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Canadian Association of Insolvency and Restructuring Professionals
Association canadienne des professionnels de l'insolvabilité et de la réorganisation

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Date: **30 March 2020**

À/To: **National Judiciary Committee**

De/From: **CAIRP COVID-19 response working group**

Objet/Re: **Urgent issues relating to the current scheduling restrictions resulting from the COVID-19 pandemic at the Court level**

Background

CAIRP has been approached to provide comments on the current urgent issues arising in proceedings under the *Bankruptcy and Insolvency Act* ("**BIA**"), the *Companies' Creditors' Arrangement Act* ("**CCAA**") and the *Canada Business Corporations Act* ("**CBCA**"), as a result of the restrictions placed on the access to the courts in view of the physical distancing ordered by the various governments in an attempt to control the current coronavirus ("**COVID-19**") pandemic.

CAIRP's preliminary thoughts are set out hereunder. They were developed following a conference call with members of CAIRP's Executive, the Chair of our Consumer Practice Committee and other members who had been contacted by the Judicial branch of various Provinces. Those on the call represented firms of various sizes, various practice areas, in various provinces. Notwithstanding, these comments were developed quickly and without a full discussion in view of the request to provide comment to the Judiciary in a shortened time-frame. As such, the issues raised and proposed solutions may be incomplete, and may need to be revisited later.

The request as formulated to us was that we address the following questions:

1. What are the urgent issues relating to the BIA, CCAA and CBCA that are impacted by the current scheduling restrictions resulting from the COVID-19 pandemic?
2. What are your proposed solutions that can be addressed by the judiciary?
3. How can we facilitate hearing court applications in urgent matters that cannot be adjourned;
4. How should urgent requests be made to the court, including requests for electronic hearings;
5. What types of applications can be heard in writing (i.e. based on written materials only); and
6. How can decisions in insolvency matters be quickly posted online so there is a common understanding of how matters are being addressed by the courts.

1. Urgent issues relating to the BIA, CCAA and CBCA that are impacted by the current scheduling restrictions resulting from the COVID-19 pandemic

From our perspective, the problems will arise on two levels. Firstly, urgent matters will surface in specific files that will require immediate intervention by the Court on a priority basis, and secondly, normal administrative issues will cause an urgent need for relief, as otherwise the strict deadlines or the deeming provisions in the legislation will cause an irreversible situation or will cause a flurry of court applications in the future to correct the impact of the mere passage of time.

In the first category, we can identify matters such as:

1.1. Shareholder disputes that may require some safeguard order or the appointment of a liquidator, receiver or receiver-manager under the CBCA.
1.2. Oppressive conduct that requires remediation under the CBCA.
1.3. The appointment of an interim receiver under sections 46, 47 or 47.1 BIA.
1.4. The appointment of a receiver under section 243 BIA.
1.5. An application for a bankruptcy order under the BIA.
1.6. An application for an initial order under the CCAA.
1.7. An application for an interim order for an arrangement under the CBCA.
1.8. An application for relief specific to restructuring procedures in a context of proceedings under the BIA or CCAA, such as authorization of a sale of assets, interim financing, etc.
1.9. A relief that would be incidental to an interim financing order that has already been made. if interim financing was sought, the terms and size thereof may be subject to a specific timeline. This means that on a case by case basis claims process orders, adjudication of claims, meeting orders and sanction orders may become urgent to prevent the interim financing from expiring or becoming in default or to allow a plan to complete or a transaction to conclude.
1.10. Other applications of a similar nature.

These cannot be predicted, as their occurrence and the degree of urgency will depend on the specific situation.

In the second category, we can identify matters such as:

1.11. Automatic discharges in personal bankruptcy files under the BIA – We can expect that debtors will in large number stop making payments in respect of their surplus income obligations or personal commitments, due to the uncertainty. The suspension of surplus income payments may need to be corrected by systematically opposing bankrupts' automatic discharges in the future, which would then overwhelm the mediation system and the Court system.
1.12. Automatic defaults in consumer proposals under Division II of Part III of the BIA – We can expect that consumer debtors will be missing payments under their consumer proposals, resulting in deemed annulments that, to be corrected, would require amendments to or revival of the consumer proposal (both of which are subject to creditors' whim) or may have irreversible impact on the debtors who may not make another consumer proposal or benefit from the stay of proceedings under sections 69 to 69.2 BIA;
1.13. Defaults in commercial proposals under Division I of Part III of the BIA,
1.14. Deemed assignments in proceedings under Division I of Part III of the BIA as a result of the failure to file a proposal within the 30 days following a notice of intention to make a proposal or any extension thereof;
1.15. Deemed assignment in proceedings under Division I of Part III of the BIA as a result of the failure to file a proposal at the expiry of the 6 month delay – this possible impact is particularly problematic in view of the provisions of section 50.4(10) BIA which limits the Court's discretion to make an order extending a timeline under section 187(11) BIA;
1.16. Applications for an extension of a stay in proceedings under the CCAA;

1.17. Applications for delays in holding a meeting of creditors – the BIA mandates, at sections 51 and 102 BIA, that the meeting of creditors must be held within a specific delay, which can only be extended by the Court;[1]

1.18. Applications to tax bills of costs, fees, etc., approve the accounts of the trustee and grant the trustees' discharge. In view of the fact that the cash flow stream of the licensed insolvency trustees ("**LITs**") will have been curtailed by the expected decrease in payments from debtors, similar to other businesses which are currently experiencing cash flow problems, the ability to draw funds that have been earned and are available in the estate's trust account may become an issue of great importance to the viability of some of the firms.

1.19. Delays in presenting a claim for repossession of property under section 81.1 BIA or a claim for priority under section 81.2 BIA. While these may not appear urgent, it is obvious that the pandemic will have an adverse impact on the creditors' ability to file their claims within the required deadline, such that their rights may be affected through no fault or negligence on the part of the creditors. CAIRP believes this is not the intention of the BIA and that the potential hardship should be addressed.

2. Proposed solutions that can be addressed by the judiciary

For the first category above as described in paragraphs 1.1 to 1.10, we cannot imagine a blanket panacea that could solve these issues, but rather believe that these issues can be resolved by having a strong process in place to address these issues. We consider these to be exceptions and suggest they could be dealt with as follows:

2.1. A process should be set up to present a summary of the issue that requires immediate attention, with a short explanation of the urgency;

2.2. A referee needs to be appointed to determine the urgency, in a triage operation, and if appropriate refer the matter to a judge for follow up.

2.3. The judge seized with the problem can then decide of the appropriate information needs, evidence, and relief.

For the second category above as described in paragraphs 1.11 to 1.19, we believe these can all or substantially all be resolved by obtaining an order applicable to all active files in the relevant bankruptcy district, based on the Court's authority under sections 34, 183 and 187 BIA:

2.4. suspending the count of days under the BIA, substantially the same way as is contemplated for the count of days for claims under sections 81.1 and 81.2 BIA in paragraph 11 of the Standard Initial Order Form related to the CCAA for the judicial district of Montreal, found at http://www.barreaudemontreal.qc.ca/en/avocats/SC-comm;

2.5. Authorizing the postponement of meetings of creditors until a date that is 30 days after the date on which the restrictions pertaining to access to the court are lifted.

We feel this relief would solve the problems relating to issues described in paragraphs 1.11 to 1.17 and 1.19 above, with the possible exception of issue number 1.15, although we point out that there are precedents for extending the 6 month delay notwithstanding section 50.4(10) BIA when special circumstances exist.[2]

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[1] Section 102 BIA allows some discretion for the Official Receiver to extend the timeline for a meeting, but only for a very short while, so it is irrelevant for the purposes hereof.

[2] *Re Dundee Oil & Gas Limited*, 2018 CarswellOnt 2174, judgment of the Honorable Sean Dunphy, SCJ; *Re Techno Moules PLC Inc.*, , 300-11-000042-193, judgment of Special Clerk Amélie Lachance sitting as Registrar, on 23 March 2020.

We are cognizant of the fact that such a wide omnibus order could result in abuse by malintentioned parties. We suggest such an order should provide for a requirement for the insolvency professionals (monitors, trustees, etc.) to continue monitoring the affairs of the debtor or bankrupt and report to the court and the creditors in the event of a problem. As well, the order should provide for an updating of financial information usually available in any application for an extension of time, such as financial information (a comparison of actual and budgeted information for proceedings under Division I of Part III of the BIA) and prospective information (projected cash flows).

If a problem develops due to abuse or a change in circumstances that is a substantial change, the matter can be treated as part of the exceptions as contemplated in paragraphs 2.1 to 2.3 above. As well, for the issues described in paragraphs 1.18, we suggest these could be dealt with as part of the exceptions as contemplated in paragraphs 2.1 to 2.3 above, recognizing that these will not be the first priority but will be dealt with in due course when a decision maker (Judge or registrar) has time availability.

As regards issue no 1.15, if the Judiciary believes the relief requested cannot be granted, we believe the issue can still be corrected by our members, but that would require systematically filing "holding proposals" and using the provisions suggested above to delay the meeting of creditors in abeyance, until such time as an amended proposal (a definitive proposal) can be filed and considered by creditors.

In respect of all of the above, there would need to be a possibility for stakeholders to return the matter to Court on a case by case basis, under the provisions suggested in paragraphs 2.1 to 2.3 above.

3. **Facilitating hearing court applications in urgent matters that cannot be adjourned**
4. **How should urgent requests be made to the court**
5. **What types of applications can be heard in writing?**

We are addressing these 3 questions together as we believe they are related.

We suggest that urgent matters are really exceptions and should be dealt with as suggested in paragraphs 2.1 to 2.3 above. To be efficient, the Court needs to identify a single portal to receive a short communication that will explain the nature of the problem, the reason for the urgency and the type of relief sought. The person(s) in charge of that portal need to perform a triage operation to prioritize problems and assign them to a decision maker. From that point, the decision maker can determine how to best streamline the process, from what evidence is needed including if need be *viva voce* evidence, the timelines, whether a hearing will be held or whether e-mail exchanges of documents are sufficient, etc.

We believe the matter of how the application should be heard should be left to the decision maker (Judge or Registrar) seized of the issue, but we see no reason why the parties should not be required to make joint acknowledgements of the factual basis and make submissions limiting the decision maker's intervention to contentious issues that cannot be resolved. Inasmuch as possible, these could and should be dealt with through exchanges of documents rather than verbally at a hearing by phone or videoconference.

6. **How can decisions in insolvency matters be quickly posted online so there is a common understanding of how matters are being addressed by the courts.**

CAIRP's members include most of the licensed insolvency trustees. We suggest the orders made by the Court that have an impact on files in general can be publicized by posting them of CAIRP's website, and by requesting that CAIRP issue an e-mail blast to all members, notifying them of the decision and where it can be found.

The Office of the Superintendent of Bankruptcy ("**OSB**") can also be helpful in publicizing decisions, as the OSB can communicate quickly with all licensed insolvency trustees.

As well, the bar associations have a quick access to their members who may require being notified of the relief measures.

Finally, if the relief is in respect of a specific case and does not impact the practice as a whole, the insolvency professionals can be requested to communicate the orders by posting them on their website and to communicate a notice that the order was made to creditors by electronic means, for those creditors who have provided coordinates or who are represented in the file.

We hope you will find the foregoing useful. We are available to discuss the contents of this memorandum with you at your convenience.

CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS

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