COURT FILE NUMBER	1601-03113
COURT	COURT OF QUEEN'S BENCH
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF QUICKSILVER RESOURCES CANADA INC., 0942065 B.C. LTD. and 0942069 B.C. LTD.

BENCH BRIEF OF MNP LTD.

The Liquidation Trust is a creditor who is related to QRCI and s. 22(3) of the CCAA does not permit it to vote in favour of the Plan

1. Section 22(3) was incorporated into the CCAA following a recommendation from the Report of the Standing Senate Committee on Banking, Trade and Commerce that stated "[m]oreover, Section 54(3) of the *Bankruptcy and Insolvency Act* regarding related parties should be incorporated in the *Companies' Creditors Arrangement Act*."

   > *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, November 2003, p. 8, Recommendation 36

2. This is in keeping with the principle cited by QRCI in *Ted Leroy Trucking [Century Services] Ltd., Re* that the interpretations of like provisions in the *CCAA* and the *BIA* should be consistent.

3. The BIA provides the relevant definition of related parties at ss. 2 and 4:

   > s. 2
   >
   > **person** includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;
   >
   > s. 4(2)
   >
   > For the purposes of this Act, persons are related to each other and are related persons if they are
   >
   > ...
   >
   > (b) an entity and
   >
   > (i) a person who controls the entity, if it is controlled by one person
   >
   > ...
   >
   > (c) two entities
   >
   > (i) both controlled by the same person or group of persons
   >
   > ...
   >
   > s. 4(3)(c)
   >
   > a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests;

4. Here, the Liquidation Trustee controls the Liquidation Trust and the Liquidation Trustee controls QRCI. As a result, pursuant to s. 4(2)(c) each of the Liquidation Trustee, the Liquidation Trust and QRCI are related parties vis a vis each other:

    a. The Liquidation Trustee controls the Liquidation Trust by virtue of the terms of the KWK Trust Agreement (particularly, s. 3.5) and the terms of the First Amended Joint Chapter 11 Plan of Liquidation for QRI (particularly Article 9, including 9.6.1 and 9.6.2) (the "QRCI Plan"); (attached to the Monitors report)

    b. The Liquidation Trustee controls QRCI by virtue of having the right to vote the shares of QRCI:

        i. The QRCI Plan provides that the Liquidation Trust Assets were transferred into the Liquidation Trust, which includes QRI's equity interest in QRCI. As set out at 1.1.70 of the QRCI Plan, the Liquidation Trust Assets include, without limitation:

> the Liquidation Trust Causes of Action, the Liquidation Trust Reserve, and all other property and assets of the Debtors remaining after segregation of the Cash component of the Unsecured Plan Consideration, including Canadian Proceeds that are payable to the holders of Allowed General Unsecured Claims, reserving for Fee Claims, and payment of Administrative Expense Claims, U.S. Trustee Frees, Priority Tax Claims, Other Priority Claims, Other Secured Claims, First Lien Claims (if applicable), the Cash component of the Second Lien Plan Consideration, including Canadian Proceeds that are payable to the holders of Allowed Second Lien Secured Claims. For the avoidance of doubt, from and after the Effective Date, the Liquidation Trust shall be vested with the right to receive Canadian Proceeds, which amounts shall be distributed in accordance with the terms of this Plan and the Liquidation Trust Agreement.

        ii. Canadian Proceeds is defined in 1.1.20 of the QRCI Plan as "any Cash received on account of (i) the Canadian Note, and (ii) the Debtor's equity interest in QRCI and its subsidiaries.

        iii. The Monitor, at paragraph 34 of the Ninth Report, confirms that the authority granted to the Liquidation Trustee would allow the Liquidation to vote the shares of QRCI, subject only to the general overriding ability of the Court under CCAA proceedings to order replacement directors.

5. QRCI takes the view that the Trustee is only a "bare trustee" although there is no provision in the Liquidation Plan or Trust Agreement that supports this allegation.

6. In addition it should be noted that while QRCI is taking the position that the QRI claims against QRCI have been assigned some provisions of the Trust Agreement appear to suggest otherwise.

7. There is no provision that specifically provides for the assignment of the intercompany claims. The Trust Agreement rather suggests that it has the right to receive the "Canadian Proceeds" that has been transferred.

> *1.1.70 "Liquidation Trust Assets" means the assets to be transferred to the Liquidation Trust on the Effective Date including, without limitation, the Liquidation Trust Causes of Action, the Liquidation Trust Reserve, and all other property and assets of the Debtors remaining after segregation of the Cash component of the Unsecured Plan Consideration, <u>including Canadian Proceeds</u> that are payable to the*

> *holders of Allowed General Unsecured Claims, reserving for Fee Claims, and payment of Administrative Expense Claims, U.S. Trustee Fees, Priority Tax Claims, Other Priority Claims, Other Secured Claims, First Liens Claims (if applicable), the Cash component of the Second Lien Plan Consideration, including Canadian Proceeds that are payable to the holders of Allowed Second Lien Secured Claims. For the avoidance of doubt, from and after the Effective Date, the Liquidation Trust shall be vested with the right to receive Canadian Proceeds, which amounts shall be distributed in accordance with the terms of this Plan and the Liquidation Trust Agreement.*

8. The terms Canadian Proceeds is defined as follows:

> *1.1.20 "Canadian Proceeds" means any Cash received on account of (i) the Canadian Note, and (ii) the Debtors' equity interests in QRCI and its subsidiaries.*

9. It should also be noted that the Liquidation Plan contains provisions incompatible with a full and complete assignment. For instance the Liquidation Plan contains the following provision (s.9.3.1):

> *Notwithstanding the foregoing, for purposes of Bankruptcy Code section 553,the transfer of the Liquidation Trust Assets to the Liquidation Trust shall not affect the mutuality of obligations which otherwise may have existed prior to the effectuation of such transfer. Such transfer shall be exempt from any stamp, real estate transfer, mortgage reporting, sales, use, or other similar tax, pursuant to Bankruptcy Code section 1146(a).*

10. It is submitted that parties to an alleged assignment cannot "pick and choose" which aspects of an assignment would apply in the circumstances and which would not. The claims were either assigned or they were not.

11. It is also clear that the purpose of creating the trust was not to transfer or assign the assets to a third party who would be at liberty to manage the assets as it sees fit. The purpose of the Liquidation Trust and Liquidation Plan was rather to have someone administer the liquidation and distribution of those assets in a context where QRI is being wound-up and its directors have resigned. The assignment takes place in a context where QRI dictated what the rights and obligations of the assignee would be. In that context, the role of the trustee reassembles that of a proxy or mandatary (see. *First Toronto Mining Corp.*)

12. Neither s. 22(3) of the CCAA or 53(4) of the BIA provide a Court with the discretion to allow the vote of a related party to be counted for a proposal or plan of arrangement.

13. The Monitor notes in the 9th Report that the Liquidation Trustee has not exercised voting rights in QRCI since appointed this fall. That is not relevant. S. 4(3)(c) of the *BIA* is clear that the right to control the voting shares is all that is need to determine that parties are related.

14. Similarly, the fact that there are separate beneficiaries to the trust is not relevant. S. 4(3)(c) confirms the right to control the voting rights in an entity is as if the person owned the ownership interests in the entity.

15. In the alternative, if there were no Liquidation Trustee, and the Liquidations Trust Beneficiaries controlled both the QRI claim and the right to vote the shares of QCRI, they similarly would not be entitled to vote as they would also be a creditor who is related to QCRI.

16. QRCI relies on two authorities (*Oulahen, Re* and *SAAN Stores Ltd./Magasins SAAN Ltee)* for the proposition that the assignment of a claim to an unrelated party may result in that unrelated party being allowed to vote for a proposal or plan of arrangement.

17. These authorities do not apply as here as the control of QRCI was transferred in the Liquidation Trust along with the QRCI claim.

18. In *Oulahen, Re*, the assignees of the claims were not permitted to vote in favour as the Court found that the assignees, who were individuals, were effectively proxies of the assignors, who were related individuals. In other words, the related nature of the creditor transferred along with the claim, which is the same as in this case.

19. *Re SAAN* also distinguishes itself from *Re: Northland Properties Ltd.*, 1988 CarswellBC 556 which is a more similar case to the facts at hand.

20. In *Northland,* a bondholding creditor was not permitted to vote in favour of a plan of arrangement on the basis that the creditor was also a subsidiary of the debtor (para. 34). It is noteworthy that this decision predates the related party provisions of the CCAA as the Courts recognized the problems with related party voting prior to the express amendments to the CCAA.

The purpose or intention behind QRI's vote is irrelevant

21. Both the Monitor's 9th report and the QRCI submissions put a great deal of emphasis on the 'good' nature of the QRI vote and diminish the MNP no vote as not really being against the Plan.

22. The MNP no vote is a vote against the Plan and MNP is entitled to exercise its vote in its interest - the Court does not have the ability to force a plan through over the wishes of the valid creditors except in the case where the no votes are an abuse of process or tortious, and there is no suggestion that is the case here.

23. It is a fundamental principle that valid creditors are entitled to vote as they see fit:

    See *NovaLIS Technologies Ltd..,, Re* 2008 NSSC 222 at para 41

    See also *Hypnotic Clubs Inc., Re,* 2010 ONSC 2987 at para 33

Allowing the QRI vote would create a problematic precedent

24. Allowing the QRI vote creates uncertainty and discretion in an area of insolvency law that is fairly predictable. It encourages a discretionary approach to related parties that is inappropriate. It asks the Court and Monitors to inquire as to actual evidence of control as opposed to the legal definition of control presently used (and also used in all Business Corporations Acts, etc.)

25. QRCI has no ongoing operations. This is an application to distribute proceeds.

Bankruptcy vs. The Plan

26. The Plan doesn't offer more to creditors than a bankruptcy would. This is admitted in par. 48 of the Monitor Report in support of the Plan:

    The Applicants assets have all been monetized and the only assets remaining are in the form of cash or potential collections of receivables. The <u>difference in net realization of cash between a liquidation scenario and a Plan is insignificant</u> (i.e. cash has the same value in liquidation as it does in the Plan). However, the Monitor notes that the Plan and Meeting Order contemplate an efficient distribution of the Available Funds to the

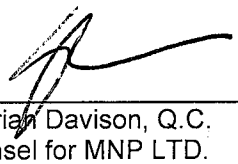
Creditors and significant time and effort has already been incurred drafting the Plan, therefore the process costs associated with the Plan are likely less than incremental process costs if a liquidation were to be initiated including potential bankruptcy costs/levies. Lower process costs result in a higher distribution to Affected Creditors.

27. A bankruptcy would be preferable as it would allow for the review of transactions. It is understood that QRI received millions of dollar in payments in the months prior to the CCAA filing. If the CCAA Plan is approved, the creditors will lose the ability to have these transactions reviewed and analysed.

28. The administrative reserve of more than $1M is very high in the circumstances.

29. The Liquidation trustee is doing the same thing as would QRI Management had there not been a Chapter 11 proceeding - liquidating QRCI and seeking to recover money owed to QRI for payment to QRI's creditors

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15TH DAY OF DECEMBER



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Insolv. Bull. 124897965001

Bulletins from the Office of the Superintendent of Bankruptcy
Other Documents
Debtors and Creditors Sharing the Burden

November 2003 — A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act

November 2003 — A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

DEBTORS AND CREDITORS SHARING THE BURDEN:

A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

Report of the Standing Senate
Committee on Banking, Trade and Commerce

Chair
The Honourable Richard H. Kroft

Deputy Chair
The Honourable David Tkachuk

November 2003

Ce rapport est aussi disponible en français.

Des renseignements sur le Comité sont donnés sur le site :

www.senate-senat.ca/bancom.asp

Information regarding the Committee can be obtained through its web site:

www.senate-senat.ca/bancom.asp

The Committee

The following Senators have participated in the study:

The Honourable Richard H. Kroft, C.M., Chair of the Committee

The Honourable David Tkachuk, Deputy Chair of the Committee

and

The Honourable Senators:

W. David Angus

Michel Biron, C.M.

D. Ross Fitzpatrick

Céline Hervieux-Payette, P.C.

James F. Kelleher, P.C.

E. Leo Kolber (past Chair of the Committee)

Paul J. Massicotte

Michael A. Meighen

Wilfred P. Moore

Donald H. Oliver

Marcel Prud'homme, P.C.

Raymond C. Setlakwe, C.M. (retired from the Senate on July 3, 2003)

Ex-officio members of the Committee:

The Honourable Senators: Sharon Carstairs, P.C. (or Fernand Robichaud, P.C.) and John Lynch-Staunton (or Noël A. Kinsella)

Other Senators who have participated from time to time on this study:

The Honourable Senators Maria Chaput, Leonard J. Gustafson, Pana Merchant and Madeleine Plamondon

Staff of the Committee:

Mr. Yoine Goldstein, Special Advisor to the Committee, Partner, Goldstein, Flanz & Fishman

Ms. June M. Dewetering, Acting Principal, Parliamentary Research Branch, Library of Parliament

Mr. Denis Robert, Clerk of the Committee, Committees and Private Legislation Directorate, The Senate

Mrs. Kelly J. Bourassa, Barrister and Solicitor, Policy Advisor to the Chair

Ms. Rhonda Walker, Policy Advisor to the Deputy Chair

Order of Reference

Extract from the *Journals of the Senate* of October 29, 2002:

The Honourable Senator Kolber moved, seconded by the Honourable Senator Bacon:

That in accordance with the provisions contained in section 216 of the *Bankruptcy and Insolvency Act* and in section 22 of the *Companies' Creditors Arrangement Act*, the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report on the administration and operation of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*; and

That the Committee submit its final report no later than June 19, 2003.

The question being put on the motion, it was adopted.

Extract from the *Journals of the Senate* of May 15, 2003:

Resuming debate on the motion of the Honourable Senator Kolber, seconded by the Honourable Senator Rompkey, P.C.:

That the date for the presentation by the Standing Senate Committee on Banking, Trade and Commerce of the final report on its study on the administration and operation of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, which was authorized by the Senate on October 29, 2002, be extended to Thursday, December 18, 2003.

After debate,

The question being put on the motion, it was adopted.

Paul Bélisle

Clerk of the Senate

Recommendations

Consumer Insolvency:

Federal Exempt Property:

1. The *Bankruptcy and Insolvency Regulations* be amended to provide a list of federal exempt property. The debtor should be required to choose, at the time of filing for bankruptcy and in its entirety, either the list of federal exempt property or the list of provincial/territorial exempt property available in his or her locality. The value of the property in the list of federal exempt property should be increased annually in accordance with increases in the cost of living as measured by the Consumer Price Index.

Exemptions for RRSPs and RESPs:

2. The *Bankruptcy and Insolvency Act* be amended to exempt funds in all Registered Retirement Savings Plans from seizure in bankruptcy, provided that three conditions are met: the Registered Retirement Savings Plan is locked in; contributions made to the Registered Retirement Savings Plan in the one-year period prior to bankruptcy are paid to the trustee for distribution to creditors; and the exempt amount is no greater than a maximum amount to be set by regulation and increased annually in accordance with increases in the cost of living as measured by the Consumer Price Index.

3. The *Bankruptcy and Insolvency Act* be amended to exempt funds in a Registered Education Savings Plan from seizure in bankruptcy, provided that two conditions are met: the Registered Education Savings Plan is locked in; and contributions made to the Registered Education Savings Plan in the one-year period prior to bankruptcy are paid to the trustee for distribution to creditors.

Reaffirmation Agreements:

4. The *Bankruptcy and Insolvency Act* be amended to prohibit reaffirmation by conduct or by express agreement.

Summary Administration:

5. The *Bankruptcy and Insolvency Act* be reviewed in order to eliminate all unnecessary procedural requirements and to provide parties to a bankruptcy with an opportunity — to the extent possible — to choose their level of involvement in accordance with a "by exception rather than by rule" approach. Moreover, the use of electronic communication should be encouraged in order to simplify and expedite the insolvency process.

Non-Purchase Money Security Interests in Personal Exempt Property:

6. The *Bankruptcy and Insolvency Act* be amended to prohibit non-purchase money security interests in property that would otherwise be exempt from seizure in bankruptcy. Property should be defined to include exempted property intended for use or consumption by the debtor or the debtor's family, and should encompass apparel, household furnishings and motor vehicles owned by the debtor.

Mandatory Counselling:

7. The *Bankruptcy and Insolvency Act* be amended to require the completion of mandatory counselling by first-time and second-time bankrupts as a condition of automatic discharge from bankruptcy available after 9 and 21 months respectively. Debtors making a consumer proposal should also undertake mandatory counselling. The nature and timing of mandatory counselling should be examined to ensure its effectiveness.

Consumer Liens:

8. The issue of consumer liens continue to be addressed within provincial/territorial consumer protection legislation.

Student Loans:

9. The *Bankruptcy and Insolvency Act* be amended to reduce, to five years following the conclusion of full- or part-time studies, the length of time prior to permitting the potential discharge of student loan debt. As well, the Act should allow the Court the discretion to confirm the discharge of all or a portion of student loan debt in a period of time shorter than five years where the debtor can establish that the burden of maintaining the liability for some or all of the student debt creates undue hardship.

Discharge from Bankruptcy and the Treatment of Second-Time Bankrupts:

10. The *Bankruptcy and Insolvency Act* be amended to provide automatic discharge from bankruptcy after 21 months for second-time bankrupts who have completed mandatory counselling. The Superintendent of Bankruptcy, the trustee or

any interested party should have the opportunity to oppose the automatic discharge, in the same way that the discharge of a first-time bankrupt can be opposed, thereby requiring a Court hearing.

Contributions of Surplus Income to the Bankrupt's Estate:

11. The *Bankruptcy and Insolvency Act* be amended to require bankrupts with surplus income to contribute to their estate for a total of 21 months. Trustees should have the discretion to permit a shorter contribution period in cases of undue hardship. Surplus income should continue to be determined in accordance with the directive of the Superintendent of Bankruptcy. The discharge of the debtor should not be delayed merely because of the obligation to continue to contribute for a total of 21 months. In appropriate circumstances, a trustee should be able to seek a summary judgment to require such payments.

Voluntary Agreements to Make Post-Discharge Payments:

12. The *Bankruptcy and Insolvency Act* be amended to allow trustees to enter into voluntary payment agreements with bankrupts who do not have surplus income. Fees payable to the trustee in accordance with such an agreement should not exceed the minimum legal amount established for summary administration bankruptcies.

Non-Dischargeable Credit Card Purchases:

13. The matter of purchases by the debtor of luxury or non-essential goods and services shortly prior to filing for bankruptcy continue to be decided either during the course of a discharge hearing or through an accusation of fraud.

International Insolvency:

14. The *Bankruptcy and Insolvency Act* be amended to recognize the effect of a foreign discharge or compromise of debt with respect to an individual, provided certain conditions are met. The conditions should be: the bankrupt foreign-resident Canadian has a real and substantial connection with the foreign jurisdiction; the foreign procedure is fair and non-prejudicial to creditors; and the personal exemptions used by the bankrupt foreign-resident Canadian in the foreign proceedings are substantially similar to those in Canada.

Debt Forgiveness by the Canada Customs and Revenue Agency:

15. The *Bankruptcy and Insolvency Act* be amended to provide that, for consumer proposals, the year-end date for income tax purposes is the date on which the proposal is filed with the Official Receiver. For commercial proposals, the year-end date should be the earlier of: the date of filing of the notice of intention to file a proposal; and the date of filing of the proposal with the Official Receiver. Moreover, the *Income Tax Act* should be amended to ensure that the debt forgiveness provisions in Section 80 of the Act are not applicable to individuals who file proposals under the *Bankruptcy and Insolvency Act*.

Ipso Facto Clauses:

16. The *Bankruptcy and Insolvency Act* be amended to provide that *ipso facto* clauses in agreements for basic services are not enforceable with respect to consumer proposals and consumer bankruptcies.

Credit Reporting:

17. The Office of the Superintendent of Bankruptcy take a leadership role in convening a meeting among credit granting agencies, credit grantors, provincial/territorial representatives and other relevant parties with a view to negotiating a mutually acceptable credit scoring regime.

Inadvertent Discharge of Selected Claims in Proposals:

18. The *Bankruptcy and Insolvency Act* be amended to ensure that an insolvent debtor will not be released from the debts and liabilities referred to in Section 178 of the Act unless the holder of those debts provides affirmative and informed consent.

Bankruptcy and Family Law:

19. The *Bankruptcy and Insolvency Act* be amended to:

- ensure that bankruptcy does not prevent a claimant from recovering the total amount of support arrears from a bankrupt spouse;
- clarify that only Court orders made under Section 68 of the Act have priority over enforcement of spousal and child support against the bankrupt's income during the period of bankruptcy;
- provide that bankruptcy does not stay or release any claim for equalization or division against exempt assets under provincial/territorial legislation regarding equalization and/or the division of marital property;
- exclude, from assets vesting in the trustee, the right to sue the bankrupt's spouse for equalization or division of property under provincial/territorial matrimonial property law; and
- add, to the debts that survive bankruptcy, a debt for equalization or division of property under provincial/territorial matrimonial property law, to the extent that the debt arises from malicious or fraudulent dissipation or concealment of property by the bankrupt.

Commercial Insolvency:

Compensation Protection: Wages and Pensions:

20. The *Bankruptcy and Insolvency Act* be amended to provide that unpaid claims for wages and vacation pay arising as a result of an employer's bankruptcy be payable to an amount not to exceed the lesser of $2,000 or one pay period per employee claim. The funding of these claims should be assured by creating a super priority over secured claims to inventory and accounts receivable. The secured creditor or creditors should be able to assume the rights of the employees against the directors.

21. The *Bankruptcy and Insolvency Act* not be amended to alter the treatment of pension claims.

Debtor-in-Possession Financing:

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 Rights of Unpaid Suppliers:

23. The *Bankruptcy and Insolvency Act* be amended to repeal, subject to the noted exception, the provisions that provide protection for unpaid suppliers of goods to bankrupt companies. The provisions that protect the rights of farmers, fishers and aquaculturalists as suppliers should be retained.

Cross-Border Insolvencies:

24. The *Bankruptcy and Insolvency Act* be amended to incorporate the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency. Consideration should be given to adding a reciprocity provision and provisions that would assure the creation of a creditors' committee, consisting of Canadian creditors, to protect their interests. The reasonable expenses of the members of this committee should be paid by the foreign debtor, if considered appropriate by the Canadian Court.

Director Liability:

25. The *Bankruptcy and Insolvency Act* be amended to include a generally applicable due diligence defence against personal liability for directors.

Transfers at Undervalue and Preferences:

26. The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to ensure consistent and simplified rules for challenging fraudulent preferences, conveyances at undervalue and other reviewable transactions. A trustee/monitor under a proposal should have the same powers as a trustee in bankruptcy. The Acts should provide a standard for challenging transactions that may affect the value of creditors' realizable claims.

Bankruptcies by Securities Firms:

27. The *Bankruptcy and Insolvency Act* be amended to clarify: the definition of "net equity;" the status of cash in the accounts of bankrupt securities firms; and the applicability of Part XII of the Act to electronic transactions.

Financial Market Issues:

28. The *Companies' Creditors Arrangement Act* be amended to give the Court the right to exempt securities regulators from Court-ordered stays of proceedings in instances where two conditions are met: the exemption is needed for the protection of third parties; and the exemption does not subject directors or senior management to undue pressure and loss of time.

Insolvency Practitioner Liability as a Successor Employer:

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

Executory Contracts:

30. The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit disclaimer of executory contracts in existence on the date of commencement of proceedings under the Acts. This disclaimer should apply to all executory contracts, provided a number of conditions are met. In particular: the debtor should be obliged to establish inability or serious hardship in restructuring the enterprise without the disclaimer; the co-contracting party should be permitted to file a claim in damages in the restructuring; and, where a collective agreement is being disclaimed, the debtor should also have the burden of establishing that post-filing negotiations have been carried on, in good faith, for relief of too onerous aspects of the collective agreement and should establish in Court that the disclaimer is necessary in order to allow for a viable restructuring.

31. The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit trustees, Court-appointed receivers and monitors, if authorized by judgment, to assign executory contracts when appropriate, in connection with going concern transactions and on a liquidation basis, provided that two conditions are met: the proposed assignee is at least as credit worthy as the debtor was at the time the contract was entered into; and the proposed assignee agrees to compensate the other party for pecuniary loss resulting from the default by the debtor or give adequate assurance of prompt compensation.

Workers' Compensation Board Premiums:

32. The *Bankruptcy and Insolvency Act* not be amended to alter the treatment of Workers' Compensation Board premiums.

Interim Receivers:

33. The *Bankruptcy and Insolvency Act* be amended to clarify the role of the interim receiver, and the duration and meaning of the term "interim." As well, the definition of "receiver" should be amended to include interim receivers when they operate in a manner similar to Court-appointed receivers.

Going Concern and Asset Sales:

34. The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit the debtor, subject to prior approval of the Court, to sell part or all of its assets out of the ordinary course of business, during reorganization and without complying with bulk sales legislation. Similarly, the debtor should be permitted to sell all or substantially all of its assets on a going concern basis. On an application for permission to sell, the Court should take into consideration whether the sales process was conducted in a fair and reasonable manner and whether major creditors were given reasonable notice, in the circumstances, of the proposed sale and had input into the decision to sell. No such sale to controlling shareholders, directors, officers or senior management of the debtor having a significant financial interest in the purchaser or in the sales transaction should be permitted, other than in exceptional circumstances.

Governance:

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. Moreover, prior to appointment, a trustee/monitor should disclose, to the Court, any business and legal relationships it has or has had with the debtor. The auditor or recent former auditor of the debtor should not be permitted to be the monitor. Furthermore, the monitor should not be permitted, in the event of a failed restructuring, to become the trustee or a receiver for a secured creditor.

Plan Approvals:

36. The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to require a trustee/monitor to provide, in connection with a request for Court approval of a reorganization plan, an opinion that, as a group, each of secured creditors and unsecured creditors are likely to receive no less under the plan than it would receive in a liquidation. Moreover, Section 54(3) of the *Bankruptcy and Insolvency Act* regarding related parties should be incorporated in the *Companies' Creditors Arrangement Act*. Finally, the Acts should be amended to provide the Court approving a reorganization plan with the power to approve a restructuring of the equity of the debtor, with or without shareholder approval.

Priorities:

37. The *Companies' Creditors Arrangement Act* be amended to incorporate the priority rules in the *Bankruptcy and Insolvency Act*.

Insolvency of Other Vehicles:

38. The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to provide for the liquidation or the reorganization of a business trust.

Income Tax:

