft objects may amend or terminate contract on debtor's insolvency or commencement of proposal in some circumstances

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
	60	• Stay imposed on filing of notice of intention does not prevent secured creditor from taking possession of aircraft objects
	61	• Stay imposed on filing of proposal does not prevent secured creditor from taking possession of aircraft objects
	62(2)	• Stay imposed on bankruptcy does not prevent secured creditor from taking possession of aircraft objects unless court orders otherwise
	69(3)	• Court order which postpones or restricts secured creditor's ability to take possession of aircraft objects is limited
	128	• Stay imposed on application does not prevent secured creditor from taking possession of aircraft objects.
Treatment of Collective Agreements – BIA Proposals	44	• Debtor may apply to court for order to serve "notice to bargain" • Criteria for court's consideration on application are enumerated • Bargaining agent may require debtor to disclose information related to renegotiation
Treatment of Collective Agreements - CCAA	44	• Unrevised collective agreements remain in force • Concessions made by bargaining agent on renegotiation of collective agreement treated as unsecured claims
	131	• Debtor may apply to court for order to serve "notice to bargain"

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
		• Criteria for court's consideration on application are enumerated • Bargaining agent may require debtor to disclose information related to renegotiation
Initial Applications – CCAA	127	• An initial application under the CCAA must be accompanied by certain materials including: a projected cash flow; a report containing the prescribed representations regarding the preparation of the cash flow statement; and copies of all financial statements. • The court may make an order prohibiting the release to the public of any cash flow statements
Distribution of Securities – BIA	120(1)	• Where securities of a particular type are available in a customer pool fund, the trustee will distribute them to customers with claims to the securities, unless the trustee determines that it would be more appropriate to sell the securities and distribute the proceeds to the customers.
Stays & Sanctions	126	• The court may only sanction a compromise or arrangement if it provides for payment of certain Crown claims within 6 months of the court sanction. • No compromise or arrangement will be sanctioned if the court is satisfied that the company is in default of certain Crown claims
	126	• The court may sanction a compromise or arrangement only if it provides for payment of certain wage and vacation pay amounts to employees and former employees immediately after the sanction, and the court is satisfied that the company can and will make such payments

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
		• If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or arrangement only if it provides for payment immediately after the sanction of certain unpaid amounts to the fund, and the court is satisfied that the company can and will make such payments. • However, the court may sanction a compromise or arrangement if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator.
	128	• No order made under sections 11 or 11.02 prohibits a person from requiring immediate payment for goods, services, or other valuable consideration, OR requires the further advance of money or credit
	128	• On an application in respect of a debtor, a court may make an order effective for not more than 30 days: staying proceedings under the BIA or WRA; restraining further proceedings; and prohibiting commencement of action against the company.
	128	• On an initial application in respect of a debtor other than an initial application, a court may make an order: staying for any period necessary, all proceedings under the BIA or WRA, restraining future proceedings; and prohibiting commencement of action against the company.
	128	• No order may be made that prevents a member of the Canadian Payments Association from ceasing to act as a clearing agent. • No order may be made that prevents a creditor holding security on aircraft objects from taking possession of the aircraft objects after 60 days following the commencement of CCAA proceedings unless, within that 60

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
		days, the debtor company remedies any default under the security agreement and agrees to perform all obligations under the agreement. If, at any time, the debtor company defaults in protecting or maintaining the aircraft objects, the secured creditor may take possession. • No order may be made that affects the exercise or performance of certain assigned functions and powers by the Minister of Finance, Superintendent of Financial Institutions, Governor in Council, Minister of Finance or Canada Deposit Insurance Company, or the Attorney General. • An order may provide that Her Majesty may not exercise certain rights for a period that the court considers appropriate, but ending not later than the time referred to in section 11.09(a). Such order may cease to be in effect if the company defaults on certain payments that become due to Her Majesty after the order is made OR any other creditor becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercise of certain rights. • Similar legislation and provincial equivalent legislation remains in operation • The rights of regulatory bodies are not affected with respect to any investigations or proceedings taken against the company, except when one is seeking to enforce its rights as a creditor.
Cross-Border Insolvencies	267 & 131	• Application procedures for recognition of foreign proceedings (need documents identifying the foreign proceeding) • Nature and effects of foreign proceedings – (main proceeding versus non-

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)

		main proceeding)
		
		• Court can make any order that it considers appropriate for the protection of the debtor's property or the interests of a creditor
		
		• If an order recognizing a foreign proceeding is made, every person who performs any functions in any proceedings under the BIA (including the court) shall cooperate with the foreign representative and the foreign court
		
		• If an order recognizing a foreign proceeding is made, the foreign representative shall, without delay, inform the court of any substantial changes of the foreign proceeding and the representative's authority to act in her capacity. As well, the foreign representative shall publish in one or more newspapers in Canada, a notice containing the prescribed information.
		
		• Where there are concurrent or multiple foreign proceedings, court shall review, and if appropriate, amend or revoke orders made under the Act.
		
		• Miscellaneous provisions:
		
		  • Court may authorize any person to act as a representative of proceeding under the Act
		
		  • Foreign representative status – foreign representative is not submitted to the jurisdiction of the court except with regard to costs, but court may make any order conditional on compliance with any other court order
		
		  • A foreign proceeding appeal or review does not prevent an application to the court under this part

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
		• A certified copy of a foreign order, in absence of evidence to the contrary, is proof that the debtor is insolvent • In making a compromise or arrangement, the following should be taken into account in the distribution of dividends to the company's creditors in Canada: the amount a creditor is entitled to receive outside Canada by way of a dividend in a foreign proceeding; and the value of property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or by way of a transfer that would be considered a preference under the Act. • The court is not prevented from applying legal or equitable rules • The court is not compelled to give effect to orders that are not in compliance with the laws of Canada
Miscellaneous - BIA	2	• Repeal of BIA definitions "settlement" and "localité d'un débiteur" • Amendments to BIA definitions "court", "creditor", "person" and "locality of the debtor" • BIA definitions added for "bargaining agent", "collective agreement", "current assets", "date of the bankruptcy", "director", "income trust", "time of the bankruptcy", "transfer at undervalue" and "localité"
	3	• Change in the designation of an insurance contract deemed a disposition under BIA
	4	• BIA section 3 repealed

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
	5	• BIA definition added for "entity"
	34	• Prescribed statement of affairs must be filed with proposal • Cash flow statement must be prepared on a weekly basis • Material adverse change reports must be filed by trustee
	75	• Pre-bankruptcy general assignments of book debts are ineffective as against the trustee
	80(2)	• Where outcome of vote of creditors is determined by the vote of a person not acting at arm's length with the debtor, the chair may recalculate the vote disregarding the non-arm's length person's vote
	89	• Non-arm's length creditors are treated as deferred creditors
	92(2)	• Federal claims may be proved during three months following filing of the debtor's tax return
	93(1)	• Trustee's final statement of receipts and disbursements to include all monies distributed to persons related to the trustee
	94	• Meeting of creditors must be held within 21 days of receipt of request for meeting by official receiver or creditors representing 25% in value
	109	• Trustee's final statement of receipts and disbursements required following annulment

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
	112(2)	• Offence provision for witnesses failing to attend on summons for OSB hearing
	113	• BIA section 209(2) repealed
	114	• Claims for debts in other currencies converted to claims in Canadian currency
	117(2)	• BIA definition added for "hold"
Miscellaneous - CCAA	124	• Amendment to CCAA definitions "company" and "shareholder" • CCAA definitions added for "bargaining agent", "cash-flow statement", "claim", "collective agreement', "director", "income trust", "initial application", "monitor", "Superintendent of Bankruptcy", "prescribed" • Section 4 of the *BIA* applies for the purpose of determining whether a person is related to a company. • CCAA applies if the total of claims against the debtor, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.
	129	• Except with the permission of the court and on any conditions the court may impose, a monitor may not be a trustee who was, at any time within the preceding two years, a director, officer or employee of the debtor company, related to the company or to a director, officer or employee of the company or the auditor of the company (or partner or employee of the auditor of the company).

Subject Matter of Provision(s)	Bill C-55 Provision No(s).	General Summary of Provision(s)
	131	• Sections 65 and 66 of the Winding-up and Restructuring Act do not apply • This Act is to be applied conjointly with other acts. • Claims in foreign currency are to be converted to Canadian currency as of the date of the initial application.
Administration	131	• The Minister may make regulations for carrying out the purposes and provisions of the Act • The Act is to be reviewed within 5 years after coming into force

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