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Overview Article

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2009 IIC Symposium Issue: Introduction and Overview

Stephanie Ben-Ishai* & Anthony Duggan**

In the midst of the current financial crisis, bankruptcy and insolvency has suddenly become big news with major corporations filing for CCAA or Chapter 11 protection on, it seems, an almost weekly basis. Most of these proceedings are still in the early stages, but there is no doubt that they will confront the courts and insolvency practitioners with a host of challenging issues over the coming months. In Canada, the most prominent case arising out of the financial crisis to have reached a conclusion is, of course, the asset backed commercial paper litigation and in this symposium we feature two pieces analyzing the decision and explaining the background to it. Financial crisis themes run through other contributions as well, including a comparative assessment of Canada's regime for dealing with bank failures and an account of how insolvency professionals have had to adapt to the reduced availability of credit for restructuring purposes. The following is a more comprehensive overview of these and the other contributions to this issue.

In the first article, "**Asset Backed Commercial Paper: Why the Courts Got it Right**," Fred Myers and Alexa Abiscott discuss the asset backed commercial paper ("ABCP") market restructuring. The restructuring was carried out under the *Companies' Creditors Arrangement Act* ("CCAA") and the most controversial aspect of the proposed plan was a provision for mandatory releases of third parties to be granted by all creditors. In *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, the Ontario Court of Appeal approved the plan, including the release provisions, and the authors discuss the decision in detail. Ultimately, reflecting their position as counsel for the proponents of the plan, the authors argue that the case was correctly decided. They also claim that the decision is set to become a leading authority on the interpretation of the CCAA. Aside from these assessments, the article provides an interesting and useful account of the factual and legal background to the litigation.

In a complementary article, "**Canada's Asset Backed Commercial Paper Restructuring**," Jeffrey Carhart and Jay Hoffman describe and analyze the issues they encountered in representing the Court Appointed Ad Hoc Committee of Asset Backed Commercial Paper Holders during the ABCP proceedings. In particular, the authors describe their position with respect to the release provision — namely, that the releases should not be absolute in nature. Rather, there should be a "carve out" from the releases for certain types of fraud. This position was accepted by the presiding judge and later endorsed by the Court of Appeal.

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In “**Bank Bankruptcy in Canada: A Comparative Perspective**,” Professor Stephanie Ben-Ishai provides an overview of Canada’s bank bankruptcy regime. She uses the *Global Bank Insolvency Initiative: Legal, Institutional, and Regulatory Framework to Deal with Insolvent Banks* (“GBI”) as the framework for locating the Canadian system within an international context. Additionally, Professor Ben-Ishai describes and assesses the structure of liquidation proceedings under the *Winding-up and Restructuring Act*, providing a comparative analysis of bank bankruptcy and corporate bankruptcy. Ultimately, she concludes that the Canadian bank bankruptcy regime fares well in an international context when evaluated according to the GBI benchmarks. However, she also identifies possible reforms which might assist in addressing future bank failures more effectively.

In “**Discussion on Claim Purchasing**,” Denis Ferland explains claim purchasing and its objectives, and identifies the governing principles at common law and in civil law. He gives particular attention to the Québec Superior Court of Justice’s decision in *Minco-Division Construction Inc. v. 9170-6929 Québec Inc.*, which deals with claim purchasing from a financial restructuring and insolvency perspective. He also discusses *Re Laserworks Computer Services Inc. and Triage T.R.I.M. Ltée (Syndic de)*, which deal with the acquisition of claims for an improper purpose and he provides a comparative analysis of the Canadian law on claim purchasing and the relevant provisions of the United States’ *Bankruptcy Code*.

In “**Developments and Trends in Stakeholder Rights: Labour as a Gatekeeper**,” Aubrey Kauffman and Stuart Brotman analyze the participation of labour, specifically unions, in prominent restructuring cases. The analysis focuses on the active participation of labour in trying to shape the outcome of a restructuring. The authors discuss recent examples, such as the Stelco and Air Canada restructurings, to highlight the key role that labour can play in the restructuring process.

“**Expedited Debt Restructuring in Canada**,” written by Kevin McElcheran and Heather Meredith, explores the disconnect between the number of companies in dire financial straits and the number of formal insolvency proceedings in Canada, noting that, despite the global credit crisis, business bankruptcies actually declined in 2008. They explain how the lack of available credit in the current economic climate has made it difficult for debtors both to refinance existing debt and to find buyers with access to sufficient funds to purchase the business as a going concern. The authors examine various alternative methods of restructuring financially distressed businesses, with an emphasis on efficiency. They conclude that there is no single preferred approach to corporate restructuring, but that the choice of method in each case depends on the particular circumstances of the distressed company. This requires creativity in the restructuring professional and it puts a premium on correctly diagnosing the causes of the company’s distress.

In “**Classification, Consolidation and Context: A Canadian Approach to Substantive Consolidation**,” Michael MacNaughton explores the benefits of substantive consolidation — including the promotion of compromise and agreement — and the manner in which it affects restructuring options. He argues that the Canadian case law on classification of creditors for plan voting purposes supports the commonality of interest/non-fragmentation approach, which aims to facilitate restructurings, while ensuring that classification does not unduly prejudice stakeholder rights. The same philosophy informs the Canadian approach to substantive consolidation. This is in contrast to the United States where, under the *Owens*

Corning test, the courts take a decidedly more conservative approach, disallowing substantive consolidation unless the relevant corporate actors wholly disregarded separateness prior to the commencement of insolvency proceedings, or, after the commencement of insolvency proceedings, the assets and liabilities of enterprise group members are so intertwined that separating them would negatively affect all creditors.

In the reform process preceding recent amendments to the *Bankruptcy and Insolvency Act* and the *CCAA*, the disclaimer of collective agreements in *BIA* and *CCAA* proceedings was the subject of considerable debate. Ultimately, the government settled for a provision which forces the parties to the bargaining table, but stops short of allowing the court to impose a solution if the parties are unable to reach agreement themselves.

In “**Unilateral Disclaimer of Collective Agreements: Exploring the Constitutional Implications**,” Steven Meurrens suggests that the debate surrounding collective agreements remains unresolved, and that future amendments might allow restructuring debtors to unilaterally modify collective agreements. With this possibility in mind, he uses recent Supreme Court of Canada decisions — *GMAC Commercial Credit Corporation — Canada v. T.C.T. Logistics and Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia* — to explore the constitutionality of unilaterally altering collective agreements and, specifically, to consider whether legislation based on the United States Bankruptcy Code would be constitutional in Canada.

The issue concludes with “**The Resurrection of Goods and Services Tax Claims in Bankruptcy**,” where Roger Simard asks whether there is a real trust or right of ownership in favour of the Crown for the sales and services tax portion of an account receivable owed to a bankrupt supplier by its customer. Simard questions whether the statutory tax collection mechanism, applicable prior to the supplier’s bankruptcy, precludes the Crown from enforcing its rights to those taxes. He discusses both provincial and federal legislation, as well as cases currently before the Supreme Court of Canada. According to Simard, the key questions are whether the Crown is entitled to enforce any rights against the purchaser after the supplier’s bankruptcy and, if so, which part of the taxes claimed from the purchaser are still owing to the Crown. He concludes that, in claiming directly against the purchaser, or the trustee/receiver as successor agent of the Crown collecting from the purchaser, the Crown is ignoring the goods and services tax collection scheme enacted by legislation that existed and applied prior to the supplier’s bankruptcy.

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