Bill C-12: Clause by Clause Analysis — Clauses 71-80

An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005

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Bill Clause No. 71
Section No. CCAA s.22.1
Topic: Voting by Equity Claimants

Proposed Wording

**22.1** Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

Rationale

The amendment is one of several made with the intention of clarifying that equity claims are to be subordinate to other claims. Equity claims are ownership interests and, as such, should be subject to the risks of insolvency. It is possible, however, that in some restructurings it would be appropriate for the equity claimants to have a vote – for example, where they are the only creditors – and therefore judicial discretion is provided to the court to allow this to happen in the appropriate circumstances.

Section 22.1 is added to clarify that unless the court orders otherwise, holders of equity claims should be in the same class in respect of those claims and should be prevented from voting those claims at any meeting.

Present Law

None.

Bill Clause No. 71
Section No. CCAA s.22
Topic: Voting by Related Parties

Proposed Wording
22.(1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or an arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

   (a) the nature of the debts, liabilities or obligations giving rise to their claims;
   (b) the nature and rank of any security in respect of their claims;
   (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
   (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

(3) A creditor who is related to the debtor company may vote against, but not for, a compromise or an arrangement relating to the company.

Rationale

Section 22 sets out the rules regarding the division of creditors into classes for the purpose of voting at a meeting of creditors.

Subsections (1) and (2) have been amended for readability.

Subsection (3) has been added to parallel the voting system in the BIA proposal provisions. Parties related to the debtor company will no longer be entitled to vote in favour of a plan, only against it. This should reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties.

Present Law

As enacted by Chapter 47, Clause 131:

22.(1) Subject to subsection (3), a debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or an arrangement relating to a company and, if it does so, it must apply to the court for approval of the division before any meeting is held.

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests are sufficiently similar to give them a commonality of interest, taking into account

   (a) the nature of the debts, liabilities or obligations giving rise to their claims;
   (b) the nature and rank of any security in respect of their claims;
   (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
   (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

(3) Creditors having a claim against a debtor company arising from the rescission of a purchase or sale of a share or unit 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.
Bill Clause No. 72  
Section No. CCAA s.23(1)  
Topic: Duties and Functions of Monitors  

Proposed Wording

23.(1)(a)(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,
(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and
(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Rationale

Paragraph (a) is amended to clarify that only a notice of the initial application order must be provided to creditors. Chapter 47 inadvertently stated that the order itself needed to be sent to each creditor.
Further, the paragraph is amended to require that the estimated amount of each creditor's claim be listed. The list is intended to assist creditors as they prepare for creditors' meetings. Without information relating to the amounts, the list will be of limited value since creditors' votes at meetings are based on their claims.

Paragraph (d) is amended in order to clarify that even in the absence of prescribed information in the regulations, the monitor must nevertheless file a report on the state of the company's business and financial affairs with the court. In addition, subparagraph (1)(d)(ii) of Chapter 47 has been removed and added to paragraph (d.1).

Paragraph (d.1) specifies the information that the monitor must report to the court. The intention of the paragraph is to ensure that creditors receive the notice and information in a timely manner for them to be in a position to make an informed decision at the meeting.

The change in paragraph (e) is a technical amendment to correct cross-referencing as a result of the addition of paragraph (d.1) to the section.

Paragraph (f) is amended to clarify that the documents should be filed as prescribed by regulations.

Paragraph (f.1) is added to clarify the rationale for the fee.

Paragraph (j) is amended to clarify that the time for filing of prescribed documents may be prescribed by regulations.

Subsection (2) is amended to correct cross-referencing.

**Present Law**

**As enacted by Chapter 47, Clause 131:**

23.(1)(a)(ii) within five days after the order is made,

(A) send a copy of the order to every known creditor who has a claim against the company of more than $1,000, and
(B) make a list showing the name and address of those creditors publicly available in the prescribed manner;

[...]

(d) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,

(i) without delay after ascertaining any material adverse change in the company's projected cash flow or financial circumstances,
(ii) at least seven days before any meeting of creditors under section 4 or 5,
(iii) not later than 45 days, or any longer period that the court may specify, after the end of each of the company's fiscal quarters, and
(iv) at any other times that the court may order;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d);

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

[...]

(j) unless the court otherwise orders, make publicly available, in the prescribed manner, all documents filed with the court, and all court decisions, relating to proceedings held under this Act in respect of the company and provide the company's creditors with information as to how they may access those documents and decisions; and
(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Bill Clause No. 73
Section No. CCAA s.26(3)
Topic: Compilation of Information

Proposed Wording

26.(3) The Superintendent of Bankruptcy may enter into an agreement to provide a compilation of all or part of the information that is contained in the public record.

Rationale

The amendment clarifies that the Superintendent of Bankruptcy has the authority to enter into agreements to provide compilations of information maintained in the public record to third parties.

Present Law

None.

Bill Clause No. 74
Section No. CCAA s.29(2)
Topic: Rights During Investigations

Proposed Wording

29.(2) For the purpose of the inquiry or investigation, the Superintendent of Bankruptcy or any person whom he or she appoints for the purpose

(a) shall have access to and the right to examine and make copies of the books, records, data, documents or papers — including those in electronic form — in the possession or under the control of a monitor under this Act; and
(b) may, with the leave of the court granted on an ex parte application, examine the books, records, data, documents or papers — including those in electronic form — relating to any compromise or arrangement in respect of which this Act applies that are in the possession or under the control of any other person designated in the order granting the leave, and for that purpose may under a warrant from the court enter and search any premises.

French version only:

29.(3) Le surintendant des faillites peut retenir les services des experts ou autres personnes et du personnel administratif dont il estime le concours utile à l'enquête ou l'enquête et fixer leurs fonctions et leurs conditions d'emploi. La rémunération et les indemnités dues à ces personnes sont, une fois certifiées par le surintendant, imputables sur les crédits affectés à son bureau.

Rationale

Subsection (2) is amended to correct a drafting error created by Chapter 47, which could be interpreted to mean that only electronic "data" were to be subject to a production order, while electronic books, records and papers were not. The amendment clarifies the policy intention to include all materials under a production order, including those in electronic form.

Subsection (3) of the French version of the Act is amended by replacing the word "payables" with "imputables" as it more accurately reflects the concept of payment from an appropriation.
Present Law

**As enacted by Chapter 47, Clause 131:**

29.(2) For the purpose of the inquiry or investigation, the Superintendent of Bankruptcy or any person whom he or she appoints for the purpose

(a) shall have access to and the right to examine and make copies of all books, records, data, including data in electronic form, documents and papers in the possession or under the control of a monitor under this Act; and
(b) may, with the leave of the court granted on an *ex parte* application, examine the books, records, data, including data in electronic form, documents and papers relating to any compromise or arrangement to which this Act applies that are in the possession or under the control of any other person designated in the order granting the leave, and for that purpose may under a warrant from the court enter and search any premises.

**French version only:**

(3) Le surintendant des faillites peut retenir les services des experts ou autres personnes et du personnel administratif, dont il estime le concours utile pour l'investigation ou l'enquête et fixer leurs fonctions et leurs conditions d'emploi. La rémunération et les indemnités dues de ces personnes sont, une fois certifiées par le surintendant, payables sur les crédits affectés à son bureau.

Bill Clause No. 75
Section No. CCAA s.30(3)
Topic: Subpoena or Summons

**Proposed Wording**

30.(3) The Superintendent of Bankruptcy may, for the purpose of the hearing, issue a summons requiring the person named in it

(a) to appear at the time and place mentioned in it;
(b) to testify to all matters within their knowledge relative to the subject matter of the inquiry or investigation into the conduct of the monitor; and
(c) to bring and produce any books, records, data, documents or papers — including those in electronic form — in their possession or under their control relative to the subject matter of the inquiry or investigation.

(4) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (3).

**Rationale**

Subsection (3) is amended to correct a drafting error created by Chapter 47, which could be interpreted to mean that only electronic "data" were to be subject to a production order, while electronic books, records and papers were not. The amendment clarifies the policy intention to include all materials under a production order, including those in electronic form.

Subsection (4) is amended to correct a divergence between the French term (assignations) and the English terms (subpoena, other request or summons) by modernizing the English version to limit the English version to "summons".

Present Law

**As enacted by Chapter 47, Clause 131:**

30.(3) The Superintendent of Bankruptcy may, for the purpose of the hearing, issue a subpoena or other request or summons, requiring and commanding any person named in it

http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01986.html 05/01/2014
(a) to appear at the time and place mentioned in it;
(b) to testify to all matters within his or her knowledge relative to the subject matter of the inquiry or investigation into the conduct of the monitor; and
(c) to bring and produce any books, records, data, including data in electronic form, documents or papers in the person’s possession or under the control of the person relative to the subject matter of the inquiry or investigation.

(4) A person may be summoned from any part of Canada by virtue of a subpoena, request or summons issued under subsection (3).

Bill Clause No. 76
Section No. CCAA s.32
Topic: Disclaimer of Agreements

Proposed Wording

32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;
(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or
(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party’s right to use the intellectual property — including the party’s right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

http://www.ic.gc.ca/eic/site/bsf-obs.nsf/eng/br01986.html 05/01/2014
(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

(9) This section does not apply in respect of

(a) an eligible financial contract;
(b) a collective agreement;
(c) a financing agreement if the company is the borrower; or
(d) a lease of real property or of an immovable if the company is the lessor.

Rationale

Prior to Chapter 47, the CCAA was silent on the ability of a debtor to disclaim an agreement. A judicial practice developed, however, based on inherent jurisdiction that allowed the disclaimers of most kinds of agreements.

The rationale for allowing disclaimers is to facilitate restructurings by granting debtors the ability to repudiate agreements that would threaten its viability if they continued to be bound by them. At the same time, codification of the current practice makes the process more transparent by providing both parties with a better understanding of the rules that apply when considering a disclaimer. The amendments are designed to ensure that the process occurs in an open, fair and expeditious manner.

Subsection (1) is amended to require that notice of a disclaimer only be given if the monitor approves the disclaimer. In addition, notice of disclaimers must be given to the monitor. Approval of the monitor is required to prevent a strategic debtor from using the provision to assist related parties by disclaiming agreements that are profitable for the debtor at their expense. Moreover, because disclaimers will not require court approval unless there is opposition, it is necessary to protect against potential abuse.

Subsection (2) is amended to clarify that notice to have a disclaimer set aside be given to the monitor and other parties to the agreement, if any. The language in Chapter 47 currently could be interpreted to exclude the need for notice to these interested parties.

Subsection (3) is added to provide a debtor with the opportunity to appeal to the courts if a monitor refuses to approve a disclaimer. The provision is needed as monitor approval is required to effect a disclaimer.

Subsection (4) amends the test to be applied by the court in determining whether a disclaimer should be granted. Chapter 47 relied upon a difficult to interpret test that may have created greater uncertainty. In fact, the test, which was drawn from the commercial lease disclaimer section of the BIA, has been judicially interpreted in an inconsistent manner. By providing the court with legislative guidance, the provision should ensure better transparency and fairness. Further, the guidance ensures that the court will consider the effect on all parties, not just the debtor as the commercial disclaimer section requires.

Subsection (5) has been amended to clarify that the counterparties to a disclaimed agreement are provided with at least 30 days notice of a disclaimer so that they may prepare for the event regardless of how the disclaimer becomes effective, i.e., court order or monitor approval.

The amendment to subsection (6) is to clarify that certain rights to use intellectual property granted under a disclaimed agreement – including rights to exclusive use and to as-of-right extensions – continue to be available to the disclaimed party provided that that party continues to perform its obligations under the agreement.

Subsection (7) has been amended to clarify that a party to a disclaimed agreement who suffers a loss has a provable claim in the proceeding. The subsection was also amended to ensure that the disclaimer does not serve to reduce the priority, if any, enjoyed by the party.
Subsection (8) has been added to ensure that a party receiving the subsection (1) notice of intention to disclaim an agreement is able to obtain, within five days, a written explanation from the debtor as to why the debtor is seeking to end the agreement so that it may make an informed decision as to whether to commence a subsection (3) court application to oppose the disclaimer.

By virtue of Clauses 104(1) and 105 of An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2007, which received Royal Assent on June 22, 2007 (Chapter 29), the definition of eligible financial contract referred to in subsection (9)(a) is now to be found in s.2 rather than in s.11.05(3). Clause 112(20) of this Act amends subparagraph (9)(a) of Clause 26 to remove reference to the old location of the definition.

Present Law

As enacted by Chapter 47, Clause 131 and amended by Chapter 29:

32. (1) Subject to subsection (3), a debtor company may disclaim or resiliate any agreement to which it is a party on the day of the filing of the initial application in respect of the company by giving 30 days notice to the other parties to the agreement in the prescribed manner.

(2) Subsection (1) does not apply in respect of

(a) an eligible financial contract;
(b) a collective agreement;
(c) a financing agreement if the debtor is the borrower; and
(d) a lease of real property or an immovable if the debtor is the lessor.

(3) Within 15 days after being given notice of the disclaimer or resiliation, a party to the agreement may apply to the court for a declaration that subsection (1) does not apply in respect of the agreement, and the court, on notice to any parties that it may direct, shall, subject to subsection (4), make that declaration.

(4) No declaration under subsection (3) shall be made if the court is satisfied that a viable compromise or arrangement could not be made in respect of the company without the disclaimer or resiliation of the agreement and all other agreements that the company has disclaimed or resiliated under subsection (1).

(5) If the company has, in any agreement, granted the use of any intellectual property to a party to the agreement, the disclaimer or resiliation of the agreement does not affect the party’s right to use the intellectual property so long as that party continues to perform its obligations in relation to the use of the intellectual property.

(6) If an agreement is disclaimed or resiliated by a company, every other party to the agreement is deemed to have a claim for damages as an unsecured creditor.

Bill Clause No. 77
Section No. CCAA s.34
Topic: Ipso Facto Clauses

Proposed Wording

34. (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.
(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid for services rendered or goods provided before the commencement of those proceedings.

(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;
(b) requiring the further advance of money or credit; or
(c) preventing a lessor of aircraft objects under an agreement with the company from taking possession of the aircraft objects

(i) if, after proceedings commence under this Act, the company defaults in protecting or maintaining the aircraft objects in accordance with the agreement, (ii) 60 days after the day on which proceedings commence under this Act unless, during that period, the company

(A) remedied the default of every other obligation under the agreement, other than a default constituted by the commencement of proceedings under this Act or the breach of a provision in the agreement relating to the company’s financial condition,
(B) agreed to perform the obligations under the agreement, other than an obligation not to become insolvent or an obligation relating to the company’s financial condition, until the proceedings under this Act end, and
(C) agreed to perform all of the obligations arising under the agreement after the proceedings under this Act end, or

(iii) if, during the period that begins on the expiry of the 60-day period and ends on the day on which proceedings commence under this Act unless, during that period, the company

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or
(b) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the Canadian Payments Act and the bylaws and rules of that Association.

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and
(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and
(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

Rationale

Chapter 47 introduced this section to the CCAA to deal with ipso facto clauses, which are common in commercial agreements. An ipso facto clause states that an insolvency or a filing under insolvency legislation by a party to the agreement is a breach of the agreement. The section is mirrored in the BIA proposals section 65.1. Parties should be entitled to rely on agreements regardless of an insolvency filing provided that they comply with all other terms of the agreement.

Subsection (1) is amended to clarify that insolvency cannot be used as a reason to terminate an agreement. This matches the provision under proposals. Chapter 47 inadvertently left out the words "or that the company is insolvent".

Subsection (2) is amended to match the exclusions set forward in subsection (1). The intention is to ensure consistent treatment regardless of the type of agreement. In addition, the words "or that the company is insolvent" are added as described above.

Subsection (3) is amended to add the words "or that the company is insolvent" as described above.

Subsection (4) is amended to implement the obligations under An Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment. Chapter 47 inadvertently omitted inclusion of this specific language in this section.

Subsection (6) is amended to add the words "or public utility" to clarify that the provision applies to those entities as well.

Subsection (7) is added to match the provision under BIA proposals. Chapter 47 inadvertently omitted this subsection.

Also, by virtue of Clauses 104(1) and 105 of An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2007, which received Royal Assent on June 22, 2007 (Chapter 29), the definition of eligible financial contract referred to in subparagraph (7)(a) is now to be found in s.2 rather than in ss.11.05(3). To ensure that this Act is compatible with this change, Clause 112(23) provides the new wording for s.34(7).

Further, Clause 112(23) also repeats the wording of new subparagraphs (8) and (9), which were added by Chapter 29, to ensure that this Act does not inadvertently repeal those new subparagraphs.

Present Law

As enacted by Chapter 47, Clause 131 and amended by Chapter 29:

34.(1) No person may terminate or amend any agreement, including a security agreement, with a debtor company, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with a debtor company by reason only that an order has been made under this Act in respect of the company.
(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that an order has been made under this Act in respect of the company or that the company has not paid rent in respect of any period before the filing of the initial application in respect of the company.

(3) No public utility may discontinue service to a debtor company by reason only that an order has been made under this Act in respect of the company or that the company has not paid for services rendered, or for goods provided, before the filing of the initial application in respect of the company.

(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the date of the filing of initial application in respect of the company; or
(b) requiring the further advance of money or credit.

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

(6) The court may, on application by a party to an agreement, declare that this section does not apply, or applies only to the extent declared by the court, if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or
(b) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the Canadian Payments Act and the bylaws and rules of that Association.

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and
(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and
(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.
Bill Clause No. 78  
Section No. CCAA s.36.1  

Proposed Wording  

36.1(1) Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.  

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act  

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";  
(b) to "trustee" is to be read as a reference to "monitor"; and  
(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".  

Rationale  

Subsection (1) is added in order to ensure that the provisions of the BIA relating to preferences and transfer at undervalue would apply in CCAA matters. The purpose is to prevent forum shopping, where the debtor would choose the CCAA because preferences and transfer at undervalue transactions could not be attacked.  

Subsection (2) is added to provide clarification that the BIA terminology is to be read in the CCAA context.  

Present Law  

None.  

Bill Clause No. 78  
Section No. CCAA s.36  
Topic: Sale of Assets  

Proposed Wording  

36.(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.  

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.  

(3) In deciding whether to grant the authorization, the court is to consider, among other things,  

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;  
(b) whether the monitor approved the process leading to the proposed sale or disposition;  
(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;  
(d) the extent to which the creditors were consulted;  

http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01986.html 05/01/2014
(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and  
(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and  
(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or an officer of the company;  
(b) a person who has or has had, directly or indirectly, control in fact of the company; and  
(c) a person who is related to a person described in paragraph (a) or (b).

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Rationale

Chapter 47 intended to provide debtors with the ability to deal with their assets outside of the ordinary course of business while restructuring, subject to certain safeguards to protect the interests of creditors.

Subsection (1) is amended to clarify that the ability of the debtor company to dispose of its assets should not be restricted by a requirement that shareholder approval be obtained.

Paragraph (3)(c) is amended to clarify that the disposition must be more beneficial to the creditors than a disposition under a bankruptcy scenario. The language in Chapter 47 referred to a disposition under the BIA. As the BIA contains provisions relating to bankruptcies, proposals and receiverships, it would be difficult for a court to interpret with any certainty.

Paragraph (4)(b) is amended to address concerns that the offer that the court considers must be a legitimate offer. As such, the court is directed to judge the offer only against the consideration that would be received in other offers made in accordance with the bidding process, and not against offers never formalized.

Subsection (5) is amended to clarify that the charge may be granted over either the proceeds from the sale or disposition or, in the alternative, over other assets. Chapter 47 inadvertently limited the court by restricting it to providing a charge on the proceeds. In some circumstances, it may be beneficial to provide the court with flexibility to determine the appropriate property to charge.

Due to drafting errors in Chapter 47, the explanation of related parties was incomplete. Subsection (6) is therefore amended to correct the explanation of who is a person related to a debtor company by including those individuals that have or had direct or indirect control of the debtor company and by clarifying that it includes persons related to those described in paragraphs (a) and (b).
Subsection (7) is added to ensure that the interests of wage earners are protected, as are the interests of other creditors. By requiring the court to consider the effect of any sale on the rights of those claimants, the risk that a debtor company will engage in a liquidating plan (i.e., a restructuring run with the intention of disposing of all assets) will be removed.

Present Law

**As enacted by Chapter 47, Clause 131:**

36.(1) A debtor company in respect of which an order has been made under this Act may not sell or dispose of any of its assets outside the ordinary course of its business unless authorized to do so by a court.

(2) A company that applies to the court for the authorization must give notice of the application to all secured creditors who are likely to be affected by the proposed sale or disposal of the assets to which the application relates.

(3) In deciding whether to grant the authorization, the court must consider, among other things,

(a) whether the process leading to the proposed sale or disposal of the assets to which the application relates was reasonable in the circumstances;
(b) whether the monitor approved the process leading to the proposed sale or disposal of the assets;
(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;
(d) the extent to which the creditors were consulted in respect of the proposed sale or disposal of the assets;
(e) the effects of the proposed sale or disposal on the creditors and other interested parties; and
(f) whether the consideration to be received for the assets is reasonable and fair, taking into account the market value of the assets.

(4) In addition to taking the factors referred to in subsection (3) into account, if the proposed sale or disposal of the assets is to a person who is related to the company, the court may grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or dispose of the assets to persons who are not related to the company or who are 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.

(5) In granting an authorization for the sale or disposal of assets, the court may order that the assets may be sold or disposed of free and clear of any security, charge or other restriction, but if it so orders, it shall also order that the proceeds realized from the sale or disposal of the assets are subject to a security, charge or other restriction in favour of the creditors whose security, charges or other restrictions are affected by the order.

(6) For the purpose of this section, a person who is related to the debtor company includes a person who controls the company, a director or an officer of the company and a person who is related to a director or an officer of the company.

**Bill Clause No. 79**

**Section No. CCAA s.39(1)**

**Topic: Crown Securities**

**Proposed Wording**
39.(1) In relation to proceedings under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if, before the day on which proceedings commence, the security is registered under a system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

Rationale

The section is amended to reflect a change in terminology regarding the timing of proceedings.

Present Law

As enacted by Chapter 47, Clause 131:

39.(1) In relation to a proceeding under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if the security is registered before the date of the filing of the initial application in respect of the company under any system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

Bill Clause No. 80
Section No. CCAA s.52(3)
Topic: Forms of Cooperation

Proposed Wording

52.(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

(a) the appointment of a person to act at the direction of the court;
(b) the communication of information by any means considered appropriate by the court;
(c) the coordination of the administration and supervision of the debtor company's assets and affairs;
(d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and
(e) the coordination of concurrent proceedings regarding the same debtor company.

Rationale

Chapter 47 amended the Act by including the principles of the United Nations Commission on International Trade Law's Model Law on Insolvency. In cross-border insolvency situations, Canadian courts often cooperate with foreign courts. The amendment clarifies that Canadian courts should continue that practice by listing, from the Model Law, the forms of cooperation that courts should consider.

Present Law

None.