TORYS

CAIRP NIQP Presentation Materials / Case Studies

TOPIC: OTHER INSOLVENCY ENGAGEMENTS

Handout #2:

- Case Study #2 (Questions and Answer Guide)

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Case Study #2 — Questions and Answer Guide

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- Usual Caveat: The facts described below are for illustrative purposes only. This case study is intended only as a fictitious but practical exercise to provide context to the subject matter.

THE FACTS

- ABC Inc. is a private corporation incorporated in 2010 under the *Canada Business Corporations Act* (CBCA).
- ABC Inc. is a manufacturing company with a head office and manufacturing facility in Toronto, Ontario. It sells / distributes its products across Canada and the United States.
- In 2015, ABC Inc. acquired the shares of its biggest competitor, whose head office and manufacturing facility is located in Vancouver, British Columbia. This new company is a subsidiary of ABC Inc.
- ABC Inc. has always had Big Bank as its secured operating lender. The credit agreements were signed in 2010, together with the following security documents:
  - general security encumbering all of ABC's real and personal property;
  - general assignment of accounts;
  - pledge of certain securities;
  - security under the terms of Section 427 of the *Bank Act*, notice of which was published on February 3, 2010, for credit advances granted on February 28, 2010; and
  - mortgage encumbering all of the real properties of ABC Inc.

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- The B.C. subsidiary, since its acquisition by ABC Inc., is co-debtor of all of the credit facilities granted by the Big Bank and has granted similar security to that of ABC Inc. All of the security has been registered in accordance with the respective *Personal Property Security Act* in Ontario and in B.C., and also under the respective *Mortgages Act*.
- Currently, two (2) technical defaults (EBITDA and inventory covenant, and failure to deliver an insurance certificate showing the renewal of existing policies and the Big Bank as loss payee) have been tolerated for about four (4) months.

Big Bank has consulted you and asked for your recommendations regarding the analysis of ABC Inc.'s financial situation — specifically, it wants to know what, if anything, it should do.

QUESTION #1

1. *What additional facts or documents do you require in order to assess the position of the Big Bank and be in a position to make a recommendation?*

ANSWER:

- key is to understand: (i) the Bank's position; (ii) ABC's position as debtor; and (iii) the position of relevant third parties – you need further information for each of these
- loan and security documents (i.e. what rights does Bank have, are there cure rights / notice obligations, what collateral is subject to security, etc.)

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- PPSA and other searches / review of info re: other creditors (i.e. is security properly registered? what other creditors are there? what is the relative priority of existing claims? has debtor previously commenced bankruptcy / insolvency proceedings? etc.)
- financial statements and other business / operations info — want to see both historic and forward-looking information to determine how severe ABC's problems are
- collateral base — e.g. valuations — with specific focus on inventory (i.e. is Bank in any jeopardy? what is the cause of the covenant default and is it systemic / pervasive?)
- correspondence (i.e. has Bank waived rights, agreed to forebear, made representations, etc.?)

2. *Based on what you know from the facts above, what preliminary thoughts do you have as to a recommendation?*

ANSWER:

- informal appointment (look-see / monitor), but avoid getting too close to the debtor — you're not there to fix their problem / assist them (at least not yet); you're there as agent for the Bank
- consider having recourse to enhanced reporting rights under the security documentation
- consider whether a more formal arrangement is required — e.g. written forbearance agreement
- if there is a real problem, consider security enforcement or other remedy
- if inventory problems reveal possible criminal fraud, consider whether there is an obligation to report to authorities
- consider implications of recommendation (e.g. cross-default provisions, defaults under other key contracts, public reporting obligations if the debtor is a public company, etc.)

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3. *The Bank informs you that certain pieces of equipment, including a truck, were recently seized by a sheriff executing upon a judgment, and that the assets are to be sold in two (2) days' time. The Bank is desperate to stop the sale to prevent its collateral from being eroded, and asks you what can be done.*
   a) *What is your recommendation to the Bank? Should the sale be stopped?*
   b) *What additional means does ABC Inc. have to stop the sale?*

ANSWER:

a) Recommendation to the Bank?
   - consider whether there is a need to stop the sale — is it valuable collateral? would the Bank have first priority to the proceeds from these assets? are the assets vital to the ongoing business such that their absence will adversely affect operations? etc.
   - consider how to stop the sale — presumably a stay of proceedings is needed (receivership, restructuring, bankruptcy); also consider whether the account can merely be brought into good standing by paying / financing payment of arrears
   - avoid over-reacting — the seizure of minor assets may not be material
   - consider wider-effect of acting (e.g. cross-default provisions, defaults under other key contracts, public reporting obligations if the debtor is a public company, etc.)
   - consider whether there is time to act (e.g. are there notice requirements / cure periods? is a BIA or PPSA notice required? will the debtor and other interested parties waive the notice period? how much time is needed to prepare court materials or other enforcement documents?)

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- consider other timing issues — if accounting firm has just been retained by Bank, does it have time to get "up and running" and people in place to take over and operate business (and to understand the business, risks, issues, etc.)
- consider bigger picture — what is the seizure and sale of this one asset indicative of? is the company in trouble or is this a "one off" incident? is there a cash flow issue or other looming crisis?
- consider using these defaults as the basis for taking other steps in the Bank's interests — e.g. appointment of monitor, taking additional security, etc.
- objective is not to stop this one asset sale — the objective is to devise a strategy that ensures that the Bank's overall realization is maximized
- consider cost-benefit analysis (e.g. benefit of preventing this particular collateral from being lost v. impact of a receivership / restructuring / bankruptcy on the company and the remaining collateral)

b) Additional means that ABC Inc. has to stop the sale that the Bank doesn't?

- possibly payment of the accounts to bring them into good standing (but presumably doesn't have funds or would have done so already)
- also, consider voluntary insolvency proceedings to halt sale (bankruptcy, proposal, CCAA)

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4. *ABC Inc.'s shareholders, several of whom are on the board and/or in senior management, have each personally guaranteed the entire loan to Big Bank. They are concerned about their personal exposure if their guarantees are called by Big Bank, and they ask for your advice. Can you advise them and what would you recommend to them under the circumstances?*

ANSWER:

- consider whether you should be advising the shareholders and/or guarantors — conflict of interest
- assuming no conflict issue, consider whether any of the shareholders ought to consider their personal insolvency situation — it may be pre-mature given that no demand has been made by Big Bank against company or under guarantees
- balance ethics v. leverage — the shareholders are in a bind, and pressure could be brought to bear by Big Bank to have the debtor company co-operate with the Bank (e.g. allow monitor access, consent to waiver of BIA s. 244 notice period / appointment of receiver, etc.)
- guard against unethical strategies intended to repay principal obligation so as to relieve liability under guarantees (e.g. "priming" creditors, including running up inventory and other purchases so as to increase the collateral base), including potential reviewable transactions
- watch for conflicts between shareholders (no duty to the company) v. directors / officers (fiduciary duty to the company)

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5. *Your recommendations to Big Bank, if acted upon, will be prejudicial to some stakeholders. The Bank asks you if that matters?*

ANSWER:

- possibly — avoid assisting or advising with respect to reviewable transactions, priming creditors and other unethical practices.
- however, you have been retained by the Bank only at this point, and have no express duty to other stakeholders. Within the bounds of ethics and law, your duty is to assist the Bank (regardless of whether its interests conflict with the interests of others)

At a subsequent meeting, you learn that the facilities located in Toronto are undergoing an expansion. The work began in July 2017 and is not yet completed. At the present time, ABC Inc. cannot pay the various parties who have been performing the work.

QUESTION #2

6. *Regarding potential lien claims, what formalities should have been completed by ABC Inc. and these parties?*

ANSWER:

- Many formalities are statutorily provided and cannot be contracted out of
- *Construction Lien Act* (Ontario) ("CLA") requires the payor pursuant to any contract or subcontract for the supply of goods or services in respect of an improvement (CLA defines broadly) to hold back monies in respect of the contract price for the benefit of those parties having supplied goods or services to the payee in respect of an improvement

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- Basic holdback is equal to 10% of the price of the goods or services actually supplied, though there are finishing holdbacks and additional holdbacks that may also arise
- The CLA creates trusts that are intended to preserve monies in respect of an improvement for the benefit of contractors and subcontractors having supplied goods or services to the construction project — these trusts have been held to survive in a bankruptcy (but frequently fail due to comingling). Recent amendments to the legislation aim to bolster these trusts and the ability to trace proceeds

7. *What remedies are available to the parties or companies that participated in the work?*

ANSWER:

- A person who supplies goods or services to an owner / contractor / subcontractor in respect of an improvement has a lien against the land in question (i.e. the land improved by the goods or services provided)
- Liens must be preserved and perfected in accordance with the requirements of the CLA
- Generally, a lien in respect of an improvement has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, save and except for those executed or enforced prior to the creation of the lien (i.e. the time at which the goods or services in question were first supplied)
- A lien in respect of an improvement has priority over all conveyances, mortgages or other agreements affecting the owner's interest in the land in question. However, prior mortgages (i.e. prior to the creation of the lien) have priority over the lien to the extent of the lesser of: (i) the actual value of the land at the time the lien first arose; and (ii) the total of all amounts that prior to that time had been advanced under the mortgage or otherwise secured (i.e. the mortgagee does not get the benefit of any value added to the land as a result of the improvement giving rise to the lien) — in other words, prior mortgage does not get the benefit of the improvement

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- As between liens of the same class (i.e. lien claimants having provided goods or services to the same payor), there is no priority and liens are distributed rateably. The liens of each member of a class have priority over the liens of the payor of that class
- Section 31 of the *Personal Property Security Act* (Ontario) provides further clarity that a perfected security interest under the PPSA is subordinate to a lien for the provision of goods or services in the ordinary course of business (whether such lien is statutory or arises from common law)
- A lien claim is typically enforced by commencement of an action in the Ontario Superior Court of Justice by way of Statement of Claim (issued in the office of the court registrar in the region in which the lands in question are located). Other lien claimants may join the action and, where there are multiple actions commenced, the court may consolidate the actions
- Anyone with an interest in the land in question, including a lien claimant, may apply to the court to have a Trustee under the CLA appointed over the land in question on such terms as the court considers appropriate

8. *In determining how to respond to these lien claims, what considerations ought Big Bank have in mind?*

ANSWER:

- Consider whether the liens are material based on both the quantum of the claims and also the real property in question — is that real property part of Bank's collateral and how important is it?
- Consider priorities of Bank v. lien claims
- Consider whether more lien claims are likely to be filed and whether they can be stopped through an insolvency filing / stay of proceedings

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- Consider whether the building is a vital asset in debtor's business — does work need to be completed?
- Consider whether any action is required by the Bank to protect its interests (e.g. call loan, take additional security, pay out liens, etc.)
- Consider whether / how this affects the risk assessment and exposure of the Bank

9. *In determining how to respond to these lien claims, what considerations ought ABC Inc. have in mind?*

ANSWER:

- Consider the effect of liens on title, including with respect to selling the property
- Consider cross-defaults / reporting obligations (e.g. public securities obligations v. contractual obligations, such as covenants to report to the Bank)
- Consider whether the lien claimants are critical suppliers, whether work needs to be completed, impact on business
- Consider the appointment of a trustee under CLA / paying funds to discharge the liens

10. *ABC Inc. clearly requires additional funds, by loan or otherwise, in the very short term. Should Big Bank loan additional monies and what should it consider in making this decision given the construction liens?*

ANSWER:

- Consider advancing further monies in a different manner (i.e. not simply a further advance under an existing facility) — consider a DIP that has super-priority in an insolvency proceeding or advancing monies as a specific building mortgage (i.e. building mortgages (i.e. to finance the improvement) have priority over liens resulting from the improvement in question except to the extent that proper holdbacks were not maintained by the owner; therefore, a mortgagee has an interest in monitoring the owner and ensuring holdbacks are kept)

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- Perform cost / benefit analysis of further funding
- Consider whether there are other unencumbered assets or other collateral to secure further advances / any third persons that could guarantee further advances
- Confirm that existing security is valid / enforceable and address any deficiencies at this stage while debtor is co-operative and needing further advances

Big Bank is dissatisfied with the company's financial situation, and since one of ABC Inc.'s customers is preparing to make a payment of several million dollars, the Bank asks for your advice on one or more means of recovering these incoming monies. However, the security instruments stipulate that they can only be exercised in case of default, and the only defaults that currently exist are of a technical nature (as described above) and have been tolerated for about four (4) months.

QUESTION #3

11. Big Bank asks you whether and how it can obtain these monies, and whether it is advisable?

ANSWER:

- Understand underlying agreements (e.g. cure periods, notice requirements, clauses re: waivers, etc.)
- Confirm that the money in question is subject to the Bank's security and are there any prior-ranking claims
- Reserve rights / issue of implied waiver (though contracts may address this) — has the Bank waived its right to act on the technical defaults
- Consider whether there is time to act (i.e. demand letters / BIA s. 244 notices / etc.)

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- Consider appointment of agent to collect receivable v. a broader remedy (e.g. receivership) — is a broad or narrow remedy required
- Consider whether there is a right to sweep accounts or another means of claiming funds
- Consider the impact of taking the money on the debtor and its business — will it force the "lights off", is this the best realization strategy?
- Consider entitlement to contact a third party (i.e. the customer) to demand moneys and possible resulting damage to debtor's business — e.g. customers may get nervous and find new source of supply

12. *Big Bank asks you whether it would be exposed to potential liability if it were to take action to recover this account receivable?*

ANSWER:

- Minimal risk if within contractual rights / compliance with applicable law — especially consider the waiver issue and the reasonableness of relying on long-standing technical defaults
- Consider risk of improvident realization claim / potential claims of other creditors (not just debtor) — e.g. if Bank recovers 100% of its debt but does so in an unreasonable manner that causes damage to the business and loss of recovery for junior creditors or other stakeholders, those stakeholders may have claims against the Bank
- If realization on the receivable is risky, consider a formal process that is Court-supervised to insulate the lender
- Consider the impact of a realization strategy for this one asset on the bigger picture / broader realization strategy and options (e.g. appointing a receiver to collect this receivable may put other receivables in jeopardy)

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- ABC Inc.'s Board of Directors has invited you to one of the meetings of the Board, and asks you the following:

QUESTION #4

13. *Whether it can file a notice of intention, should a plan of arrangement be filed under the CCAA but be rejected by the creditors?*

ANSWER:

- Section 66 of the BIA states that proceedings under the CCAA cannot be continued under the BIA and that proceedings shall not be commenced under Part III of the BIA in respect of a company if a compromise or arrangement has been proposed in respect of the company under the CCAA and the compromise or arrangement has not been agreed to by the creditors or sanctioned by the court under that Act
- Although an insolvent company has sought the protection of the CCAA, if it has not proposed a plan of compromise or arrangement, the company can file a proposal under Part III of the BIA
- If CCAA proceedings terminate, there is no automatic bankruptcy — it is not clear whether and when new BIA proceedings could be commenced (i.e. new proceedings, not a transfer of existing proceedings)

14. *Whether it can file an application under the CCAA?*

ANSWER:

- Consider whether CCAA is an option — threshold requirements (i.e. must be a "debtor corporation" — which definition includes an insolvency requirement — with in excess of $5 million in debts)
- Identify strategic objectives — why file, what is to be achieved and is CCAA best means of doing it?

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- Consider pros / cons of the CCAA — amount of preparation necessary, time to complete, cost of proceedings, no automatic stay but broad stay, no automatic bankruptcy if unsuccessful, ability to repudiate executory contracts, easy to facilitate DIP financing, more judicial discretion / flexibility
- Consider defensive strategy (i.e. filing to stay other parties, reacting to other parties) v. pro-active strategy (i.e. filing to pro-actively restructure / address issues)

15. *Whether it can file a notice of intention, given the urgency, and then transfer the reorganization proceedings to the CCAA?*

ANSWER:

- Same general considerations as above, including need for an automatic stay of proceedings (unlike CCAA)
- Consider whether this amounts to an abuse of process
- Consider technical requirements under BIA to file an NOI and ensure they are satisfied
- Consider transfer restrictions — proceedings under Part III of the BIA may be taken up and continued under the CCAA, provided a proposal has not been filed (see s. 11.6 of the CCAA)

16. *The directors' potential liabilities and the means available to protect them? Can you both advise the directors in their capacity as directors and the company regarding its financial situation?*

ANSWER:

- Know who your client is — acting for the company v. acting for the Board (which is often difficult to distinguish as the Board often switches back and forth between company considerations and personal considerations)

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- Consider conflicts of interest — advising the company v. advising the directors in their personal capacity
- Theory v. practice — often difficult to know which hat is being worn at any given time, and directors often move back and forth from corporate to personal issues
- In practice, would typically act only for company but would informally address directors' preliminary questions — at some stage would advise them to get independent professional advice (and the sooner the better)
- Ethical dilemma — if directors have hired you to act for the company, it is very difficult in practice to refuse to answer their questions when they move to personal liability issues
- Consider whether directors have any duty to creditors — Supreme Court of Canada in *Peoples v. Wise* said no fiduciary duty exists, but there is a "duty of care" (lesser standard) and that creditors may sue directors under oppression provisions of corporate statutes
- Advise against unethical conduct (e.g. priming trade creditors, entering into reviewable transactions, etc.)
- Consider status of D&O insurance and ensure premiums are paid up

17. *Should they pay certain claims involving potential directors' liability but which are ordinary claims in a context of bankruptcy, such as the HST, which are six (6) months late, representing a total of about $800,000?*

ANSWER:

- Consider who you act for and should be advising
- Consider whether the means to pay exists — is payment even an option
- Consider methods of protecting directors — e.g. cash payments v. setting aside monies in trust

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- Avoid unethical behaviour such as reviewable transactions / preferences
- Little personal downside to paying these amounts — likely the worst that happens is that payment is set aside (i.e. no greater potential liability than already exists) — in practice it is common for directors to take care of their personal exposure before an insolvency filing or "turning over the keys" to a secured creditor
- Consider pros / cons of a bankruptcy filing. The reversal of priorities is a good thing for the Bank but may be a bad thing for the directors (though *Century Services* SCC case says no priority for GST / HST even in CCAA)

Assuming that ABC Inc. has been a public company since 2010 and has commenced proceedings under the CCAA:

QUESTION #5

18. *What can the company offer ordinary creditors? Anything other than cash? What should the terms of the Plan be?*

ANSWER:

- Don't focus right away on what terms in a Plan will ensure requisite creditor vote — it's easy to propose a Plan that creditors will approve. The more important issue is to first identify what the debtor needs to achieve in order for the restructuring to be a success — once you've identified what the company must achieve, then consider how best to obtain the requisite vote
- Consider offering cash v. non-cash consideration to creditors
- Consider the number and timing of payments / distributions to creditors
- Consider debt-to-equity swaps, rights offerings, and other creative solutions

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19. *How are Crown claims treated:*

a) *In proceedings under the BIA?*

ANSWER:

- Crown is generally an unsecured creditor
- Deemed trusts are lost unless specifically enumerated in Section 67(2) of the BIA (i.e. essentially, source deductions)
- Accordingly, BIA is an effective means of reversing many Crown priorities that exist outside of bankruptcy

b) *In CCAA proceedings?*

ANSWER:

- Crown is generally an unsecured creditor
- Deemed trusts / statutory liens are generally lost, except for source deductions (see Sections 37 — 40 of the CCAA)
- Accordingly, CCAA is an effective means of reversing many Crown priorities that exist outside of bankruptcy

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- GST / HST enjoyed a priority for a while (GST in the *Ottawa Senators* decision by the Ontario Court of Appeal was given priority over secured claims in a CCAA proceeding, effectively on the basis that the priority granted in the *Excise Tax Act* was held to trump the limitation on Crown claims in the CCAA) — however, this was overturned by the Supreme Court of Canada in *Century Services.*

c) *Under corporate reorganization such as under the CBCA or OBCA?*

ANSWER:

- This statute deals with voluntary wind-ups where solvent — Crown claims would typically be paid in full
- This statute also provides a means to reorganize equity, but not the restructuring of debt. Although recently it has become popular to resort to this tool to compromise specific bond and secured debts, to date it is generally not a tool for compromising Crown claims
- Therefore, no real impact on Crown claims / no loss of priority claims

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You are now consulted by the President of ABC Inc. who informs you that, in his opinion, the best solution is to proceed with the sale of the company.

QUESTION #6

20. *How could you proceed with the sale of shares or assets if, at this time, it is taken for granted that ABC Inc. is clearly insolvent and in default under the terms of the agreements with the Big Bank, even though no notice has been transmitted to ABC Inc. by the Bank as yet?*

ANSWER:

- No purchaser likely willing to do a share deal — buying shares means buying all the liabilities and therefore acquiring an insolvent company — the only real means of doing a share deal is if principal secured creditors are prepared to release claims and security for less than 100 cents on the dollar so as to voluntarily clean up the balance sheet
- However, if a share deal is possible, there may be no insolvency issue (i.e. the vendor(s) are the shareholders (not ABC) and they are not insolvent)
- Consider best vehicle to effect sale (e.g. receivership "flip", normal receivership process, PPSA power of sale process, etc.)
- *Bulk Sales Act* in Ontario may limit ability to sell outside of a Court-supervised process (but doesn't apply to receivers / trustees)

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- Be wary of sales outside of Court-supervised process if debtor is insolvent — may be a reviewable transaction; at a minimum establish and document a good sales process and valuations to justify sale price, and ensure distribution of proceeds is carefully addressed (i.e. most reviewable transaction challenges will be triggered by disputes arising on distribution of proceeds and whether the monies went to the parties having priority to such proceeds)
- Either company must sell itself (since Bank not yet in a position to enforce its security), or Bank must facilitate a sale transaction, likely with the company's co-operation (e.g. Bank could demand payment / issue BIA s. 244 notice, company waives notice period and consents to appointment of receiver, etc.)
- Company could seek to sell its assets as part of a liquidating CCAA (or less commonly, a liquidating BIA proposal proceeding)
- Purchaser would likely dictate the form / structure of a sale, including requiring Court-approval and the granting of a "vesting order" that vests all of the purchased assets in the purchaser free and clear of any claims — a private sale would likely be unacceptable to a purchaser due to insolvency / existing claims in the assets
- Consider securities laws requirements governing sale of shares / assets of a public company

Keeping in mind that this is a public company and the members of the Board of Directors have personal interests regarding the sale of shares or assets:

QUESTION #7

21. *What would you recommend regarding the solicitation and analysis of offers to purchase the assets?*

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ANSWER:

- Consider conflict of interests — remember who your client is and who you are advising
- Spell out options (pros / cons), but be cautious about championing a specific strategy or transaction — let the client choose
- Process of selling assets is as important (if not more important) as the actual outcome of the process — it is flaws and mistakes in the process that are a lightning rod for disputes — among other things, properly canvass the market in soliciting bids
- Consider putting the process in the hands of an independent party
- Get third party valuations
- Consider securities law requirements re: sales process / disclosure, etc.
- Consider consultations with key stakeholders for their views on process and outcome — be particularly cognizant of the stakeholders "on the line" (i.e. the one(s) who would get the next dollar of proceeds if the sale price was increased by a dollar)
- Directors should be mindful of their duties (principally to company / shareholders, not creditors, though there is a duty of care and cannot act oppressively)

You have been appointed monitor of ABC Inc.'s assets pursuant to the CCAA and you find yourself in the following situation: an offer to purchase has been duly accepted by ABC Inc., according to your recommendations, but the day after acceptance of this offer, a new buyer files an unconditional offer with you for a purchase price which is $6,000,000 higher than the offer already accepted.

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QUESTION #8

22. *What do you do? What do you recommend?*

ANSWER:

- Seek advice and directions from the Court on full and unbiased disclosure of the facts — don't feel compelled to make a determination alone or to champion one outcome over the other
- Consult with key stakeholders
- Consider circumstances of late bid (e.g. is it as a result of a flaw in the sales process? is it a case of a party "hiding in the weeds" such that the integrity of the process is threatened?)
- Ensure that the new offer is actually better — higher price alone is not necessarily determinative (e.g. consider conditions, holdbacks, adjustments, timing, etc.)
- Do not breach / induce breach of the existing purchase agreement — however, the directors of the company may have a duty to breach the contract (as case law has held that directors may have such a duty in some instances)

23. *What will appear in your report to the Court, which would be filed within the context of the application for approval of the transaction by the Court?*

ANSWER:

- Full disclosure, background
- Details of the sales process that was approved by the Court and adherence to that process.

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- Explanation of the extenuating circumstances surrounding the late bid, if any
- Analysis of the bids (without necessarily championing one over the other)
- Let the interested creditors / stakeholders appear on the motion and argue in favour of one result over another
- Show concern for the integrity of the process / insolvency law and practice / the Courts

If you are engaged to advise a buyer interested in ABC Inc.:

QUESTION #9

24. What are the pros and cons of an asset v. share deal?

ANSWER:

- Consider the pros / cons of an asset v. share deal (including ability to get vesting order for asset deal but not share deal; dealing with one vendor on an asset deal but possibly multiple vendors on a share deal; ability to leave liabilities or unwanted assets behind on an asset deal; possible ability to take advantage of tax losses on a share deal; etc.,)
- Consider whether you can get 100% of the shares (or sufficient majority)
- Maximize leverage from insolvency (e.g. demand exclusivity, grind purchase price down and consider delaying transaction to take advantage of pressure on vendor from poor cash flows, dictate form / structure of transaction, etc.)
- Identify the buyer's objectives — what structure best achieves this

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- Consider the need for a Court-supervised process / vesting order / recognition in other jurisdictions
- Consider the need for valuations / evidence that the consideration paid is appropriate and other means to insulate the transaction from later challenge (e.g. as allegedly being a reviewable transaction)
- Consider risks of completing a transaction outside of a formal process

You are now consulted by an ordinary creditor who asks you whether a committee of inspectors or creditors will be set up in connection with:

- the bankruptcy of ABC Inc.
- a proposal filed by ABC Inc.
- a plan of arrangement filed by ABC Inc. under the terms of the CCAA.

QUESTION #10

25. How do you answer him regarding each of these events?

ANSWER:

- Inspectors may be appointed under the BIA (1 to 5 inspectors total)
- Consider appointment of an interim receiver – provides oversight role
- Committees are unlikely under the BIA and CCAA, though not unprecedented — more common in CCAA proceedings, but still rare (unlike U.S. practice)

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26. What would be the powers of the committee of inspectors or creditors in each of these three (3) events?

ANSWER:

- Primarily statutory under the BIA; principally as set out in the applicable Court Orders under the CCAA

If ABC Inc., instead of being a corporate entity, were a limited partnership under the laws of Ontario:

QUESTION #11

27. Could it file an assignment of property under the BIA?

ANSWER:

- Yes, assuming thresholds are satisfied (i.e. is an "insolvent person" as defined in the BIA).
- BIA extends to partnerships / limited partnerships

28. Could it file a notice of intention and/or a proposal under the BIA?

ANSWER:

- Yes, assuming thresholds are satisfied (i.e. is an "insolvent person" as defined in the BIA).
- BIA extends to partnerships / limited partnerships

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29. Could it file a plan of arrangement under the CCAA?

ANSWER:

- Strictly speaking, no — CCAA only applies to a "debtor company" and not partnerships / limited partnerships
- In practice however, courts look the other way and permit it — see examples of partnerships in CCAA proceedings such as *Lehndorff* and *Playdium*; see other ways around this such as in *Calpine* and *MuscleTech* (i.e. which all the benefits and protections of Orders are extended to affiliated non-applicants)

30. Could it take advantage of the winding-up procedures prescribed in the CBCA or provincial equivalent?

ANSWER:

- No — not within the scope of that statute (i.e. voluntary winding-up under corporate statutes is for solvent companies only; also, limited partnership would be governed by partnership legislation rather than corporate legislation)

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