Much Ado: Evaluating the Collective Agreement Amendments in the BIA and CCAA

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This article considers the effect of recent statutory amendments that recognized the legal status of the collective agreement during insolvency. The essay reviews the law prior to, and after, the amendments along with survey data and interview responses of insolvency practitioners to determine if these changes unduly interfered with or prevented the successful restructuring of distressed businesses. It contends that the bulk of the early jurisprudence setting aside the force and effect of the labour contract damaged the law, weakened the legitimacy of the insolvency process and generated unnecessary conflict in the midst of restructuring efforts. By contrast the provisions recognizing the legal status of the collective agreement repaired the law, fostered voluntary negotiations among the parties and reduced unnecessary litigation between debtors and labour unions. Importantly, Parliament's reforms converted the court-centered conflict over the legal status of the collective agreement into a negotiation focused on securing agreement to rescue distressed businesses. As a result, the paper maintains these reforms introduced positive change into the restructuring attempts of stakeholders striving to salvage unionized companies facing bankruptcy.

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1. Introduction

Canadian bankruptcy litigation used to inspire a spirited debate whenever debtor employers in a unionized workplace faced insolvency. How could stakeholders meaningfully reallocate the resources of a flagging business during a cash crisis if high-priced collective agreements consumed the last vestiges of available capital? If a debtor employer was encumbered with an existing collective agreement, then the economic incentive for senior creditors to help restructure a distressed business might be lost. Unless bankruptcy judges permitted stakeholders to disclaim collective agreements, unionized businesses could be vulnerable to preventable liquidations. The disagreement between debtor employers and their trade unions over the enforceability of the labour contract generated a high stakes contest about the legal validity of collective agreements during bankruptcy. After almost fifteen years of discord in the case law, the time was ripe for legislative reform that would finally resolve the legal status of the collective agreement during insolvency. In the midst of the worst global financial crisis since the Great Depression, the Parliament of Canada acted and amended two key insolvency statutes designed to address the place of labour contracts during insolvency.

In 2009, a number of amendments were enacted into law, including section 65.12 of the *Bankruptcy and Insolvency Act*[1] (BIA) and section 33 of the *Companies' Creditors Arrangement Act* (CCAA).[2] Among other things, both reforms mandated that the collective agreement would remain in force during insolvency proceedings unless the parties to a labour contract voluntarily agreed to revise their bargain. However, the proposed reforms garnered concern that they created an incentive to simply liquidate businesses rather than attempt to extract concessions from labour unions who were not normally predisposed to accepting reductions in their terms and conditions of employment.[3]

In the face of misgivings about the prudence of the proposed changes, Parliament passed its amendments into law without conducting a meaningful examination of the expected effect of its proposed reforms.[4] In the three years that have passed since these labour-related reforms have come into force, no study has attempted to understand the practical implications of these amendments. This investigation aims to review the consequences of these statutory amendments on the law and on insolvency practice in Canada.

This essay will evaluate the effects of adding section 65.12 to the BIA and section 33 to the CCAA. In particular, it will examine whether the amendments recognizing the legal status of the collective agreement have unduly interfered with or generally prevented the restructuring of unionized businesses subject to insolvency proceedings. This paper contends that distressed companies have not suffered undue hardship as a result of the reforms nor have they commonly prevented restructuring of troubled companies with collective agreements. Instead, my analysis suggests that these amendments have reinforced the purposes of the law, fostered voluntarism among the parties, and lessened unnecessary litigation between debtor employers and labour unions attempting to salvage distressed businesses. Taken together, these developments indicate that the labour-related insolvency

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[1] R.S.C. 1985, c. B-3

[2] R.S.C. 1985, c.C-36, also see section 32(9)(b) for a similar provision in the CCAA

[3] See the testimony of Mr. Andrew Kent of the Insolvency Institute of Canada, *Standing Committee on Industry, Natural Resources, Science and Technology,* 38th Parl. 1st Sess. No. 064 (17 November 2005) at 11. His concerns were echoed among insolvency practitioners who characterised the amendments as "flawed and unbalanced" because labour unions sometimes overreached impairing the debtor's ability to restructure. See Peter P. Farkas, *To Repudiate or not?* CA magazine June-July 2008 available on line at: http://www.camagazine.com/archives/print-edition/2008/june-july/regulars/camagazine4797.aspx

[4] Jacob Ziegel,"Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions" (2010) 26 Business & Finance Law Review 63 at 73 and 75. Also see Jacob Ziegel, *The Travails of Bill C-55* (2005) 42 Can. Bus. L.J. 441 and Jacob Ziegel, "Bill C-55 and Canada's Insolvency Reform Process" (2006) 43 Can. Bus. L.J. 76 for an excellent review of the political process informing the passage of the 2008 bankruptcy and insolvency amendments.

amendments have introduced a measure of constructive change into the efforts of stakeholders to rescue distressed businesses.

The first part of this study closely reviews the jurisprudence that challenged the status of the collective agreement in insolvency law so as to evaluate the effect of the case law on the ability of stakeholders to restructure failing enterprises prior to the advent of these amendments. The second part of this essay explores how the statutory reforms have affected the law and restructuring practice over the last three years. This section begins by setting out the amendments and describing their content. This part also explores the potential repercussions of Parliament's amendments on restructuring efforts and examines the recent decisions implementing the amendments in order to understand if these alterations are being fully utilized. In addition, this part of the essay reviews survey information from insolvency practitioners pertaining to the reforms and examines the views of several leading lawyers practicing in this area to understand whether the legislative changes are causing any undue hardship on the ability of stakeholders to effectively restructure distressed businesses. The essay concludes by commenting on the results of the statutory changes on the law and on the ability of parties to pilot their way through a financial calamity.

2. Bankruptcy Case Law and the Legal Status of the Collective Agreement

Despite recent claims to the contrary,[5] Canadian courts have ruled that collective agreements caught by insolvency proceedings could be terminated, disclaimed, or suspended during insolvency proceedings. Over many years, the case law evolved to accept the opposite proposition, namely, that a collective agreement could not be terminated by a bankruptcy judge but could *only* be terminated pursuant to the applicable labour relations statute governing specific occurrences such as abandonment, fraud or a failure to bargain.[6] As we will see the development of this jurisprudence setting aside or suspending collective agreements damaged the law, weakened the legitimacy of the insolvency process and generated unnecessary conflict during reorganization efforts. To truly understand the effect of bankruptcy litigation upon the law we must closely re-trace the development of the jurisprudence. This examination begins with a case that greatly influenced the legal status of collective agreements in insolvency law but was, on its face, concerned with other matters.

A. Collective Agreements Terminate Upon Bankruptcy

In 1994, the Ontario Court of Appeal issued its decision in *St. Marys Paper Inc.*[7] The ruling was disconcerting for many insolvency practitioners as it required a trustee to pay the debtor's pension shortfall under the Ontario *Pension Benefits Act* (PBA).[8] The trustee had entered into an agreement to engage unionized employees of the debtor employer in order to operate a failing paper mill. This agreement reduced vacation, pension plan and other payments owed to these employees. A majority of the Court of Appeal found the trustee liable for the pension shortfall because it had operated the business and agreed to continue to make payments into the pension

[5] See Ian Klaiman, "Chapter c. 47, Opening But Not Resolving Collective Bargaining: A Proposal for Mandatory Arbitration on Negotiation Impasse" (2011) 26 Business & Finance Law Review 136 at 138; Richard H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Aurora, ON: Canada Law Book, 2006) at 3-46-3-51 and see Jacob Ziegel, "Bill C-55 and Canada's Insolvency Reform Process" (2006) 43 Can. Bus. L.J. 76 at 85.

[6] *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.* (2006) SCC 35 at para. 50.

[7] [1994] 19 O.R. (3d) 163. (Ont. C.A.)

[8] Murray Gold and Stephen Wahl, Submissions of the Canadian Labour Congress to the Senate Banking Committee Regarding Reform of Canada's Insolvency Laws (17 September 2003) at at 12-15.

plan. The majority noted the BIA had specific provisions limiting the trustee's personal liability in environmental matters but did not specifically "shelter a trustee from liabilities arising out of taxation or employment statutes."[9]

However, in a strongly worded dissent, Madam Justice Rosalie Abella opined that the trustee was under no obligation in law to carry on the business of the paper mill. In her view, the trustee agreed to do so only because it disclaimed the responsibility for any other obligations.[10] She noted that the trustee was not a successor employer because it had not been deemed so by the Ontario Labour Relations Board ("OLRB" or "Board") and only that tribunal had exclusive jurisdiction to make such a declaration in a unionized workplace. Although Abella J.A. pointed out that the trustee was not at liberty to operate the business without regard to employment laws that "seek to protect workers from exploitation,"[11] she noted that "contracts of employment with the employees, including collective agreements, terminate with a bankruptcy."[12] Justice Abella's views concerning the legal status of the collective agreement would transform the subsequent case law on this point.

In *Re 588871 Ontario Ltd,*[13] a trustee sought an order that all legal proceedings were stayed against it by section 215 which barred, except by leave of the court, any action "against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to the" BIA. In this connection, the debtor employer's trade union requested leave of the court to pursue a successor employer application before the Board. Justice Spence denied leave to the trade union due to an inherent conflict between the exclusive jurisdiction of the OLRB to attribute successor liability and "the rule" adopted from *St. Marys Paper* that a collective agreement terminated upon bankruptcy. Justice Spence wrote that the leave provisions of the BIA were designed to ensure that the purposes of the *Act* could be achieved without the undue interference of other proceedings. As a result, permitting the trade union leave would be tantamount to permitting the Board to make determinations inconsistent with bankruptcy law. In his view, if a trustee could be found to be a successor employer, "no Trustee would ever undertake to carry on that business and that could thwart the proper operation of the BIA."[14] As a result, Justice Abella's view that collective agreements terminate with bankruptcy was adopted for the first time and given the force of law.

A year later, a Nova Scotia court in *Associated Freezers of Canada Inc.*[15] also adopted the dissent set out in *St. Marys Paper.* In this case, Justice MacDonald considered an application by a trustee to stay a proceeding launched by a trade union at the Nova Scotia Labour Relations Board (NSLRB or Labour Board). In rejecting the trade union's request to pursue its case, the court adopted Justice Abella's statement that a collective agreement terminates upon bankruptcy[16] and indicated therefore that the trade union required leave of the court in order to pursue its applications before the NSLRB.[17]

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[9] *St. Marys Inc*., *supra,* note 7 and see section 14.06 (1.2) of the BIA for the statute's present limitation on successor liability.
[10] *Ibid* at para. 4.
[11] *Ibid* at para. 17.
[12] *Ibid.* at para. 18.
[13] *Re 588871 Ontario Ltd* [1995] O.J. No. 14666 (Ont. S.C.) See R.S., 1985, c. B-3, s. 215 for the entire provision.
[14] *Ibid* at 18.
[15] *Associate Freezers of Canada Inc.*[1995] N.S.J. No. 457 (N.S.C.)
[16] *Ibid.*
[17] Furthermore, Justice MacDonald considered whether section 69.3 of the BIA, which prohibited creditors from commencing any other proceeding on a claim provable in bankruptcy, precluded the trade union's application to the Labour Board. MacDonald J. concluded that items, such as vacation pay, were dictated by pre-bankruptcy activities and were provable claims in bankruptcy that required a stay of proceedings. Since this ruling, the Nova Scotia Court of Appeal has specifically ruled that a successorship application does not require leave of the court and is not a provable claim in bankruptcy because such claims are not the obligation of the bankrupt employer but are the obligation of the purchaser. See *Saan Stores Ltd.,* [1999] N.S.J. No. 31 at para 58.

MacDonald J. acknowledged labour-law precedent standing for the notion that the collective agreement does not terminate on the appointment of a court appointed receiver[18] but nevertheless found that in bankruptcy law, without employment, there can be no collective agreement.[19] This ruling was affirmed by the Nova Scotia Court of Appeal in a brief decision.[20] With the above-noted judgments, the view that collective agreements terminated with bankruptcy attained an authoritative status in law. However, this initial assessment would be subject to closer scrutiny by various appeal courts.

B. Collective Agreements Can Subsist Despite Bankruptcy

In *Saan Stores Ltd.,*[21] the Nova Scotia Court of Appeal affirmed a lower court decision that refused to quash a Labour Board decision declaring that the purchaser of assets was a successor employer bound by the debtor's collective agreement. Saan Stores acquired retail outlets from the trustee after Greenberg Stores had declared bankruptcy. Greenberg had acquired its retail stores from Metropolitan Stores in 1994 and the union had a collective agreement with Metropolitan that was recognized by Greenberg. In 1997, Greenberg declared bankruptcy in an effort to reorganize. Its parent company owned each of Metropolitan, Greenberg, and Saan Stores. A trustee was appointed and, on the same day, sold Greenberg's assets to Saan Stores. After the sale, Saan Stores took the position that the collective agreement and the union's certification applicable to Greenberg were terminated by the bankruptcy.

Justice Hallett, writing for a unanimous Court of Appeal, indicated that the employment of unionized employees was terminated by the bankruptcy. However, although employment was terminated by bankruptcy, that in and of itself, did not terminate the benefits to which the employees were entitled by virtue of the labour relations scheme. The court pointed out that the sale of business provisions in the *Trade Union Act*[22] were unaffected by the bankruptcy and therefore unaltered by the termination of the employment relationship between the bankrupt and the former employees. The court found that, by operation of the statute, the terms of employment found in the collective agreement were to govern the new employment relationship between the purchaser and the unionized employees.[23] In so finding, Justice Hallett explicitly rejected the trustee's argument that the labour relations legislation could not apply to the situation because a disposition did not occur between the predecessor employer and the purchaser. The Court responded that the *reality* (as opposed to the form) of the sale was that this was a disposition from the predecessor to Saan Stores orchestrated by their common parent company.[24] In any event, it was open to the Labour Board to find that Saan Stores was indeed the successor employer bound by the collective agreement.[25] The finding that collective agreement rights could bind a purchaser of assets from a trustee *after* bankruptcy proceedings was followed by a decision recognizing the validity of the collective agreement *during* insolvency proceedings.

In *Jeffrey Mine Inc.,*[26]the Québec Court of Appeal unanimously decided that a Monitor appointed pursuant to the CCAA *was* bound by a collective agreement. The Monitor had directed the

[18]*Ibid* at para. 26.
[19]*Ibid* at para. 28.
[20]*Associate Freezers of Canada Inc.,* [1996] N.S.J. No. 202
[21]*Saan Stores Ltd. v. United Steelworkers of America, Local 596* [1999] N.S.J. No. 31 (N.S.C.A.)
[22]RSNS 1989, c 475
[23]*Saan Stores*, *supra*, note 21 at para. 66.
[24]*Ibid* at para. 68.
[25]Also see *129410 Canada Inc.,* [2001] C.C.S. No. 19042 where the Québec Labour Court determined that the event of the bankruptcy itself was irrelevant to the acquisition of bargaining rights by a successor employer acquiring the business from the trustee.
[26]*Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.* [2003] Q.J. No. 264 (Québec C.A.)

debtor business with a reduced complement of employees and eventually entered into a major new contract with a foreign company. The Monitor brought a motion[27] seeking approval to disclaim the collective agreement because of the (excessive) costs associated with certain benefits plans. The Monitor pointed to the pension plan, vacation days, retirees' life insurance, and other costs provided for in the collective agreement and argued it would not make the new contract economically worthwhile. The Monitor also noted that the project would allow it to recall the bulk of employees from lay-off for the duration of the contract. The trial judge allowed the request (without rising) and issued an order that the Monitor did not have to comply with the collective agreement.

The Québec Court of Appeal held that the Monitor was in a similar situation to a liquidator and that the property and civil rights of Jeffrey Mine Inc. had not devolved to it as a consequence of the insolvency. As a result, the Monitor could not be considered the new employer instead of the debtor: after all, its acts were made in the debtor's name.[28] It also concluded that there was nothing in the lower court orders terminating the certification of the trade union so that it was still effective. Since the certification was still valid, the Monitor had to respect the exclusive representation of the trade union.[29] The court reasoned that "nothing in the CCAA authorizes the monitor or the court to unilaterally determine the consideration payable to the supplier of goods or services."[30] It followed that the consideration payable to these workers *must* be provided for in the collective agreements, which included the salaries and other benefits payable at the time of the initial order. Justice Dalphond, writing for the court, indicated that the difference in the terms of employment before and after the order amounted to a modification of the former employees' working conditions. He indicated that a monitor could not disclaim a collective agreement given the attendant legislative framework which makes the collective agreement a "truly original instrument rather than a mere bilateral contract."[31] Like Hallett J.A., in *Saan Stores Ltd.*, Justice Dalphond found that the continued existence of collective agreement was based in the applicable labour relations statute. But Justice Dalphond established the legal status of the collective agreement by underscoring the existence of the union's right to certify rather than the successor rights provisions of the applicable labour statute. At the time of the decision, *Jeffrey Mine Inc.* was widely regarded as a high-water mark[32] for sustaining collective agreement rights during insolvency.

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[27] *Ibid* at para. 18.

[28] *Ibid.* at para. 35 to 37. The decision in *Jeffrey Mines Inc.* denying that employment obligations existed between the monitor and the employees is reminiscent of the Ontario Court of Appeal's decision in *Royal Oak Mines,* [2001] O.J. No. 562 (Ont. C.A.). In the latter case, the court ruled that a receiver was not responsible for contributions to the employees' pension plan because those payments remained the responsibility of the debtor employer, even though it could not afford to pay such obligations. The receiver was, *via* court order, to guide and control Royal Oak but the debtor company retained possession of the mines and employed its employees. In the court's view, the interim receiver held wide authority to manage and alienate the assets but did not maintain the obligation to carry on the business affairs of Royal Oak. Consequently, Royal Oak had the obligation to pay pension benefits under the collective agreement and was obligated to provide notice of termination under the relevant statute. The court held it had a power pursuant to section 47(2) of the BIA to issue an order not to make payments to a pension plan without court authorization. However, the courts in both *Royal Oak* and *Jeffrey Mine* decisions did not specifically consider whether the receiver could be considered to be an employer *via* a common employer declaration pursuant to the terms of the applicable provincial labour legislation.

[29] *Ibid* at para. 45-46. The court noted that the action of dismissing 60 unionized employees who had worked for the debtor under a valid collective agreement and immediately hiring them back on the basis of each person signing an individual contract violated the union's exclusive representational rights and was therefore illegal.

[30] *Ibid* at para. 50.

[31] *Ibid.* at para. 53.

[32] Since *Jeffrey Mines Inc.*, the Québec Court of Appeal has adopted the reasoning applied by Mr. Justice Pierre Dalphond and applied it to contracts related to employment falling outside a collective agreement. Also see *Uniforêt inc. c. 9027-1875 Québec inc.*, [2003] J.Q. no 8125 at para 1. In that decision, the Monitor suspended the employer's contribution to an entity that managed an employee profit sharing plan which was derived from the earnings of the insolvent company. The Québec Court of Appeal interpreted *Jeffrey Mine Inc.* to prevent the unilateral alteration of the terms and conditions of work by the Monitor where it was granted the power to continue the operation of an insolvent company. As a result, the Monitor could not simply

Nonetheless, Ontario's highest court of record attempted to fashion its own unique view of the place of the collective agreement rights during insolvency.

C. Collective Agreements Suspend During Bankruptcy

In *Royal Crest Lifecare Group Inc.,*[33] a company operating a chain of 17 nursing and retirement homes was petitioned into bankruptcy. The Court appointed trustee proposed to carry on business while it searched for a new buyer. However, the trustee failed to recognize the various collective agreements; it did not deduct or remit union dues or pension plan payments, nor did it recognize any grievances filed by the trade unions. On the first day of the bankruptcy, the trustee applied to the Court for an order that it was not, among other things, bound by the debtor's collective agreements.[34] Predictably, the trade unions resisted and asked the Court for leave to apply to the Labour Board in order to declare the trustee was indeed a successor employer in law.

Mr. Justice Farley dismissed the trustee's motion, referring to Hallett J.'s opinion in *Saan Stores Ltd.* as a thoughtful analysis of the situation at hand.[35] Justice Farley also questioned the statement of Abella J.A. that collective agreements terminate on bankruptcy as no legal analysis was provided that buttressed that proposition.[36] As a result, Farley J. refused to grant the motion declaring that the trustee was not bound by the collective agreements.[37] However, Mr. Justice Farley explained that it would be undesirable to "saddle"[38] the trustee with heavy personal liability given its role as a realizor of the assets. As long as the trustee operated the debtor's business in a reasonable manner, with due dispatch in order to realize the assets, and did not slip into the role of the employer, the trustee would not be subject to successor liabilities. The unions' leave application was denied. However, if the trustee began to act more as an employer than as a diligent realizer of the debtor's assets, the motion could be re-initiated. In light of this finding, Justice Farley indicated that the collective agreement was not terminated for all purposes but rather "is put into suspended animation, to be revived if, as, and when a purchaser with a personal economic interest in the business acquires the business."[39] The trade unions appealed.

A majority of the Court of Appeal[40] noted that a party seeking to challenge a decision by a trustee must obtain the permission of the court pursuant to the leave provisions found in section 215 of the BIA. Justice MacPherson writing for the majority indicated "it was simply too early to attach formal, and final, legal labels to the relationship between the trustee and the employees."[41] Even though its

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cancel employee profit-sharing payments post filing as these payments were due as part of the employees working conditions. Also see P. Belanger, "Bankruptcy, Collective Agreements, and Employment Contract: What Obligations are Transmitted to the Purchaser of a Bankrupt Business?" in J.P. Sarra, ed., Annual Review of Insolvency Law 2004 (Toronto: Carswell, 2005) at 255-281, who contends this application of *Jeffrey Mine Inc.* to be a very generous interpretation of the law.

[33] [2003] O.J. No. 756, the reader should be aware that the author was counsel to several bargaining agents in this litigation.

[34] *Ibid.* at para. 2.

[35] *Saan Stores*, *supra* note 21. See J. MacDonald, "Successor Employer Issues for Trustees in Bankruptcy" in (2004) 16 Comm. Insolvency. R. 43 at 44 for the proposition that Farley J. adopted *Saan Stores ratio* in his judgment.

[36] Royal Crest, *supra,* note 33 at para. 22.

[37] *Ibid.* at para. 33.

[38] *Ibid.* at para. 24.

[39] *Ibid.* at para. 30.

[40] *Canadian Union of Public Employees, Locals 1712, 3009, 2225-06 and 2225-12 v. Royal Crest Lifecare Group Inc.*, [2004] O.J. No. 174 (Ont.C.A.), application for leave to appeal dismissed [2004] S.C.C.A. No. 104 (S.C.C.).

[41] *Ibid* at para. 35. The Ontario Labour Relations Board's jurisprudence indicated that the acquisition of a business on the day of the transaction itself can resolve the question of whether collective agreement rights transfer with a business. No extra time is necessarily required to pass before a legal relationship can be firmly set in place by law in a sale proceeding. See *County of Hastings*, [2002] OLRB Rep. Nov./Dec. 1031 and *Daynes Health Care Ltd.* [1983] OLRB Rep. May 632 The Labour Board's approach concerning prematurity of a sale of business matter was specifically developed in the context of bankruptcy and

decision also permitted the unions to return to court to establish its claims, the Ontario Court of Appeal seemed to be affirming the existence and importance of collective agreements while paradoxically disrupting the enforcement of it during bankruptcy proceedings. Nonetheless, the Supreme Court of Canada would subsequently abandon this ruling in favour of an approach that recognized that the legal status of the collective agreement continued during insolvency.

D. Collective Agreements Preserve Legal Status During Bankruptcy

The Supreme Court of Canada decision in *T.C.T. Logistics*[42]ushered in a reversal of the established case law that purported to derogate from the legal status of a collective agreement during insolvency. T.C.T. Logistics Inc. operated a number of its sites in the United States and Canada, including a warehousing business located in Toronto, Ontario. The company became insolvent and its largest secured creditor, GMAC Commercial Credit Corporation – Canada, succeeded in obtaining an order appointing KPMG as an interim receiver. Later, KPMG was appointed the trustee in bankruptcy and entered into an agreement to sell most of the debtor's warehousing business to Spectrum Supply Chain Solutions Inc.[43] The trustee terminated all employees prior to the closing of certain transactions and Spectrum re-hired a number of the employees without regard to seniority and certain pension and vacation provisions owed to employees under the existing collective agreement. The trade union reacted by filing a number of applications with the Labour Board, in part, to maintain its members' collective agreement rights with Spectrum. The OLRB,[44] Superior Court[45] and the Court of Appeal[46] all failed to grant the union direct access to the Labour Board to hear its application.

In a 7 to 1 decision, the majority of the Supreme Court of Canada held that a bankruptcy court could not deny a trade union leave to apply to the Labour Board for a declaration that a trustee or third party purchaser was a successor employer unless its claim was frivolous, manifestly without merit or disclosed no cause of action. Among other things, Madam Justice Rosalie Abella, writing for the majority, did not disturb a key decision of the court below. In the Ontario Court of Appeal decision, Feldman J.A. abandoned the analysis in *Royal Crest Lifecare Group Inc.* concerning the suspension of the collective agreement during bankruptcy. She specifically addressed Justice Abella's minority opinion in *St. Marys Paper Inc*. Madam Justice Feldman added an interpretive twist to Abella's original proposition that "contracts of employment with the employees, including collective agreements, terminate with a bankruptcy." By indicating that it really meant that to "the extent that an employee's contract of employment with a bankrupt employer is contained in a collective agreement, the employee's contract is terminated on bankruptcy"[47] Feldman concluded that although employment ceases, a collective agreement was not necessarily terminated upon bankruptcy. Rather, the Court of Appeal determined that the collective agreement could *only* be terminated pursuant to the applicable labour relations statute governing specific occurrences such as abandonment, fraud or a failure to bargain.[48] Justice

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insolvency matters. See Jeffrey Sack, C. Michael Mitchell and Sandy Price, Ontario Labour Relations Board Law and Practice *3rd. Edition* (Toronto: LexisNexis Butterworths, 1997) at 6.1 to 6.76 for a review of sale of a business and related employer provisions.

[42]*GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.,* [2006] SCC 35 (SCC) on appeal from *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.,* [2004] O.J. No. 1353 (Ont. C.A.) leave to appeal to the Supreme Court of Canada granted *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corp. of Canada,* [2004] S.C.C.A. No. 267.

[43]*GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.,* [2004] O.J. No. 1353 (Ont. C.A.) at para. 10-16.

[44] *Industrial Wood & Allied Workers of Canada v. Spectrum Supply Chain Solutions Inc.,* [2002] O.L.R.D. No. 2866.

[45]*GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.,* [2003] O.J. No.1603 (Ont. S.C.).

[46]*T.C.T Logistics, supra*, note 42 at para. 33.

[47]*T.C.T Logistics, supra*, note 43 at para. 49 and *supra*, note 7, for Justice Abella's original statement.

[48]*Ibid* at para. 50.

Feldman specifically adopted the decisions in Saan *Stores Ltd.*[49] and *Jeffrey Mine Inc*.[50] regarding the legal status of the collective agreement. In effect, the Courts of Appeal in Nova Scotia, Québec and Ontario all agreed that collective agreement rights continued to operate during insolvency. By cautioning bankruptcy courts not to unnecessarily interfere with employee rights when interpreting insolvency statutes[51] and by also opting not to disturb the various appeals court decisions, the Supreme Court established a new precedent that implicitly recognized the collective agreement continued to have the force of law during insolvency.

For three years subsequent to the decision in *T.C.T. Logistics* until the proclamation of the amendments, bankruptcy courts began to adopt the legal proposition from the Supreme Court of Canada that the collective agreement remained in force during insolvency, without controversy or extensive comment.[52] Collective agreements were recognized as having legal force, yet treated like other contracts, that were subject to the initial order of the bankruptcy court that suspended debts, such as severance and termination pay, pending the resolution of the insolvency.[53] Among other things, this recognition of the legal status of the collective agreement caused CCAA applications to flourish as court appointees carefully avoided any personal liability involved for taking over unionized businesses under the BIA.[54] In retrospect, the case-law until *T.C.T. Logistics* had the effect of destabilized restructuring efforts in unionized settings.

E. Analysing the Former Jurisprudence

When bankruptcy judges disclaimed collective agreements during insolvency proceedings, those rulings created a rupture in the application of labour law for distressed companies. In brief, collective agreements had characteristics and limitations founded in statute and were not required to conform to legal doctrines which might terminate their operation.[55] A collective agreement could not operate according to its terms if common law concepts could be invoked to eradicate the agreement even though the labour contract had not statutorily expired.[56] Moreover, the fact that *no employees*

[49]*Saan Stores Ltd, supra*, note 21.
[50] *Jeffrey Mines Inc. supra*, note 26.
[51] *T.C.T Logistics, supra*, note 43 at para. 51
[52]*Abitibibowater inc. (Arrangement relatif à)* [2009] J.Q no 4473 at para. 25-28 where the Québec Superior Court ruled that the company could not unilaterally rescind early retirement provisions it negotiated in a collective agreement. For other cases briefly commenting upon the impact of collective agreement rights during insolvency after *T.C.T. Logistics* but before the amendments see *Collins & Aikman Canada Inc.* [2007] O.J. No. 4186, *Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd.* [2007] O.J. No. 2998 and *Fraser Papers Inc.* [2009] O.J. No. 3188. Also see Sean Dewart, "Trial Level Reponses to the T.C.T. Case*"* (Paper delivered at the Building Bridges: Discussing Labour Issues in Restructuring Proceedings, Ontario Bar Association 24 April 2009) [unpublished]
[53]See *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558 (Ont. S.C.J.) where the court denied the union's request to have the debtor company pay termination and severance pay as well as other amounts to former employees. The merits of the appeal were denied in *Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967 (Ont. C.A.) with leave to appeal the decision to the Supreme Court of Canada denied at [2009] S.C.C.A. No. 531. Also see TQS [2008] Q.J. No. 7151 (Que. C.A.) and *Fraser Paper Inc. (Re),* [2009] O.J. No. 3188 (Ont. S.C.J.) for the proposition that the court can suspend payments arising from a collective agreement if the employees did not provide service after the initial order.
[54] Section 14.06 of the BIA now protects trustees from liability in its dealings with the debtor's employees for the period of time occurring before its appointment. If the trustee continues the business or employment of debtor employees the trustee is not by reason of these facts alone held to be personally liable for any claims against the debtor that arose before its appointment.
[55]R. MacDowell, "Labour Arbitration – The New Labour Court?" (2000) 8 Canadian Labour & Employment Journal 121 at 124.
[56]M. Mitchnick and B. Etherington, Labour Arbitration in Canada (Toronto: Lancaster House, 2006) at 16-4. The Court of Appeal in *Jeffrey Mines Inc. supra,* note 26 at para. 53 made essentially the same point as Laskin C.J. in *McGavin Toastmaster Ltd. v. Ainscough*, [1975] 54 D.L.R. (3d) 1 (S.C.C.) concerning the legal status of collective agreements when Dalphond J.A. rhetorically queried why collective agreements should be cancelled "if the certifications remain in effect and, as a result, the employer is

remained employed at any point in time was never sufficient to invalidate the enforcement of a collective agreement in labour law.[57] For some time, grievance arbitrators acknowledged this state of affairs even where each and every employee had been terminated as a result of a discontinuance of a business.[58] Although bankruptcy judges and labour arbitrators differed there could not be "one law for arbitrators and another for the court, but one law for all."[59] As a result, the jurisprudence disclaiming collective agreements created a conceptual schism in law which it could not easily bear. Until *T.C.T. Logistics*, the jurisprudence suspending or derogating the collective agreement symbolized a collapse of a longstanding bargain between labour and capital which was vital to the operation of day-to-day labour relations.

A ruling that terminated a collective agreement due to bankruptcy was a decisive finding since there could be no breach of an agreement that was not operative.[60] A host of substantive guarantees were made available to unionized employees, including *Charter* rights,[61] statutory human rights and employment standards guarantees,[62] through the mechanisms of grievance-arbitration.[63] What's more, grievance arbitration hearings[64] might not lawfully be initiated on the merits of these disputes. [65] The breakdown of labour law on the shop floor during insolvency was no mere technical inconvenience to labour unions – the dismantling of the legal structure supporting collective agreement rights endangered the bargaining agent's *raison d'être* in the workplace.

Our modern labour relations scheme was designed to attenuate and manage labour conflict by sustaining an accord that rested upon the legal enforceability of the labour contract. In essence, unionized employees were provided legal protection in their collective employment relationship with their employer in exchange for a workforce that subordinated itself to the daily control of management. In exchange, government guaranteed enforceable legal agreements in the workplace that could readily resolve disputes challenging the employer's direction of the workforce.[66] However, when the legal

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obligated to negotiate with the appropriate union the conditions applicable to a new delivery of services by employees contemplated by the said certifications?"

[57]See *Coulter Mfg.* (1973) 1 L.A.C. (2d) 426 and *Vulcan Containers Ltd*., [1997] OLRB Rep. July/August at para 63.

[58]*Canada Safeway Ltd.,* [2002] O.L.R.B. Rep. Nov./Dec. 997 at para. 46.

[59]See the comments of Lord Denning in *David Taylor & Sons Ltd. v. Barrett*, [1953] 1 All E.R. 843 (C.A.) also see *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] S.C.J. No. 64 where LeBel J. also noted there is only 'one law for all' so the arbitration ruling rejecting a criminal law finding was determined to be an affront to the rule of law by the Supreme Court.

[60] Donald J.M. Brown and David M. Beatty, Canadian Labour Arbitration 3rd ed.(Aurora, Ont.: Canada Law Book, 2006) at 4-31 and see Stephen Wahl, "Bankruptcy and Insolvency: High Stakes Poker at the Collective Bargaining Table" in Jannis P. Sarra ed., Annual Review of Insolvency Law 2004 (Toronto: Carswell, 2005) at 245 where he notes that labour law recognizes the primacy of collective worker representation as the key element in the promotion of worker's rights and freedoms as well as economic growth in Canada. Similarly, the BIA provides for a regime of collective action on behalf of creditors, through the trustee, for the realization and equitable distribution of the assets of the bankrupt. The author notes that when labour relations collide with bankruptcy and insolvency law the interrelationship of two collective bargaining regimes is at stake.

[61] *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5.

[62] *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157.

[63] *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929

[64] In this connection, see cases that address the bankruptcy matters such as *H.J. Jones-Sons Ltd.* [2008] 179 L.A.C. (4th) 439 at para. 28 where the sage arbitrator interpreted section 69.3(1) of the BIA, which prevents actions for the recovery of a claim provable in bankruptcy, to reject precedent favouring a stay of proceedings. Arbitrator Sheehan determined that "the integrity of the grievance arbitration process and an affirmation of the belief that arbitration is the only proper forum for the resolution of issues associated with analysing and applying provisions of a collective agreement" required that he assert jurisdiction over the matter.

[65]The Labour Law Casebook Group, Labour & Employment Law: Cases Materials, and Commentary (Irwin Law: Toronto, 2004) at 2

[66]*Ibid.*

recognition of the collective agreement fell into uncertainty so did the role played by a key partner in that bargain.

The dismantling of the collective agreement interfered with the institutional role of trade unions during insolvency to represent their members' legal interests. After all, bargaining collectively with an employer to secure a collective agreement is why employees join a union and why unions seek the right to represent employees.[67] Without effective bargaining agent representation, terminating or suspending collective agreements risked provoking unionized employees into unpredictable self-help measures to resolve their disputes with debtor employers.[68] These difficulties were further complicated by the negative financial implications of the early jurisprudence disclaiming collective agreement for organized employees.

In most cases, the economic consequences of the jurisprudence setting aside the labour contract relieved receivers of collective agreement obligations, meaning other stakeholders received a larger realization than would otherwise have been possible.[69] In this connection, if complying with a collective agreement fettered the stakeholder's ability to maximize the value of the company,[70] then a trustee (or debtor employer in the CCAA) might be tempted to ask a court to set aside a collective agreement in order to maximize any available savings.[71] As a result, the underlying incentive created for insolvent companies, senior creditors and others was to resort to litigation. The "dynamic tension[72]" created by the uncertainty of such litigation might, from time to time, be leveraged into an agreement by the parties in order to avoid an unfavourable legal result for the trade union. Nonetheless, even though disclaiming collective agreements might be viewed by labour law outsiders[73] as an acceptable strategy,[74] it was not viewed as a just outcome by unionized employees who were now bound to accept the significant burdens of bankruptcy decisions without receiving any appreciable benefit from those same rulings.

The early litigation interfering with collective agreements helped delegitimize the insolvency process in the eyes of trade unions as it destabilized and alienated a key stakeholder who could

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[67] *Ibid* at 391

[68] See *Royal Oak Mines*, *supra*, note 28 at para.22 where the Court of Appeal indicates that the trustee was concerned its workers would go on strike unless certain working conditions were not abided by during bankruptcy. Also see *TCT Logistics*, *supra*, note 43 at para. 59 where the Court of Appeal borrowing from Farley J. at para 31-32 acknowledges this same concern in a more muted way when it noted disgruntled unions and employees may cause value to evaporate unless corrective measures are taken to address their concerns. Of course, whether those employees simply exit their engagement with the trustee by quitting or voice their demands for better working conditions by taking collective action is never easily assessed at the outset of bankruptcy proceedings. Finally, see Keith Yamauchi, *"Collective Agreements in the Context of Corporate Reorganization: The Canadian and American Models" (2005) 11 Canadian Labour and Employment Law Journal* 295 at 316 where he notes the American courts in *Teamsters, Local 807 v. Carey Transportation Inc.* 816 F.2d 82 at 93 overtly recognized "the likelihood and consequences of a strike if the bargaining agreement is voided." during bankruptcy.

[69] David E. Baird and Ronald B. Davis, "Labour Issues" in Stephanie Ben-Ishai and Anthony Duggan eds. Canadian Bankruptcy & Insolvency Law (LexisNexis, Markham, 2007) at 91

[70] E. Laius, "Trustees in Bankruptcy & Successor Employers" *Bankruptcy & Insolvency Law Newsletter* (Fall 2003) at 1.

[71] *Report of the Standing Committee on Banking, Trade and Commerce*, *supra,* note 8 at 11 and c.5 failed to note that collective agreement rights directly caused any corporate insolvency in Canada.

[72] D. J. Miller, Hugh O'Reilly, Robert Thornton and Amanda Darrach, "Charting A New Course: Best Practices When Dealing with Employees, Retirees and Union Stakeholders in a Restructuring" (Conference Paper delivered at the Annual Review of Insolvency Law, 8 February 2013) at 2.

[73] R. MacDowell, *supra*, note 55 at 152. It is widely accepted that when courts make pronouncements on labour law, they generally have no original jurisdiction to do so, no particular expertise in the subject matter, no familiarity with the full range of statutes that come into play, and no experience with the institutional realities of labour law. Consequently, it should not be entirely unexpected that judges might remove a load bearing post that supports the edifice of modern labour relations in the workplace.

[74] Keith Yamauchi, *supra*, note 68 where the author outlines a bankruptcy model, based on the American system, for Canadian restructuring negotiations that would permit the court to reject a collective agreement in the midst of bankruptcy.

potentially co-operate to resolve the economic crisis threatening the debtor employer. Rescue efforts that attempted to force the hands of unions by threatening their continued viability were ventures that risked failure or significant delay.[75] The effort and conflict expended in this contest distracted and impeded reorganization efforts of stakeholders by adding unnecessary litigation to rescue efforts.[76] This discord ultimately created a less efficient restructuring process for all stakeholders affected by such proceedings. However, the advent of Parliament's amendments – that codified the approach enunciated in *T.C.T Logistics* – held the promise of a fresh start for stakeholders engaged in labour-oriented restructuring negotiations.

3. Reforms to the BIA & CCAA with Respect to the Effect of Collective Agreements

On September 18, 2009, after an extended legislative process, the statutory amendments originally proposed in Bill C-55 were brought into force.[77] The reforms inserted a new mechanism into the BIA and CCAA that clarified the treatment of collective agreements during insolvency and held out the possibility of good faith negotiations to revise labour contracts in the midst of insolvency. This section of the paper summarizes the legislative history of the changes and specifies the collective agreement amendments. It attempts to spell out[78] the possible consequences these reforms bring to rescue efforts. Next, this essay goes on to canvass the current jurisprudence in order to understand how the amendments are actually being used by the courts so as to understand whether or not these reforms are causing undue hardship in the law. Finally, the essay delves into contemporary work-out efforts that deal with collective agreements to acquire a deeper understanding of what effect, if any, these changes bring to restructuring negotiations. Here, the key findings of interviews with leading insolvency counsel are explored and a survey of practitioners is reviewed to determine if Parliament's amendments are improperly hindering restructuring efforts during rescue talks – or not.

A. Legislative Reforms adding section 65.12 to the BIA & section 33 to the CCAA

Initially, Members of Parliament[79] expressed some confusion as to whether bankruptcy judges were actually setting aside collective agreements during insolvency proceedings.[80] However, Joe

[75] *Ibid* at 5.
[76] Sarra, *supra,* note 32 at 203.
[77] See generally Stephanie Ben-Ishai, Bankruptcy Reforms 2008, (Toronto: Thomson Carswell, 2008) at ix to xi and also see *Infra* 107-110
[78] See Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths Ltd., 1983), at p. 87. Where the author famously explained how to interpret statutes to capture their meaning, "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."
[79] Compare the comments of Mr. Pat Martin (Winnipeg Centre, NDP) in *House of Commons Debates*, 38th Parl., 1st Sess, No. 140 (29 September 2005) at 8196 who said "…we checked this out and had it confirmed recently, a judge may unilaterally and arbitrarily alter the terms and conditions of a collective agreement of the employees" with the statement of Mr. David Christopherson (Hamilton Centre, NDP) in *House of Commons Debates*, 38th Parl., 1st Sess, No. 140 (29 September 2005) at 8198 who later noted that same day "However, we cannot adequately deal with section 33 until there is an absolute determination as to whether or not, under existing legislation in its entirety, a judge is allowed the power to step in, in the case of bankruptcies and restructuring, and unilaterally order that collective agreements be changed."
[80] See Klaiman, *supra*, note 5 for comments generally suggesting judges did not disclaim collective agreements prior to these reforms.

Fontana the Minister of Labour and Housing[81] repeatedly indicated the need to protect workers during insolvency by guarding against judicial changes to workers' collective agreements. Parliamentarians were assured by Minister Fontana that "[t]he court will not have the authority to unilaterally terminate or modify the collective agreement. If the parties do not agree to amend the collective agreement the existing collective agreement remains in force."[82] A mantra was established, by Ministers and some Members of Parliament, which asserted that if the parties did not agree to amend the collective agreement, then the existing labour contract "would remain in place and could not be changed by courts."[83] Despite governmental assurances, two amendments were specifically added to the proposed legislation by the New Democratic Party to make doubly sure the amendments in Bill C-55 precluded the courts from tampering with collective agreements.[84] However, the Ministerial interpretation of the reforms that declared the collective agreement could not be altered without the consent of the bargaining agent ignored the plain language of the proposed statute found in the balance of the amendments. It is arguable that the reforms still permit the displacement of the terms and conditions of collective agreements during insolvency through the granting of a court motion approving the service of a notice to bargain.[85] This becomes clear when the insolvency amendments are reviewed in conjunction with pre-existing labour law requirements pertaining to collective agreements.

Among other things, the amendments to both the BIA and CCAA[86] recognize that "any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force" [87] unless the parties to it voluntarily agree to revise the contract during the insolvency proceedings. With notice, a debtor employer may "apply to the court for an order authorizing the insolvent person to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent" [88] after the parties have failed to agree to revise any of the provisions of the collective agreement. The debtor employer must prove that a viable compromise or plan could not be arrived at under the existing collective agreement, that it made good faith efforts to renegotiate the agreement and the failure to provide a notice to bargain would cause irreparable damage to the employer.[89] If the notice to bargain order is granted, the union may obtain its own order requiring the disclosure of financial information relevant to collective bargaining with the debtor employer.[90] After proceedings have commenced, and if the parties to the collective agreement agree to revise it, the "bargaining agent that is a party to the agreement has a

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[81] See the comments of the Honourable Joe Fontana (for the Minister of Finance), *House of Commons Debates*, 38th Parl, 1st Sess, No. 140 (28 September 2005) at 8167 noting the need to protect vulnerable workers and provide fairer treatment during insolvency to employees.

[82] See comments of Labour Minister Joe Fontana, Standing Committee on Industry, Natural Resources, Science and Technology , 38th Parl., 1st Sess., No. 060 (1 November 2005) at 9

[83] *Ibid* at 8

[84] See Jacob Ziegel, "Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions" (2010) 26 Business & Finance Law Review 63 at 72.

[85] A notice to bargain is a communication by the employer or union, following certification or prior to the expiry of a collective agreement, of a desire to bargain with a view to reaching or renewing a collective agreement; after notice to bargain has been given, the parties are under a statutory obligation to bargain in good faith. See Jeffrey Sack and Ethan Poskanzer, Labour Law Terms: A Dictionary of Canadian Labour Law (Toronto, Lancaster House, 1984) at 105.

[86] For the legislative amendments being discussed herein see generally *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 60 as amended by *Wage Earner Protection Program Act* , S.C. 2005, c.47, s. 44 and *Companies' Creditors Amendment Act*, R.S.C. 1985, c.C-36, s. 33 as amended by *Wage Earner Protection Program Act*, S.C. 2005, c.47, s. 131. Also see J. Ziegel, *supra*, note 4 for a detailed discussion of the legislative process involved in passing the bankruptcy and insolvency reforms.

[87] BIA, s.65.12(6) and CCAA, s. 33(1) and (8) Also see CCAA, s.32(9)(d) which deem collective agreements as an exception to the types of executory contracts that can be disclaimed.

[88] BIA, s. 65.12(1) and CCAA, s. 33(2) Also see s. 17 of the Ontario Labour Relations Act, 1995 for a provincial statute that provides similar disclosure obligations when engaging in collective bargaining.

[89] BIA, s. 65.12(2) and CCAA, s. 33(2) and (3)

[90] BIA, s.65,12(5) and CCAA, s. 33(6)

claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement."[91] Finally, the vote of the creditors regarding a plan of arrangement or a proposal may not be delayed solely because the period provided in the laws of the particular jurisdiction governing collective bargaining has not expired.[92]

Principally, the reforms affirm the "sanctity of the collective agreement" and establish the conditions under which a judge might require the debtor employer and the union to negotiate a revised labour contract.[93] The wording of section 65.12(6) of the BIA and section 33(1) and (8) of the CCAA seems to reflect a straightforward edict: the collective agreement *status quo* prevails in insolvency unless the debtor employer and trade union voluntarily agree otherwise. The harmonized wording employed by the statutory reforms in the BIA and CCAA prevents courts from terminating, disclaiming, suspending or otherwise altering the collective agreement.[94] Although the court may not issue such orders, the debtor employer and the bargaining agent may negotiate contract revisions in order to modify the existing agreement in law. These provisions exclude lenders, or other third parties, from interfering in any collective bargaining which may take place in order to rework the labour contract.[95] However, despite the apparent purpose of Parliament to limit the ability of judges to displace the collective agreement, the amendments allow judges the ability issue a notice to bargain which may have the effect of setting aside the terms and conditions of the collective agreement. This outcome was not contemplated by legislators during the public review of the statute enacting these changes.

The underlying purpose of the revisions was to promote bargaining between debtors and unions in order to salvage distressed companies. If the employer viewed the labour contract as being too burdensome, the BIA and CCAA permitted parties to bargain their own solution to the insolvency within the terms of traditional labour law. In this way, the legislature endorsed Canada's public policy commitment toward voluntary collective bargaining by placing the economic challenges facing the failing business in the hands of the parties and removing courts from collective agreement disputes.[96] In addition, other provisions in the reforms supported compromising collective agreements. For instance, by providing unions the opportunity to acquire improved financial information regarding the debtor company through a disclosure order,[97] bargaining agents were provided an opportunity to make

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[91] BIA, s.65.12(4) and CCAA, s. 33(5) A similar claim providing compensation for the concessions of the bargaining unit was used in the Air Canada restructuring prior to the amendments. See #2 Interview of Insolvency Counsel by Author (4 December 2012) [all interviews on file pursuant to the approval provided by the Carleton University Research Ethics Board].

[92] BIA, s.65,12(3) and CCAA, s. 33(4)

[93] Paul H. Meier , "Companies' Creditors Arrangement Act ("CCAA") Reform and the Treatment of Collective Agreements in the Restructuring Process" *Canadian Bar Association National Labour and Employment Law Section Newsletter* August 2006 online: http://www.cba.org/cba/newsletters/lab-2006/PrintHtml.aspx?DocId=11013

[94] Roderick J. Wood, Bankruptcy and Insolvency Law (Toronto: Irwin Law, 2009) at 374

[95] Sarra, *supra*, note 32 at 203

[96] Sarra, *supra*, note 32 at 203 In this connection, the federal government specifically considered and rejected including a provision in the reforms along the lines of §1113 of the United States *Bankruptcy Code* which allows the debtor company to disclaim or modify existing collective agreement. See the comments of Minister Joe Fontana, Standing Committee on Industry, Natural Resources, Science and Technology , 38th Parl., 1st Sess., No. 060 (1 November 2005) at 10 and 14. Also see Keith Yamauchi, *supra*, note 68 for a comprehensive treatment of the American model and also Andrew B. Dawson, "Collective Bargaining Agreements in Corporate Reorganizations" (2010) 84 American Bankruptcy Law Journal 101 for a critique of the U.S. system that notes the standard interpretation of the U.S. *Bankruptcy Code always* results in the same finding: debtors are allowed to reject their collective agreements.

[97] BIA, s.65.12(5) and CCAA, s. 33(6) To date, there is no case law regarding these sections but determining the existence of a concession when alterations are made to a pension plan incorporated in a collective agreement may be difficult depending upon the effect of the concession on plan members. Also, creating a new claim in favour of unions for concessions made in bargaining may affect voting on a plan of arrangement as normally pension plans vote their claims but concessions provided by unions may affect the identity of the party holding the claim and create an important advantage for trade unions in restructuring talks. See D. J. Miller, Hugh O'Reilly, Robert Thornton and Amanda Darrach, supra, note 72 at 18-19

informed decisions in order to help them reach agreements with their employers.[98] As well, the amendments authorize bargaining agents a right to an unsecured claim against the debtor for an equivalent value for concessions made in collective agreement bargaining. Not only does this provision treat unions like other parties to an agreement with the debtor, it provides an incentive to agree to contract revisions, as a portion of any concession granted may be partially recouped through the claims process.[99]

Despite these inducements to engage in voluntary bargaining during insolvency, the statutory amendments preserve involuntary remedies based in labour law. Where a debtor employer and its union fail to freely revise provisions of the collective agreement, the court has jurisdiction to grant an order authorizing the debtor to serve a "notice to bargain" on the bargaining agent.[100] In other words, the statutes create a mechanism for the debtor employer to *force the employees' union to meet and bargain* with it even though the collective agreement has not come to an end in law.[101] It is tempting to think of collective bargaining as a voluntary exercise between willing parties but the BIA and CCAA provisions authorize the court to require a party to bargain, thereby subjecting it to a compulsory legislative timetable and statutory bargaining obligations in law.[102] Where a "notice to bargain" has been served on a party to a collective agreement, it triggers the beginning of a statutory duty to bargain under Canadian labour laws that requires parties to negotiate in good faith and to make "every reasonable effort" to reach a collective agreement.[103] The parties remain under the duty to bargain – that is, to continue to try to reach a settlement – until they attain a new collective agreement. Working in combination with the duty to bargain is another obligation to maintain a "bargaining freeze" while the parties negotiate a new collective agreement. Generally speaking, during the statutory freeze, the terms and conditions of employment that apply during bargaining cannot be unilaterally altered if those items are typically the subject of negotiations. In short, the employer has to go to the bargaining table and negotiate the changes prior to altering working conditions.[104]

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[98]Briefing Book, An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, CCAA s.33 at 3 (http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00826.html) and Briefing Book, An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act (hereinafter "BIA Briefing Book") and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, BIA s.65.12 at 9 (http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00859.html) (hereinafter "CCAA Briefing Book") Note the CCAA and BIA Briefing Books, *infra*, suggests courts will impose confidentiality restrictions and trading prohibitions for public companies.

[99]BIA and CCAA Briefing Books at 9 and 3 respectively.

[100]BIA, s. 65.12(1) and CCAA, s. 33(2)

[101]Wood, supra, note 94 at 375 unlike notice to bargain provisions in Canadian labour legislation the provisions in the BIA and CCAA are only open to use by employers. Normally, both parties to a collective agreement in labour law may initiate formal bargaining pursuant to the relevant labour statute. There was no rationale provided in the Parliamentary debates or the BIA and CCAA Briefing Books for the limitation of these provisions to employers but not unions. As we will see below, the advent of open collective agreements during restructuring provides trade unions increased bargaining leverage in restructuring negotiations with debtor employers.

[102]The provisions noted herein on negotiating a collective agreement are largely extracted from The Labour Law Casebook Group, *supra*, note 65 at 391-393.

[103]See *Royal Oak Mines v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 where the content of the duty to bargain in good faith and the reasonable efforts obligation were explained by the Supreme Court of Canada. Note the duty to bargain may not apply to collective agreement negotiations in insolvency situations as section 65.12(6) of the BIA and 33(8) of the CCAA indicates that the existing collective agreement "remains in force." In cases where a collective agreement exists there can be no violation of the duty to bargain. See *St. Raphael's Nursing Home*, [1983] OLRB Rep. Aug. 1370 and *Ready Bake Foods Inc.*, [2007] OLRB Rep. Jan/Feb 166.

[104]In Ontario, see *Royal Ottawa Health Care Group*, [1999] OLRB Rep. July/August 711.

Nonetheless, the "bargaining freeze" terminates when a new collective agreement is executed or when the parties reach a legal impasse.[105] Upon the termination of the freeze, even though the duty to bargain in good faith continues to apply, the employer may unilaterally change the terms and conditions of work if there is no collective agreement in force. In other words, after the notice to bargain has issued and the parties navigate the normal statutory obligations, the debtor employer can oust the terms and conditions of the previous collective agreement if it expired during bargaining. Of course, the bargaining agent is not required to accept the unilateral changes instigated by the employer. However, at that point in restructuring negotiations, the practical choice facing the union is to accept the unilateral changes or engage in a work stoppage that will risk the liquidation of the debtor company.

In summary, the statutory amendments restrict the alteration of the existing collective agreement to the parties in one of two ways. First, the parties may voluntarily agree to amend the existing collective agreement.[106] Second, if the debtor employer is permitted to serve a notice to bargain on the bargaining agent, it may engage in hard bargaining, unilaterally insisting on changes to the point of impasse, which may permit the terms and conditions of the collective agreement to be displaced if the labour contract expired during bargaining. In such a situation, the parties may or may not ultimately agree on the terms of a new collective agreement. However, in either event, the labour contract will be displaced (and possibly replaced) as a direct result of the "notice to bargain" issued by the bankruptcy court. Consequently, the reforms do allow for further discord where federal or provincial labour law permits the terms and conditions of the previous collective agreement to be displaced after bargaining to impasse. However, to date, [107]this development has not played out in litigation concerning the "notice to bargain" provisions. And, given the realities at play in current work-out talks, this situation may not arise for some time. In any event, recent judgements applying the statutory amendments have focused on the effect of the legal status of the collective agreement and not upon notice to bargain scenarios.

B. Recent Litigation Interpreting the Statutory Amendments

More than three years after the implementation of the collective agreement reforms to the BIA and the CCAA, the courts have had very few opportunities to interpret and apply the new statutory amendments.[108] In *Canwest Global Communications Corp. (Re)*[109] the Ontario Superior Court considered the implication of the addition of section 33(1) to the CCAA. This part of the statute maintains that "any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent."[110] Madam Justice S.E. Pepall dismissed a

[105] The end of the bargaining freeze varies across jurisdictions. For instance, in the Alberta *Labour Relations Code*, section 128 and in the British Columbia *Labour Relations Code*, section 45(2) the freeze operates until there is an actual lawful strike or lockout whereas in Ontario *Labour Relations Act*, 1995, section 86(1), and the Newfoundland and Labrador *Labour Relations Act*, section 74(b), the freeze remains in place only until a strike or lockout would be lawful.

[106] A patch work of regulation exists across Canada regarding the early termination of collective agreements. For instance, seven jurisdictions require the Labour Board's consent in the first year of the collective agreement's operation. While in Ontario and New Brunswick the Labour Board can order early termination at any time upon the joint application of the parties. See George W. Adams, Canadian Labour Law 2nd ed. (Aurora , Ont.: Canada Law Book, 2013)at 12.400 and also see *Kitchener Frame Limited, v. The National Automobile, Aerospace, Transportation and General Workers Union of Canada and its Local 145l* [2011] O.L.R.D. No. 3348 for an example of an early termination application arising from insolvency in Ontario.

[107] December 31, 2012 the last date case law was updated for this article.

[108] As of the end of 2012 there are no BIA case interpreting the amendments and only two decisions interpreting the CCAA provisions found in section 33(1).

[109] [2010] O.J. No. 2544

[110] CCAA, s. 33(1)

motion by a union for an order to have the debtor satisfy severance and termination pay obligations in accordance with the collective agreements. The union had taken the position that the employees in question had provided post-filing service and were entitled the payments in accordance with their labour contracts. The debtor submitted that the employees' employment entitlements were not converted into post-filing obligations simply because they had been actively employed following the initial order. In the court's judgement, the effect of the amendments did not alter the established law on this point.[111]

In considering the union's request Pepall J. (as she was then) indicated that section 33 of the CCAA incorporated law that had been long established referencing *Jeffrey Mine Inc.* to indicate that the collective agreement continues during insolvency.[112] In the court's view, the union's argument required a determination of whether section 33 altered the treatment of termination and severance obligations as unsecured claims. In rejecting the union's position, Justice Pepall indicated that while section 33 maintains the terms and conditions contained in the collective agreement, it does not alter the priorities or status of the claims in question.[113] She offered that if Parliament had intended to effect such a "significant amendment" whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.[114] As such, terminated employees were entitled to termination and severance payments but the obligation to pay those unsecured claims was stayed and subject to compromise in the plan of arrangement. At about the same time, the Québec Superior Court faced a similar issue relating to insurance premiums.

In *White Birch Paper Holding Company*[115]Mr. Justice Robert Mongeon denied a union's motion to declare that a debtor was bound to continue insurance payments for the health and welfare benefits of former employees. The union argued that the obligation to pay insurance premiums arose from the collective agreement, which had not been revised by the parties, so the suspension of payments constituted a violation of section 33 of the CCAA, which maintains the legal force of the collective agreement during insolvency.[116] The debtor employer responded that the provisions did not form part of the collective agreement, but even if the payments were incorporated into the labour contract, the persons at issue were retirees, not employees.[117] After the court determined that it (as opposed to a grievance arbitrator) had the jurisdiction to deal with the dispute given that the matter was fundamentally about the effect of an initial order,[118]the judge turned to the question of the scope of the reforms recognizing the legal status of the collective agreement found in section 33 of the CCAA.

In the court's view, the union's argument would require all employment obligations (including incorporated pension plans) to be enforced despite the initial order which would entail excluding "the entire collective labour relations process from the application of the CCAA" except with respect to a court issuing a notice to bargain under the *Act*.[119] The court considered that the amendments merely codified the existing case law pertaining to debtor companies being bound to honour collective agreements under the CCAA.[120] After considering Minister Fontana's remarks about the operation and effect of the CCAA collective agreement reforms, the Court, relying on prior case law,[121] concluded that

[111]For example, see Nortel Networks, *supra*, note 53
[112]*Ibid* at para 16.
[113]*Ibid* at para. 32.
[114]*Ibid* at para. 33.
[115][2010] Q.J. No. 5701
[116]*Ibid* at para.3-16
[117]*Ibid* at para. 15
[118]*Ibid* at para. 20 - 29
[119]*Ibid* at para. 32
[120] *Ibid* at para. 36
[121]Specifically, he relied upon *Jeffrey Mines Inc*., *supra*, note 26, *Nortel Networks Corp. (Re)*,*supra*, note 53 and *Royal Oak Mines, supra,* note 28

collective agreements continued to apply during insolvency "provided that they refer only to employees who continue to work."[122] In Justice Mongeon's view, Parliament did not intend for collective agreements to apply beyond these principles because that would have given unions complete power over the success or failure over any restructuring under the CCAA.[123] If the CCAA is interpreted according to its purpose, which is to enable distressed companies to avoid the pressure of their contractual obligations, then section 33 could not "be made so inflexible that the Union would be, for all practical purposes, in a near absolute position of control over the restructuring process." [124] Consequently, section 33 should be applied to situations where "employees of a bargaining unit continue to perform work after an initial order has been issued. Otherwise, the spirit of the entire corporate reorganization process under the CCAA would suffer as a result." The consequence of two early cases should not be overemphasized, yet there are some lessons worth noting in these decisions.

To date, the trade union's request to enforce the collective agreement according to its strict terms, despite the initial order, has been denied by the courts. In light of these decisions, and the absence of other case law, the reforms cannot be said to have had an important formal effect upon insolvency laws. However, Mongeon J. did not need suggest that the collective agreement only *applies* to active employees. The case law,[125] the BIA and CCAA amendments and labour statutes across the nation are clear – the collective agreement subsists in law to all bargaining unit employees despite insolvency unless very specific and limited conditions are met in law. Among other things, the continued legal status of collective agreements is important to bargaining unit employees even if the immediate effects of many of its terms are postponed by the stay. The terms and conditions found in collective agreements assist unions to establish the parameters of their claims for employees during insolvency, whether or not actively employed, and also establish the rates of pay and terms of work for employees who are retained to provide services after an initial order. In any event, the BIA and CCAA amendments have been interpreted cautiously by the courts, within the terms of existing case law,[126] and in very limited circumstances. Unfortunately, the case law alone cannot reliably reveal whether the amendments are, in fact, unduly damaging the work out efforts of stakeholders.

Although courts retain ultimate authority over insolvency matters, to understand the true impact of statutory reforms on rescue efforts, one must turn from an examination of the principles emanating from the courtroom to an investigation of the principals in the boardroom.[127]

C. An Examination of Restructuring Negotiations with Collective Agreements

Bankruptcy plans or proposals devised by stakeholders normally advance or reject numerous proposals prior to seeking approval of the courts for any specific rescue plan.[128] As a result, much of the "real action" during insolvency takes place during informal bargaining sessions between debtor and creditors. To understand the real consequences of the amendments, it is necessary to appreciate the

[122] *White Birch, supra,* note 114 at para. 47
[123] *Ibid* at para. 48
[124] *Ibid* at para. 59
[125] For instance, see *T.C.T Logistics, supra*, note 43, *Saan Stores Ltd., supra,* note 21*, and Jeffrey Mine Inc*., *supra*, note 26 and the accompanying text above.
[126] See *Abitibibowater inc. (Arrangement relatif à)* [2009] J.Q no 4473 ; *Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967 (Ont. C.A.); *Fraser Papers Inc.* [2009] O.J. No. 3188 (Ont. S.C.J.); *Collins & Aikman Canada Inc.* [2007] O.J. No. 4186, *Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd.* [2007] O.J. No. 2998;; *TQS* [2008] Q.J. No. 7151 (Que. C.A.) and *Fraser Paper Inc. (Re)*[2009] O.J. No. 3188 and accompanying text above.
[127] D. J. Miller, Hugh O'Reilly, Robert Thornton and Amanda Darrach, *supra,* note 72 at 1.
[128] *Ibid*.

direct impact of the statutory amendments upon rescue talks.[129] As a result, a detailed study was undertaken that attempted to construct a window into restructuring efforts in unionized settings that hoped to understand the dynamics of rescue talks post-reforms.

The research goals of the interviews and the survey attempted to comprehend how the legal status of the collective agreement and the notice to bargain provisions affected rescue talks. It sought to understand whether the legal status of the collective agreement placed significant obstacles between debtors and unions arriving at revised collective agreements, and if so, what those hurdles were and whether those impediments tipped rescue negotiations toward failure. This examination embarked on interviews with leading counsel involved in restructuring discussions in order to understand the tactical and strategic nuances of modern restructuring negotiations. It also conducted a survey of insolvency practitioners who have experience with collective agreements during insolvency so as to build a statistical portrait of the types of changes that have occurred in collective bargaining between debtors and labour unions post-amendments. As we will see, although a valid statistical analysis was not forthcoming from this examination, it did produce anecdotal evidence from interviews as well as survey information that help provide a preliminary understanding of the effect of the amendments upon restructuring talks post-amendments. With the aid of interviews and survey results, this next part of the essay outlines the nature of restructuring discussion post-amendments and then offers an analysis of the effect of the reforms based upon this information. Finally, the essay concludes by reviewing the evidence indicating the effect of the reforms upon debtor employers and labour unions attempting to salvage distressed businesses.

The data collection undertaken in the survey attempted to target a wide variety of practitioners on the frontlines of commercial restructuring in unionized settings across Canada. As a result, this study – with the cooperation of relevant professional associations – invited over 5,500 insolvency practitioners[130] (trustees, monitors, counsel and articling students) with experience in collective agreements during insolvency proceedings to participate in an anonymous electronic email and website survey. The survey posed 34 detailed questions designed to understand insolvency practice both before and after the amendments. It posed multiple choice, agreement scale, questions on dispute resolution and negotiations between stakeholders involved with collective agreements and asked participants about their experience with collective agreements and insolvency, the use of specific amendments as well as their opinions as to the effect of the amendments on their insolvency practice.[131]

The survey was distributed in November 2012 and January 2013 but generated a low response rate of .001 percent, meaning just eight (8) insolvency practitioners completed the electronic email survey. As a result, the findings of the survey are not representative of all insolvency professionals at large with experience in this area.[132] Over half of the survey participants had practiced in the insolvency area for more than 25 years and the balance of respondents had somewhere between 6 and 25 years'

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[129] Ronald Coase, "The Problem of Social Cost" (1961a) 3 *Journal of Law and Economics* 1 who demonstrates parties will bargain around legal rules in order to achieve more efficient results.

[130] The Canadian Bar Association represents approximately 37 000 lawyers, judges, notaries, law teachers, and law students from across Canada. It distributed a bilingual version of the electronic survey via email to its National Bankruptcy, Insolvency and Restructuring and the National Labour and Employment Law Sections inviting individuals with experience in this area of law to complete the survey. The CBA also posted the survey link for members to complete on their website if they so desired. The survey, controlling for duplication, reached approximately 4 000 CBA members. The Canadian Insolvency Foundation circulated the same survey, in the same form, to members of the Canadian Association of Insolvency and Restructuring Professionals. The CAIRP is a national professional organization representing some 920 general members acting as Trustees in Bankruptcy, receivers, agents, monitors, and consultants in insolvency matters, as well as 400 articling members, and 215 corporate, life and inactive members.

[131] See Appendix A for the survey results

[132] Despite the wide distribution of the survey only 8 individuals in both the CBA and the CAIRP responded by responding to the survey. Consequently, given the low response rate the survey is not statistically valid.

experience in the field. Three survey participants were trustees, another three represented various business stakeholders and the balance of two respondents represented bargaining agents in insolvency proceedings. The responses were inspected for errors and more meaningful categories were arranged that combined similar response in order to tabulate general themes or noteworthy exceptions to trends in the answers. Given the small sample, the responses were not subjected to statistical analysis prior to reporting. Notwithstanding the low response rate, which is likely due to the detail and length of the survey itself, the responses generated were consistent with the substance of the answers given by insolvency counsel in the interviews.

The goal of the interviews was to acquire a sophisticated understanding of the dynamics afoot in post-amendment restructuring negotiations addressing collective agreement matters, based on information from insolvency counsel who regularly engage in this limited practice area. In addition, the interviews were meant to provide a forum for a frank assessment of the impact of the reforms, if any, upon insolvency practice from both debtor and union counsel. A small target population was identified that possessed significant experience in this area of law, and the majority of counsel participated in extended, candid interviews that focused on the realities of restructuring talks dealing with collective agreements. As a result, all the goals of the interviews were met.

Twelve insolvency lawyers across Canada were contacted to participate in a 90 to a 120 minute nonattributable face-to-face interview with the author. The contact list was constructed from published decisions in insolvency law, public speaking engagements on insolvency matters and peer reviewed ratings of counsel practicing insolvency law. The list was also evenly divided between counsel representing business stakeholders (debtors, secured creditors, lenders and so on) and social stakeholders representing trade unions. Eventually a small pool of twelve counsel who had ongoing experience with the intersection between insolvency and collective agreement law were identified and contact in October and November of 2012.

Seven individuals agreed to an interview – a response rate of 58 percent – that were highly experienced in insolvency and labour law, insomuch as the majority of counsel interviewed had appeared in the Supreme Court of Canada, litigating the interrelationship of insolvency to labour law issues. All counsel agreed to participate in interviews, which occurred at their law firms over the balance of the first week in December 2012. Approximately half of the interviewees had more than 20 years' experience practicing insolvency law where collective agreement rights had been at stake. As well, despite one counsel having less than 10 years' at the bar, the balance of counsel possessed between 10 and 20 years' experience dealing with insolvency and collective agreement issues. All but one counsel had appeared at all the levels of the courts litigating insolvency and labour law matters. Finally, four insolvency lawyers spent between 10 to 30 percent of their practice dealing with insolvency and labour law matters, while three lawyers devoted between 70 to 100 percent of their practice to these same issues. In addition, these individuals each had experience with the one or more of the most noteworthy commercial restructurings dealing with collective agreement rights in recent memory. The interview respondents, on the whole, can fairly be characterized as leading counsel in insolvency law, given their significant and long-term involvement in insolvency law pertaining to collective agreements.

The author posed 15 questions[133] focused on the intersection of insolvency and labour law that were used as departure points to foster an in-depth discussion of the realities of restructuring negotiations in light of the recent statutory amendments. The questions posed were oral, open-ended queries focusing on their insolvency experience with collective agreements and any opinions they might have pertaining to the operation and effect of reforms upon rescue talks. The responses were recorded and transcribed by the author and reviewed for errors. The substance of the answers was reviewed to identify general themes and any evident trends or exceptions to any trends that might exist and the

[133]See Appendix A

content was organized thematically to reveal any patterns in the answers. The survey and interview received ethics approval.[134] Together, the findings of the survey and the in-depth interviews with leading counsel suggest that difficult, yet successful, restructuring negotiations continue to take place after the statutory reforms recognized the legal status of the collective agreements.

D. The Nature of Work-out Talks Involving Collective Agreement Rights Post-Amendment

The creation of a rescue plan is largely a bargaining process among creditors, with the debtor seeking the informal support of influential creditors for the plan before filing it with the court. While the form of these agreements varies widely, they tend to include some combination of approaches: extending the time for repaying debts; accepting only a partial debt repayment; and converting debt into equity or liquidating some of the debtor's assets in order to pay down arrears. However, interviews indicated that if an insolvency scenario presented itself with a situation where labour costs seem to have played a significant role in the insolvency and a collective agreement(s) is present, then debtor counsel will normally engage in-house counsel or human resources professionals to analyse the effect of the labour contract upon the competitiveness of the distressed company. Normally wage costs are not the dominant factor arising from a collective agreement that may have contributed to the insolvency. Rather, the cost of contract administration, along with unionized work rules and the presence of any defined benefit pension plans, tends to elevate debtor costs above the cost structure of competitor companies.[135] Managing any excessive costs from the labour contract then becomes an important factor in rescuing the business.

If the debtor employer cannot undertake a balance sheet restructuring, it will usually explore revising the collective agreement in order to trim its costs.[136] In the past, the potential for an order disclaiming the collective agreement led some stakeholders to repudiate the labour contract and to unilaterally impose concessions in unionized workplaces.[137] However, the amendments change that approach by replacing unilateral action with a requirement to enter bilateral and sometimes multilateral discussions with trade unions. In these situations, the debtor employer's need for collective agreement concessions will usually cause its legal counsel, along with the Chief Restructuring Officer, to involve the union(s) in talks designed to revise certain aspects of the collective agreement.[138] The decision to negotiate made by the debtor employer is directly influenced by its ability to use key aspects of the statutory amendments.

A combination of section 65.12(1) (2) and (6) of the BIA and sections 33(1) (2) (3) and (8) of the CCAA, which ensures that the collective agreements remain in force during insolvency and permit a

[134] The survey and interviews conducted for this essay received approved by Carleton University Research Ethics Board prior to the commencement of project.

[135] #1 Interview of Insolvency Counsel by Author (4 December 2012), #2 Interview of Insolvency Counsel by Author (4 December 2012), #3 Interview of Insolvency Counsel by Author (5 December 2012), #5 Interview of Insolvency Counsel by Author (6 December 2012), #6 Interview of Insolvency Counsel by Author (6 December 2012) although not typical, some insolvencies negotiations, like at Air Canada, focused significantly on the reduction of many financial aspects of the collective agreement. Interview # 3 and #4 represented debtor employers and other business stakeholders exclusively while the balance of Interviews mainly represented trade unions in insolvency matter but not exclusively. One of the lawyers who represented trade unions also represented secured creditors and other business stakeholders during bankruptcy proceedings.

[136] #1 Interview with Insolvency Counsel by Author (4 December 2012), #2 Interview with Insolvency Counsel by Author (4 December 2012), #3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012), #5 Interview with Insolvency Counsel by Author (6 December 2012), #6 Interview with Insolvency Counsel by Author (6 December 2012). See *Collins & Aikman Canada Inc.* [2007] O.J. No. 4186 as an example of a pre-amendment insolvency that required no collective agreement revisions to a number of different labour contracts in order to restructure.

[137] #1 Interview of Insolvency Counsel by Author (4 December 2012)

[138] #4 Interview of Insolvency Counsel by Author (5 December 2012)

court to allow a notice to bargain issue to the union, have caused debtor companies to widely forego litigation with their unions for collective agreement negotiations.[139] While these sections maintaining the status of the collective agreement operate automatically, the provisions permitting a notice to bargain are discretionary in nature. The likelihood of a debtor employer being permitted to use the notice to bargain sections is encumbered by the exacting terms of the provisions found in the amendments. First, if a trade union is engaged in voluntary negotiations with the debtor employer (a precondition for a notice to bargain order) then agreement to only one revision of the collective agreement will forego the employer's ability to later compel further collective bargaining. As the inability to agree on *any collective agreement revisions* is the standard debtors must meet as a condition precedent to using the notice provision, any voluntary bargaining sessions that agree to even minimal alterations will place those talks beyond the scope of an order. As the amendments require the parties to attempt to voluntarily bargain revisions to the collective agreement before requesting court assistance, unions will be provided a strategic opportunity to block the use of notice provisions by agreeing to minor concessions if they decide significant concessions must be avoided during insolvency.[140] As it is extremely rare for a trade union to flatly refuse to discuss revisions to its collective agreements,[141] debtor employers may find voluntary negotiations prevent them from later turning to a judge to issue a notice to bargain order if they are not satisfied with the extent of concessions acquired from the union.

The purpose of the notice to bargain sections would be seemingly defeated by voluntary bargaining. In the context of a trade union expressing a genuine willingness to bargain collective agreement revisions, it will be difficult for the debtor employer to assert the mandatory notice to bargain provisions were necessary. The existence of a sincere intention to voluntarily negotiate would negate the purpose of the order – that is, to compel the union to bargain – rendering the provision inoperable in all but the most extreme cases of a recalcitrant union rejecting all solicitations from the debtor employer to bargain. Although that outcome may comply with Parliament's intention to only alter collective agreements where both parties were willing to do so, it also significantly restricts the ability of debtor to regularly rely on the notice to bargain provisions if voluntary talks fail. Moreover, the debtor employer must also establish "irreparable damage to the company" before the court can permit the issuing of a notice to bargain. Based upon the plain meaning of the words in the statutes, a court will require irrecoverable harm or some irredeemable impairment be demonstrated before an order can be granted. Yet the mere possibility of voluntary discussions between the parties must significantly weaken claims of irreparable harm because it would still be conceivable that collective agreement revisions could occur given the genuine desire of a union to bargain with the debtor. Although it is possible for a debtor to overcome the legal formalities involved in obtaining the order, the prospect of a debtor doing so seems somewhat remote given the preference of stakeholders for "real time" rescue talks.[142]

The time involved obtaining such an order, along with the time required to force a reluctant union to compromise its agreement through litigation by obtaining a mandatory bargaining order, significantly erodes the incentive of a debtor employer to seek an order in the first place.[143] The statutory timetable mandated by collective bargaining is not an expedited process and the debtor risks

[139]BIA, s. 65.12(2) and CCAA, s. 33(2) and (3)
[140]BIA, s. 65.12(1) and (2) and CCAA, s. 33(2) and (3)
[141]#1 Interview of Insolvency Counsel by Author (4 December 2012) and #3 Interview of Insolvency Counsel by Author (5 December 2012) However, during the Stelco Inc. restructuring, United Steelworkers Local 1005 located in Hamilton, Ontario did refuse to negotiate alterations to its collective agreement with the debtor employer. Oddly, in that restructuring the employer began being profitable shortly after CCAA proceedings were initiated.
[142]#3Interview of Insolvency Counsel by Author (5 December 2012) and #4 Interview of Insolvency Counsel by Author (5 December 2012)
[143]*Ibid*.

harming negotiation with its union(s) when it forces them into mandatory discussions, even if it can bear the timetable involved in that litigation. In short, a rescue based on labour concessions becomes more remote with delay and increased labour tension. As a result, the failure of the reforms to provide a practicable legal process to "kick start" collective bargaining through the notice to bargain provisions has forced the parties to begin that dialogue on their own. Consequently, debtor employers have had to adjust their normal bargaining strategy to entice labour unions into meaningful collective bargaining.

As the legislation makes it improbable that a debtor company can normally open a collective agreement in a timely way through the use of notice to bargain provisions, debtor employers tend to take a "lay all your cards on the table and make a reasonable proposal" approach with the union.[144] Given the fact that many large unions today have prior insolvency experience to guide them in negotiations, they are well equipped to make the necessary trade-offs to rescue a business.[145] Restructuring talks necessitate a pragmatic discussion if the distressed business is to survive as there may be no prospect of bargaining after bankruptcy. As a result, the debtor employer is left with the reality that the most practical way to alter the agreement is to persuade the union to voluntarily negotiate a new, cost-effective labour contract.[146] However, although the statutory reforms did not practically require unions to negotiate labour contract changes with the debtor, the looming economic disaster, coupled with the trade union's need to protect its members, encourages them to bargain revised collective agreements.

Prior to the enactment of the reforms, business-oriented stakeholders and others[147] argued that trade unions would be provided with a "function veto" over rescue talks as the labour-related reforms included no third-party mechanism to impose an agreement if a recalcitrant union refused concessionary bargaining. Counsel representing debtor employers and senior creditors complained that the amendments removed the "dynamic tension" that was present in rescue talks when the court could impose an unfavourable outcome upon trade unions – setting aside collective agreements. The possibility of terminating collective agreements provided a significant incentive to negotiate reductions in a labour contract in good faith. As a result, it was feared that the statutory amendments inserted iron clad protection for a labour union's collective agreements, which was tantamount to permitting the bargaining agent to simply sit on its hands and do nothing but risk liquidation.[148] Despite the lack of a formal third-party neutral being handed the power to legally impose an agreement in the statutory reforms, trade unions have come to appreciate that it is in their "collective interests to bargain for a timely and positive outcome."[149] This realisation is borne out of the trade union's tactical and strategic self-interest in restructuring talks.

First, if a restructuring agreement has crystalized without union input, which is then presented to the bargaining agent as a *fait accompli,* the interests of unionized employees will not likely be well

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[144]#3 Interview of Insolvency Counsel by Author (5 December 2012)

[145]*Ibid.*

[146] #1 Interview with Insolvency Counsel by Author (4 December 2012), #2 Interview with Insolvency Counsel by Author (4 December 2012), #3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012), #5 Interview with Insolvency Counsel by Author (6 December 2012), #6 Interview with Insolvency Counsel by Author (6 December 2012) and #7 Interview with Insolvency Counsel by Author (6 December 2012).

[147]See the testimony of Mr. Andrew Kent, *supra*, note 3 at 6-7. Also see Report on the Commercial Provisions of Bill C-55 by the Legislative Review Task Force (Commercial) of The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals online at: (http://www.insolvency.ca/papers/LRTF%20Report_final_Oct-14-05.pdf). For an academic perspective, proposing a "Judicial Mediator/Arbitrator" bound by a final offer selection arbitration process and approval of the court see Dr. Janis Sarra, *Proposed Model of a Federal Insolvency Collective Bargaining Process: Final Report to Industry Canada*, (Vancouver: University of British Columbia Faculty of Law, 2005).

[148]#3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012.)

[149]Sarra, *supra*, note 32 at 203.

represented in the agreement. Practically speaking, the pressure to accept a plan or compromise that was approved by all stakeholders, except the union(s), will be enormous in court. Bargaining agents in this position will have been tactically outmaneuvered in the contest to influence the rescue of the distressed company. Typically, a union will want to avoid that situation and influence negotiations in such a way as to preserve as many unionized jobs as possible and also maximize protection for key employee benefits such as a pension plan.[150] As a result, it is important for union counsel to quickly insert its client into rescue negotiations so that the debtor employer and the secured creditors take account of the union's priorities at the front end of the bargaining process.[151] The only means by which the debtor will want to address the union's priorities is to voluntarily "open the collective agreement" for bargaining. Otherwise, the union has little to offer the other parties in the reorganization talks.[152] Although counterintuitive, this approach is widely employed by unions trying to avoid being marginalized in restructuring talks. Rescue talks allow unions a significant opportunity to maximize the economic security of its members post rescue. However, the ability of unions to achieve their goals is moderated by the economic and legal realities of insolvency.

Many labour unions appreciate that they are in a perilous place in restructuring talks. For example, the debtor may use its extensive management rights under the *existing* collective agreement to direct its enterprise and unilaterally terminate or permanently reduce its operations without any consultation.[153] In addition, the debtor and other creditors may set the agenda by bargaining over where, when, into what and how much to invest in the distressed company without union input.[154] Also, as labour is dependent upon capital for its very existence, no responsible union[155] can easily dismiss a legitimate demand to alter the terms of work so as to retain as much of its members' employment as possible. In this context, if the union is to affect the outcome of restructuring talks, it must act quickly and inject itself into negotiation by having something to offer its counterparts.[156] In this way, unions become meaningful players in restructuring negotiations and ultimately increase their bargaining strength among other stakeholders when they voluntarily choose to open their agreements to revisions.

The open collective agreement provides the union real leverage by trading potential concessions in a collective agreement for a commanding position in the rescue talks.[157] Using the "chip of the open collective agreement" involves the bargaining agent acting as if it were the first secured creditor in rescue talks to the "horror of secured creditors."[158] For instance, a union might offer hefty wage and benefit increases in an open collective agreement to potential buyers it does not favour and an economically appropriate collective agreement to other bidders as long as those purchasers accept certain employment and benefit assurances in a renewed collective agreement.[159] Like an entrepreneur, it may even demand an ownership share in the debtor employer in exchange for its consent to collective agreement changes. Alternatively, it may scuttle the ownership aspirations of purchasers by rejecting

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[150]#1 Interview of Insolvency Counsel by Author (4 December 2012), #2 Interview of Insolvency Counsel by Author (4 December 2012) and #6 Interview of Insolvency Counsel by Author (6 December 2012)
[151]*Ibid.*
[152]*Ibid.*
[153]Sarra, *supra,* note 32 at 200
[154] Harry Glasbeek, "Voluntarism, Liberalism, and Grievance Arbitration: Holy Grail, Romance, and Real Life" in Geoffrey England, ed., Essays in Labour Relations Law (Don Mills, Ontario: CCH Canadian, 1986) 57 at 84-86.
[155] See United Steelworkers of America's submission to Canada, Senate, Standing Committee on Banking, Trade & Commerce "Proceedings of the Standing Committee on Banking, Trade & Commerce - Issue 24" (September 17, 2003) at 24.
[156]# 1Interview of Insolvency Counsel by Author (4 December 2012) and #5 Interview of Insolvency Counsel by Author (6 December 2012)
[157]#5 Interview of Insolvency Counsel by Author (6 December 2012)
[158]*Ibid.*
[159]*Ibid.*

concessions required by the buyer it does not favour.[160] In other words, unions manipulate economic uncertainty[161] pertaining to the insolvency in order to ensure a rescue plan takes account of the workplace concerns of bargaining unit employees in a revised collective agreement. However, the aspirational behaviour of a union to control the restructuring will be strongly resisted by debtor employers who will temper union demands by threatening to liquidate the business and publicly tying the failure of rescue talks to the demands of the union.[162] The union will weigh the reality of that outcome against its self-interest prior to reaching any restructuring agreement. A union's agreement to a rescue plan, like buy-in from other stakeholders, largely hinges on the plan's economic appeal to its principals.

In this back-and-forth, unions tend to agree to collective agreement concessions when their officers and members believe that the employer's claims of hardship are credible, concessions could save employment and reverse the economic misfortunes of the employer and reductions will not be needed again, or at least not in the foreseeable future.[163] However, unionized workers will engage in a labour dispute with the debtor company, risking both job loss and company liquidation, if concessions are viewed as excessive or if there is a seething dissatisfaction among union members arising from prior labour–management relations.[164] This unique form of voluntary collective bargaining places an extraordinary premium on successfully revising labour contracts by the parties. If they fail, the parties jeopardize the viability of the debtor company, its bargaining agents and all employment. Since the advent of the statutory amendments, the ramifications of failure have influenced the contours of collective bargaining during restructuring in several notable ways.

First, survey results indicate that there has been an increase in voluntary stakeholder efforts to avoid insolvency proceedings. Prior to the amendments taking effect, three quarters of survey participants reported that they had witnessed a party initiate collective bargaining to revise a collective agreement in order to avoid insolvency proceedings. After the effective date of the amendments that number had grown by one respondent. [165] All but one survey respondent reported that this strategy enjoyed some level of success in lowering labour costs prior to the reforms, and that rate has maintained itself post-amendments.[166] Three survey participants reported that the effort to negotiate voluntary revisions first occurred because of the perception that parties could rely upon the amendments if talks failed.[167]Moreover, it was common for trade unions to be willing to discuss collective agreement revisions with the debtor when approached and, at times, unions even initiated those conversations.[168] However, where insolvency proceeding could not be avoided, the renegotiation of labour cost has played an increasingly prominent role in rescue talks since the amendments were enacted.

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[160]See the Stelco Inc. insolvency where the bargaining agents took an active role in bringing in a financer to the negotiation table and offered it amenable collective agreement terms due to its bid. First Interview with Author (6 December 2012) and Air Canada's bankruptcy where the unions actively opposed Trinity Time Investments $650-million investment in Air Canada which led to the financer walking away from its proposal because the unions did not agree to additional benefits concessions. See Air Canada Timeline, CBC News Online (2 April 2004) online at: http://www.cbc.ca/news/background/aircanada/timeline.html.

[161]#2 Interview of Insolvency Counsel by Author (4 December 2012)

[162]#1 Interview of Insolvency Counsel by Author (4 December 2012), #2 Interview of Insolvency Counsel by Author (4 December 2012) and #5 Interview of Insolvency Counsel by Author (6 December 2012)

[163]Gary Chaison, "Airline Negotiations and the New Concessionary Bargaining" (2007) 28 J Labor Res 642 at 647.

[164]*Ibid* at 653. Also see text in footnote 199 below.

[165]See responses to questions 10 and 20 of the Survey in Appendix A

[166]See responses to questions 10a and 20a of the Survey in Appendix A

[167]See responses to questions 24 and 24a of the Survey in Appendix A

[168]#1 Interview with Insolvency Counsel by Author (4 December 2012), #2 Interview with Insolvency Counsel by Author (4 December 2012), #3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012), #5 Interview with Insolvency Counsel by Author (6 December 2012), #6 Interview with Insolvency Counsel by Author (6 December 2012) and #7 Interview with Insolvency Counsel by Author (6 December 2012).

There seems to be a growing prevalence of using the reforms to revise existing collective agreements. Since the reforms took force, three quarters of survey respondents reported that they have witnessed insolvency proceedings being initiated in order to simply lower labour costs. One additional survey respondent had witnessed the use of this approach post-amendments.[169] It is not clear from the survey data if the collective agreement amendments are being used to strategically leverage bargaining power for concessions in the aggressive manner used under section 1113 of Title 11 of the U.S. *Bankruptcy Code*.[170] However, none of those interviewed in person had witnessed debtors attempting to use insolvency reforms pertaining to the collective agreement as a means to obtain reductions in the collective agreement through antagonistic concessionary bargaining. It is equally as plausible that stakeholders have seen certain labour costs (i.e. defined benefit pension plans) become a key driver of insolvency proceedings and are using the insolvency legislation to try and address those costs in a proactive use of the legislation.[171] Whatever the explanation, the parties to negotiations have experienced success in resolving their own collective agreement disputes during insolvency.

Debtor companies and trade unions have experienced certain successes in resolving their own collective agreement disputes through negotiations. For instance, three quarters of survey participants said they had witnessed parties resolve their collective agreement disputes prior to mediation or arbitration being engaged in insolvency proceedings. This represents an increase of 25 percent since the amendments took effect.[172] In addition, three respondents also indicated they had witnessed disputes being resolved after engaging a mediator or arbitrator, which represents a corresponding drop of 25 percent since the amendments took force.[173] Despite the apparent increase of parties resolving their collective agreement issues without the assistance of third party neutrals, there was also some evidence that settlements were taking longer to secure.

For instance, approximately half of respondents stated that they had witnessed parties successfully negotiate a revised collective agreement before a strike or lockout occurred post-amendments, which represents a drop of three respondents.[174] As well, approximately half of respondents indicated that they had witnessed parties successfully negotiate a revised collective agreement after a strike or lockout occurred, which represents a drop of one respondent in successful post-dispute negotiation.[175] Therefore, although parties seem to be experiencing success in coming to revised collective agreements, more participants are witnessing some form of labour dispute prior to resolving collective agreement matters. However, even when parties were able to agree to revise collective agreements, the outcomes of those agreements were not always predictable.

For instance, five out of seven survey participants witnessed parties successfully negotiate a revised collective agreement and then the debtor was nonetheless liquidated, which represents a drop of 16 percent in successful negotiations coupled with subsequent debtor liquidation since the implementation of the statutory revisions.[176] As well, half of the respondents witnessed parties fail to revise a collective agreement and the debtor was eventually liquidated, which represents a drop of one

[169] See responses to questions 11, 11a and 21, 21a of the Survey in Appendix A

[170] Chaison, *supra*, note 162 at 648.

[171] #3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012)

[172] See responses to questions 6 and 16 of the Survey in Appendix A. Almost every insolvency practitioner noted that mediation is utilized in larger insolvencies such as Stelco Inc., Air Canada and Nortel Networks as opposed to smaller and medium size insolvencies. See #1 Interview with Insolvency Counsel by Author (4 December 2012), #2 Interview with Insolvency Counsel by Author (4 December 2012), #3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012), #5 Interview with Insolvency Counsel by Author (6 December 2012)

[173] See responses to questions 7 and 17 of the Survey in Appendix A

[174] See responses to questions 4 and 14 of the Survey in Appendix A

[175] See responses to questions 5 and 15 of the Survey in Appendix A

[176] See responses to questions 8 and 18 of the Survey in Appendix A

respondent since the reforms were put in place.[177] As a result, fewer survey participants were observing liquidations since the reforms, whether or not the trade union agreed to a revised collective agreement. In other words, respondents reported fewer situations where parties come to agreement but are disposed of in any event and fewer instances of parties being unable to revise labour contracts prior to their businesses being dismantled. Nonetheless, whether revising a collective agreement during insolvency prevented liquidations or not, the bargaining engaged in by debtors and unions did have real effects upon the liquidity of distressed businesses.

Prior to the statutory reforms being enacted, all but one survey participants reported successfully negotiating a resolution to a collective agreement dispute or revised a collective agreement during insolvency.[178] Subsequent to the reforms being enacted, all but one of the respondents reported that they have witnessed insolvency proceedings successfully bargain a revised collective agreement that also reduced labour costs for the debtor employer.[179] The continued high rate of agreement between debtors and unions after the statutory amendments are consistent with all the interview respondents who shared that it had not been their experience that the collective agreement caused any liquidation either before or after the implementation of the reforms.[180] In addition, although none of the legal counsel categorically ruled out the possibility of such an outcome, the consensus among employer and union counsel was that if a collective agreement caused liquidation, it was not a predominant feature of current insolvency practice.[181] Furthermore, with one exception, all insolvency counsel interviewed suggested that the collective agreement reforms did not cause any excessive or undue hardship that has prevented stakeholders from rescuing a distressed company.[182] These views were consistent with the majority of insolvency professionals that responded to the survey.

Three quarters of survey participants indicated that they were unsure that collective agreement reforms to the BIA made any difference to their clients achieving positive results pertaining to labour contracts.[183] Moreover, half of the respondents indicated that the former BIA provisions did not impede their clients from achieving positive results concerning collective agreement matters during insolvency. Only two survey participants indicated the statutory reforms to the BIA made it moderately or significantly more onerous for their clients to achieve positive results in this area.[184] With respect to the CCAA reforms, three quarters of the respondents stated that they were unsure that collective agreement amendments made any difference to their clients achieving positive results regarding the labour contract.[185] Moreover, three respondents indicated that the former CCAA provisions did not impede their clients from achieving positive results concerning collective agreement matters during insolvency. Only a quarter of survey participants indicated the statutory amendments to the CCAA made it moderately or significantly more onerous for their clients to achieve positive results in this area.[186] The

[177] See responses to questions 9 and 19 of the Survey in Appendix A
[178] See responses to question 4 of the Survey in Appendix A
[179] See responses to question 22 of the Survey in Appendix A
[180] #1 Interview with Insolvency Counsel by Author (4 December 2012), #2 Interview with Insolvency Counsel by Author (4 December 2012), #3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012),#5 Interview with Insolvency Counsel by Author (6 December 2012), #6 Interview with Insolvency Counsel by Author (6 December 2012) and #7 Interview with Insolvency Counsel by Author (6 December 2012).
[181] *Ibid.*
[182] *Ibid*. The only insolvency counsel to indicate that there was undue hardship based his view upon the reforms creating a functional veto for trade unions over the restructuring. However, even he could not point to one instance of a collective agreement preventing a successful restructuring. See #4 Interview of Insolvency Counsel by Author (5 December 2012).
[183] See responses to question 28 and 30 of the Survey in Appendix A
[184] *Ibid.*
[185] See responses to question 29 and 31 of the Survey in Appendix A
[186] *Ibid.*

overall view of the participants was to reject the notion that the reforms caused undue hardship to debtor employers attempting to restructure.

Half of the survey respondents were not sure the legislative reforms to the BIA or CCAA created any undue hardship for stakeholders trying to rescue a business. However, three respondents maintained that the reforms were significant in creating undue hardship for their clients. One participant indicated the amendments actually helped stakeholders rescue distressed businesses.[187] In summary, a majority of respondents indicated it was not their experience that the statutory reforms created undue hardship for their clients or made it too onerous to salvage distressed businesses. It is apparent from the provisions, present case law and the state of rescue talks that adding section 65.12 to the BIA and section 33 to the CCAA did produce some positive developments in the law and in insolvency practice.

E. Evaluating the Broader Effect of the Collective Agreement Reforms

The provisions in the statutory amendments that restored the collective agreement[188] and prevented bankruptcy courts from altering the terms of the labour contract reinstituted the formal legal effect of the labour contract during insolvency. Not only did these provisions reverse prior decisions that challenged the legal status of the labour contract, they reasserted the pillars necessary for amicable labour relations during insolvency. Legal rights founded in these agreements were restored to bargaining unit employees and labour experts were again able to adjudicate disputes emanating from collective agreements during insolvency. What's more, these reforms, which codified the decision in *T.C.T. Logistics*, reaffirmed a number of important purposes found in the law pertaining to collective agreements.

Professor Emeritus Paul Weiler has observed that bargaining the terms and conditions of a collective agreement is an "intrinsically valuable experience in self-government."[189] In the vernacular of the Supreme Court, collective bargaining promotes the "values of human dignity, equality, liberty, and respect for the autonomy of the person."[190] Bargaining with union workers gives employees an opportunity to influence the establishment of workplace rules and provides a level of control over their lives.[191]As a result, collective bargaining "emerges as the most significant collective activity through which freedom of association is expressed in the labour context." [192] It is a fundamental legal right of employees that includes a good faith obligation to recognize unions and engage in genuine negotiations that respects the bargains entered into by the parties.[193] In this connection, these rights encompass a voluntary process of discussions that should generally be free of the unilateral imposition of law.[194] By preventing the termination of the labour contract in the reforms, Parliament endorsed the purposes of collective bargaining, and the fruit it may yield, as important institutions entitled to the positive protection of the law.[195] In turn, the validation of the collective bargaining contained in the reforms operated to bolster work-out efforts.

On the face of the reforms, the provisions permitting the court to authorize a debtor company to issue a notice to bargain[196] to the union held out the potential of further conflict between the parties.

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[187]See responses to question 32 of the Survey in Appendix A
[188]BIA, s.65.12(6) and CCAA, s. 33(1) and (8 and s.32(9)(d)
[189]Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 32
[190]*Health Service and Support – Facilities Bargaining Association v. British Columbia* (2007) S.C.C. 27at para. 82
[191]*Ibid* at para. 83
[192]*Ibid* at para. 66
[193]*Ibid* at para. 77
[194]*Ibid.*
[195]Weiler, *supra*, note 188
[196]BIA, s.65.12(1)and (2) and CCAA, s. 33(2)and (3)

The statutory amendments invited the use of litigation as a means to force negotiated concessions or even in limited circumstances to displace the existing terms and conditions of the collective agreement. However, the absence of litigation pertaining to these provisions indicates the notice to bargain conditions in the BIA and CCAA are effectively dead letters in the reforms. In addition, courts of law have affirmed the legal status of the collective agreement flowing from the reforms without altering the landscape of the priorities in an insolvency proceeding. As a result, the collective agreement was restored to its full effect in law and debtor employers were left with only one practicable solution to a cash crisis. Distressed businesses that faced labour costs issues had to meaningfully engage in collective bargaining negotiations with their unions that were truly voluntary in nature. Contrary to the concern expressed by some stakeholders before the passage of the reforms, the willingness of the debtor company and the trade union to enter a rescue agreement revising the labour contract was not impeded by the absence of third party intervention. Rather the motivation furthering agreement in rescue talks stemmed from basic economic and legal considerations of the parties.

On one hand, the rights guaranteed in the reforms upholding the labour contract provided debtor employers a substantial incentive to deal with unions if they believed labour costs needed to be reduced going forward. On the other hand, the impending bankruptcy forced bargaining agents to carefully consider which collective agreement rights might be altered in ordered to salvage their members' economic security. The contest between the parties was necessarily transformed from one of competing over their own rights in court to a voluntary negotiation over the terms of business post-rescue. Nonetheless, the recognition of the collective agreement in the reforms meant that debtor employers would use the threat of liquidation in order to leverage a "savage process of forced concessions"[197] designed to pare down the terms of the labour contract.[198] But "arm-twisting" unionized employees into accepting a "haircut" in the collective agreement is not inevitable, even in dire economic times. Nonetheless, unions have generally reacted by opening their collective agreements and leveraging the uncertainty involved in rescue talks to advance their strategic goals on behalf of their members.[199] In this way, the heightened prominence of voluntarism in restructuring negotiations affords trade unions a rare opportunity to address issues that lie at the core of entrepreneurial control of the debtor employer and permit the union to positively contribute to the competitiveness of the business going forward.[200] In other words, the debtor employer and union move closer to an equal partnership[201] during rescue talks than would have otherwise occurred if the collective agreement had been discarded in law. In fact, rescue agreements that adroitly balance the interests of each party may actually contain improvements for employees and employers alike.[202] Whatever the specific terms of

[197] Courtney Pratt and Larry Gaudet, Into the Blast Furnace: the Forging of a CEO's Conscience (New York: Random House, 2008) at 81

[198] Wahl, *supra* note 60 at 245 notes that labour law recognizes the primacy of collective worker representation as the key element in the promotion of worker's rights and freedoms as well as economic growth in Canada. Similarly, the BIA provides for a regime of collective action on behalf of creditors, through the trustee, for the realization and equitable distribution of the assets of the bankrupt. When labour relations collide with bankruptcy and insolvency law the interrelationship of two collective bargaining regimes is at stake. The property interests of business persons are weighed against the labour, human and employment rights of workers.

[199] For instance, see Staff, "Union Turns Down Final Offer" *Sault Ste. Marie News Leader* (22 March 2007) 1 for an example of a union overwhelmingly rejecting an employer's concessionary offer mandating a long-term wage cut in the face of the bankruptcy court's prior liquidation order which would close the facility within 40 days.

[200] Katherine Van Wezel Stone "The Post-War Paradigm in American Labor Law" (1981) 90 Yale Law Journal 1509 at 1510.

[201] Brian Langille, "'Equal Partnership' in Canadian Labour Law" (1983) 21 Osgoode Hall Law Journal 496.

[202] A negotiating process between the receiver, trustee or monitor involving trade unions has always held out some promise of improving rights for bargaining unit employees. See Wahl, *supra* note 60 at 251 and text in footnote 203 below for an example of such a pre-amendment agreement.

any settlement,[203] the statutory reforms provided the debtor with a clear incentive to engage in discussion with its union(s), and thereby engage it to help salvage the business.[204] Yet the evolution of voluntary restructuring talks post-amendments has not resulted in widespread liquidations or undue hardship for debtor employers that prevent collective agreements from being revised.

The available evidence[205] suggests that debtor employers are experiencing high overall rates of agreement with unions post-amendments, which help reduce labour costs during insolvency. Interviewed insolvency lawyers agree that collective agreement negotiations, post-reform, have not "put restructuring talks in the ditch."[206] As well, survey participants generally agree that the amendments have not prevented clients from achieving positive outcomes in revising collective agreements. In addition, a majority of survey respondents were not of the opinion that the amendments created undue hardship for parties tasked with revising collective agreements. Nonetheless, although there is evidence to suggest that negotiations are reaching agreements without the assistance of third party neutrals, there are also indications that agreements are occurring in the face of labour disputes. These outcomes, along with evidence that a minority of survey respondents find post-amendment efforts to affect a rescue more difficult, suggest negotiations between debtors and unions are challenging affairs. As a result, although negotiations cannot be characterized as producing undue hardship, some hardship has been experienced in the difficult bargaining process leading to rescue agreements. Even though the possibility exists that some collective agreement negotiations have caused avoidable liquidations post-reform, the interviews and survey information indicate that such a state of affairs would be the exception but not the rule in restructuring negotiations. Debtor companies and their unions continue to be able to successfully address insolvency issues post-amendments.

4. Conclusions

Insolvency decisions that displaced the legal status of the collective agreement[207] interfered with the rights of unionized employees and the jurisdiction of labour arbitrators to determine disputes between debtor employers and unions. This jurisprudence risked employees engaging in self-help measures to resolve disputes during bankruptcy and thereby undermined the very premise of peaceful labour relations. In this connection, parties were distracted by litigation, thereby failing to focus on the negotiation of new terms in the labour contract that might resolve the insolvency. When the decision in *T.C.T. Logistics* shielded "all employment rights,"[208] it ensured that the collective agreement would again subject the organized employment relationship to the supremacy of law on the shop floor.[209] Parliament's decision to later amend the BIA and CCAA to recognize the legal status of the collective agreement helped clarify and reinforce the coherence of labour law during insolvency. In short, these reforms have had encouraging effects on the reorganization process.

The early decision of bankruptcy courts to disclaim or deny the enforcement of collective agreement rights raised questions about the legitimacy of insolvency law. In the view of unions, the prior jurisprudence disclaiming the collective agreement converted rescue efforts from a voluntary

[203] In December 2007, a settlement agreement in *T.C.T. Logistics* between the union and Spectrum Supply Chain Solutions was ratified. The resolution required the union to abandon its representational rights with the employer in exchange for a payment that equaled about 90% of the monies owed bargaining unit employees at the time of the employer's closure.
[204] Wood, *supra*, note 94 at 310
[205] See generally Section D above for the information summarized in this paragraph.
[206] #5 Interview with Insolvency Counsel by Author (6 December 2012)
[207] See the discussion of the former case-law from the dissent of Justice Abella in *St. Marys Paper Inc.*, *supra*, note 7 until the majority decision of the Supreme Court of Canada in *T.C.T. Logistics*, *supra*, note 47 above.
[208] *T.C.T Logistics*, *supra*, note 43 at para. 43-51
[209] Weiler, *supra*, note 188 at 30-32

exchange of promises between stakeholders into a legalised redistribution of their members' property. Without the guarantees provided by law in the collective agreement "already vulnerable employees would be rendered more vulnerable to market forces when they received less from an insolvency proceeding."[210] As a result, the incentive for unions to engage in meaningful rescue talks was decidedly weakened. Unions reacted by defending the force and effect of the collective agreement in courts as a means to promote the interests of their members during insolvency. Parliament's recognition of the legal status of the collective agreement during insolvency reversed the effect of this jurisprudence, eliminated unnecessary litigation, and restored the validity of insolvency proceedings. Significantly, the statutory reforms augmented restructuring efforts when they reaffirmed the right of unionized employees to try and shape their own destiny through collective bargaining.

By entrenching the legal status of the collective agreement in bankruptcy, Parliament reinforced the incentives for debtor employers and their unions to voluntarily bargain a resolution to the insolvency. If stakeholders were to be truly accountable for their financial situation they would have to have an incentive to engage in constructive discussions with each other that might result in a rescue plan. After the reforms clarified the place of the agreement in insolvency, a debtor who sought to save the business would once again be required by law to negotiate changes with the applicable union(s) in order to alter the terms and conditions of work found in the collective agreement. In other words, the collective agreement would re-establish a legal benchmark that equipped both parties with important rights and helped them leverage their respective interests during rescue negotiations.

Debtor employers have forgone the use of the notice to bargain provisions found in the statutory amendments and this has required employers to negotiate with their union(s) if labour costs are to be reduced. Although the reforms permit unions to formally maintain the enforceability of their agreements with the debtor, in practice they must decide whether to bargain away some of those rights in the name of continued business viability and the future economic security of their members. As a result, unions repeatedly engage in restructuring negotiations and open their collective agreements as a means of improving the prospects for their members' future post-restructuring. Rescue agreements are not effortlessly achieved in bargaining and insolvency practitioners report an apparent increase in labour disputes prior to rescue plans being finalized. However, the evidence suggests that debtor employers and unions are now engaging in bargaining early, achieving agreements without the assistance of third party neutrals and experiencing high overall success rates in revising collective agreements and lowering labour costs. In any event, insolvency practitioners and leading counsel are generally agreed that post-amendments collective agreement negotiations have not generally prevented restructuring or caused any undue hardship which would impede rescue efforts. Parliament's reforms have recast a recurring legal dispute into a true negotiation that holds out the possibility that stakeholders will rescue distressed businesses facing bankruptcy. As a result, these outcomes demonstrate a measure of positive change was introduced by the reforms into work-out talks seeking to save unionized businesses across Canada.

[210] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 25 and 41

5. Appendix – Questionnaire and Results

Lawyer Interview Questionnaire

Practitioner Attitudes & Experience with the Bankruptcy Amendments Recognizing the Force of the Collective Agreement in Insolvency

1. How long have you practiced law in the bankruptcy and insolvency area?

2. How long have you been dealing with insolvency matters that involve collective agreements?

3. What percentage of your practice includes insolvency matters that involve legal issues pertaining to collective agreements?

4. Prior to September 18, 2009, did you participate in an insolvency matter involving a collective agreement where the assets of the debtor employer were liquidated? Please explain.

5. After September 18, 2009, did you participate in an insolvency matter involving a collective agreement where the assets of the debtor employer were liquidated? Please explain.

6. If you answered either question 4 or 5 in the affirmative, do you attribute the liquidation of the debtor's assets to stakeholders addressing a collective agreement dispute or negotiating a revised collective agreement? Please explain.

7. Do you see any positive changes as a result of the recent BIA and CCAA amendments pertaining collective agreements?

8. Do you see any negative changes as a result of the recent BIA and CCAA amendments pertaining collective agreements?

9. Do you see any unanticipated changes as a result of the recent BIA and CCAA amendments pertaining collective agreements?

10. Have you experienced changes in the way you approach insolvency matters involving a collective agreement since the amendments took effect on September 18, 2009? Please explain these changes (if any).

11. If you could give advice to the federal government on how to improve the current provisions in the BIA and the CCAA regarding the legal force of the collective agreement in an insolvency, what would you recommend?

12. If you were to give advice to a practitioners who had to either address a collective agreement dispute or negotiate a revised collective agreement in an insolvency matter after September 18, 2009, what would advice would you give?

13. If recognizing the legal force of the collective agreement was removed from bankruptcy and insolvency legislation how would that affect you or your clients in future insolvency matters?

14. Do you foresee any Constitutional difficulties for the amendments in question? Please explain.

15. Do you believe the current provisions in the BIA and the CCAA regarding the legal force of the collective agreement during insolvency have caused undue hardship on stakeholders trying to rescue a distressed business? Please explain.

THE END.

Results

Part I: Background Experience with Collective Agreements & Insolvency

1. What percentage of commercial insolvency proceedings that you have participated in required a stakeholder to either resolve a collective agreement dispute (i.e. a grievance) or negotiate a revised collective agreement?

Choice (Percentage)	# of responses
0	1
31-50	2
51-70	2
71-90	2
100	1
Total:	**8**

2. With respect to your answer noted in question 1, what percentage of these insolvency matters occurred **before September 18, 2009** – the date statutory amendments to the BIA and CCAA became effective?

Choice (Percentage)	# of responses
0	1
31-50	2
51-70	2
71-90	2
100	1
Total:	**8**

3. Before September 18, 2009, what percentage of bankruptcy and insolvency matters successfully negotiated a resolution to a collective agreement dispute (i.e. a grievance) or a revised collective agreement?

Choice (Percentage)	# of responses
0	1
31-50	1
71-90	3
91-95	1
100	2
Total:	**8**

4. Before September 18, 2009, in cases where parties had to revise a collective agreement, what percentage of insolvency proceedings succeeded in negotiating a revised collective agreement **prior** to a strike or lockout occurring?

Choice (Percentage)	# of responses
0	1
1-5	1
6-10	1
31-50	2
51-70	1
100	2
Total:	**8**

5. Before September 18, 2009, in cases where parties attempted to revise a collective agreement, what percentage of these insolvency proceedings succeeded in negotiating a revised collective agreement **after** a strike or lockout occurred?

Choice (Percentage)	# of responses
0	3
6-10	2
11-30	1
71-90	1
100	1
Total:	**8**

6. Before September 18, 2009, in cases where parties attempted to resolve a collective agreement dispute (i.e. a grievance), what percentage of these insolvency proceedings succeeded in negotiating a resolution **before** a mediation or arbitration date was set?

Choice (Percentage)	# of responses
0	2
11-30	1
31-50	1
71-90	1
100	3
Total:	**8**

7. Before September 18, 2009, in cases where parties attempted to address a collective agreement dispute (i.e. a grievance), what percentage of these insolvency matters negotiated a resolution to the dispute **after** a mediation or arbitration commenced?

Choice (Percentage)	# of responses
0	3
11-30	2
51-70	1
100	2
Total:	**8**

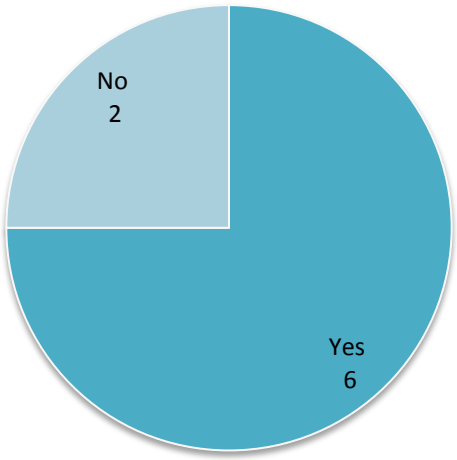
8. Before September 18, 2009, in cases where parties attempted to revise a collective agreement, what percentage of insolvency proceedings **successfully** negotiated a revised collective agreement and also witnessed the debtor employer being ultimately liquidated?

Choice (Percentage)	# of responses
0	1
6-10	2
51-70	4
100	1
Total:	**8**

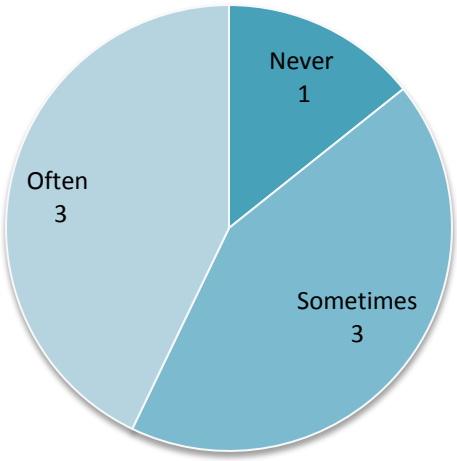
9. Before September 18, 2009, in cases where parties attempted to revise a collective agreement, what percentage of insolvency proceedings **failed** to negotiate a revised collective agreement and also witnessed the debtor employer being ultimately liquidated?

Choice (Percentage)	# of responses
0	3
6-10	1
11-30	1
31-50	2
71-90	1
Total:	**8**

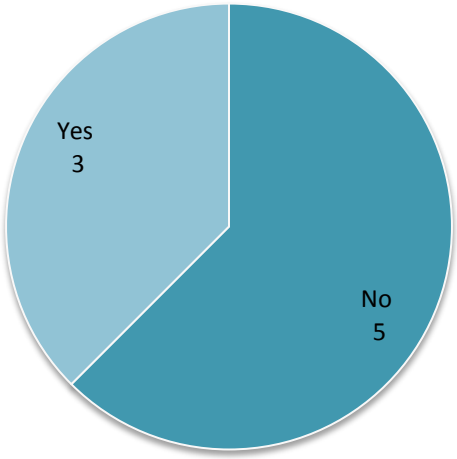
10. Before September 18, 2009, have you ever witnessed a party initiate collective bargaining to revise its collective agreement in order to lower labour costs so it could avoid insolvency proceedings?



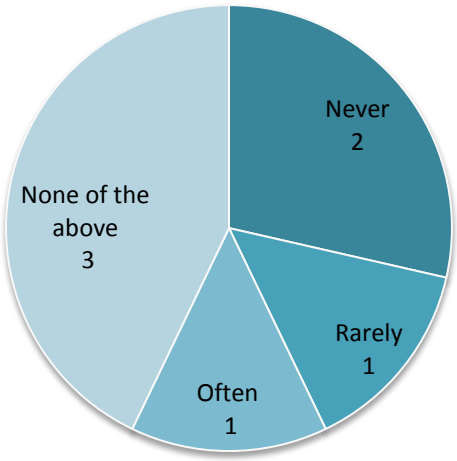
10. (a) Please indicate how often the strategy noted in the question above has been successfully applied.



11. Before September 18, 2009, have you ever witnessed a party to a collective agreement initiated insolvency proceedings in order to simply lower its labour costs?



11 (a) Please indicate how often the strategy noted in the question above has been successfully applied.



Part II - Your Use of the Section 65.12 of the BIA or Section 33 of the CCAA

12. With respect to your answer noted in question 1 above, what percentage of these insolvency matters occurred **after September 18, 2009** – the date statutory amendments to the BIA and CCAA became effective?

Choice (Percentage)	# of responses
0	1
11-30	1
31-50	2
51-70	1
71-90	2
100	1
Total:	**8**

13. After September 18, 2009, in cases where parties attempted to resolve a collective agreement dispute (i.e. a grievance) or revise a collective agreement, what percentage of insolvency proceedings successfully negotiated a resolution to the dispute while litigating pursuant to 65.12 of the BIA or section 33 of the CCAA?

Choice (Percentage)	# of responses
0	6
6-10	1
31-50	1
Total:	**8**

14. After September 18, 2009, in cases where parties had to revise a collective agreement, what percentage of bankruptcy and insolvency proceedings successfully negotiated a revised collective agreement **before** a strike or lockout occurred?

Choice (Percentage)	# of responses
0	4
6-10	1
31-50	1
100	2
Total:	**8**

15. After September 18, 2009, in cases where parties attempted to revise a collective agreement, what percentage of bankruptcy and insolvency proceedings successfully negotiated a revised collective agreement **following** a strike or lockout?

Choice (Percentage)	# of responses
0	4
6-10	2
11-30	2
Total:	**8**

16. After September 18, 2009, in cases where parties attempted to address a collective agreement dispute (i.e. a grievance), what percentage of insolvency proceedings successfully negotiated a resolution to the collective agreement dispute **before** a mediation or arbitration date was set?

Choice (Percentage)	# of responses
0	2
11-30	2
31-50	1
100	3
Total:	**8**

17. After September 18, 2009, in cases where parties attempted to resolve a collective agreement dispute (i.e. a grievance), what percentage of insolvency proceedings successfully negotiated a resolution to the collective agreement dispute **after** mediation or arbitration commenced?

Choice (Percentage)	# of responses
0	5
11-30	1
31-50	1
71-90	1
Total:	**8**

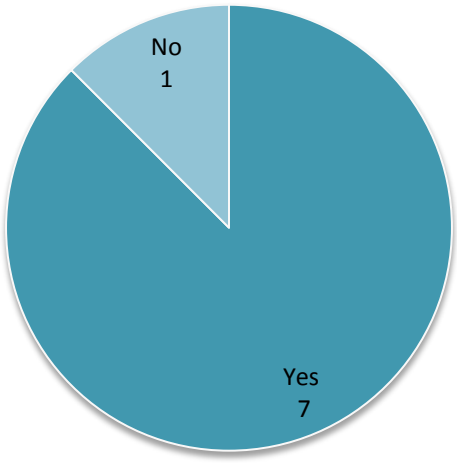
18. After September 18, 2009, in cases where parties attempted to revise a collective agreement, what percentage of insolvency proceedings **successfully** negotiated a revised a collective agreement and also witnessed the debtor employer being ultimately liquidated?

Choice (Percentage)	# of responses
0	2
1-5	1
31-50	2
100	2
Total:	**7**

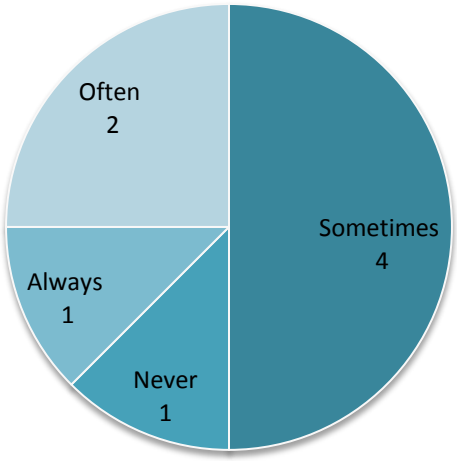
19. After September 18, 2009, in cases where parties attempted to revise a collective agreement, what percentage of insolvency proceedings **failed** to negotiate a revised collective agreement and also witnessed the debtor employer being ultimately liquidated?

Choice (Percentage)	# of responses
0	4
6 -10	2
71-90	1
100	1
Total:	**8**

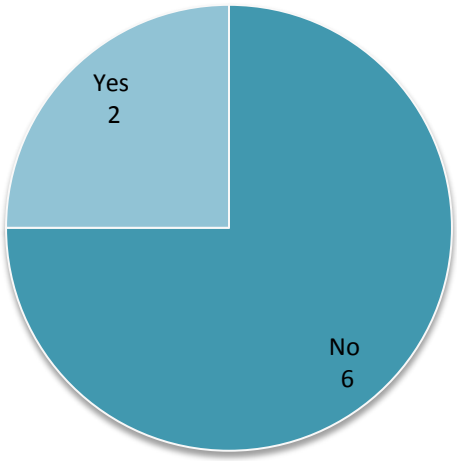
20. After September 18, 2009, have you ever witnessed a party initiate collective bargaining to revise its collective agreement in order to lower labour costs so as to avoid insolvency proceedings?



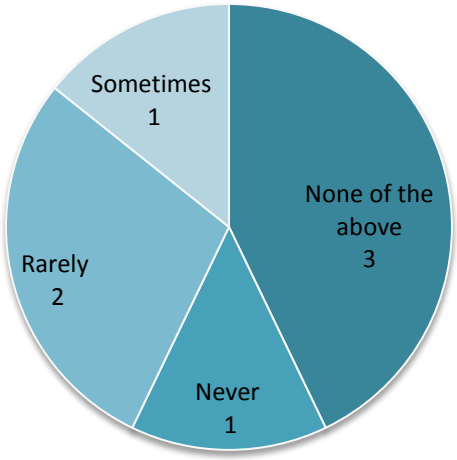
20. (a) Please indicate how often the strategy noted in the question above has been successfully applied.



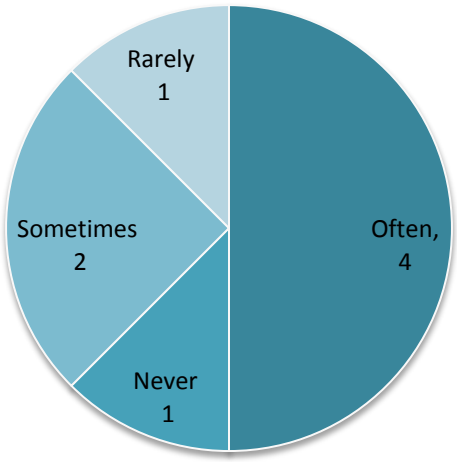
21. After September 18, 2009, have you ever witnessed a party to a collective agreement initiate insolvency proceedings in order to simply lower its labour costs?



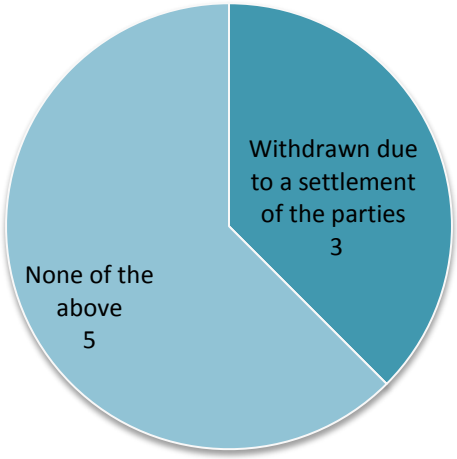
21. (a) Please indicate how often the strategy noted in the question above has been successfully applied.



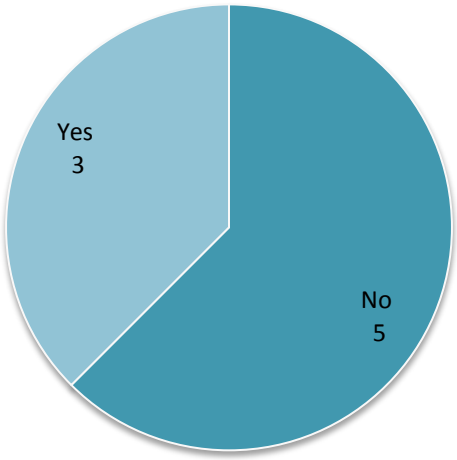
22. Please indicate in cases where parties attempted to revise a collective agreement, how often you have witnessed insolvency proceedings successfully bargain a revised collective agreement that also reduced labour costs for the debtor employer.



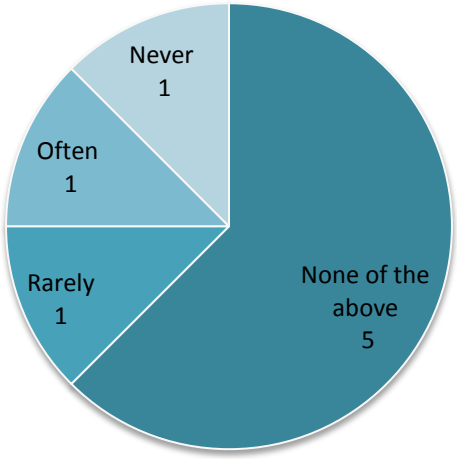
23. In your experience, what has been the typical outcome of applications to a court seeking to serve notice to bargain under section 65.12 of the BIA or section 33 of the CCAA?



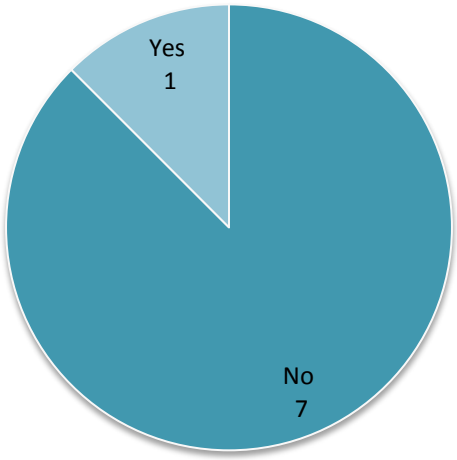
24. Have you been involved in an insolvency proceeding where a party first attempted to reach a voluntary agreement to revise its collective agreement because an application to a court to serve notice to bargain under section 65.12 of the BIA or section 33 of the CCAA could be filed if voluntary efforts failed?



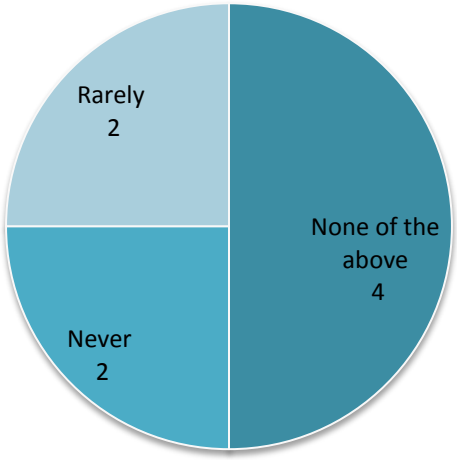
24. (a) Please indicate how often the strategy noted in the question above has been successfully applied to voluntarily revise a collective agreement without a subsequent application to a bankruptcy court for an order to serve notice to bargain.



25. Have you been involved in an insolvency proceeding where a party did not attempt to reach a voluntary agreement to revise its collective agreement because time did not permit voluntary bargaining followed by a notice period for a court application to serve notice to bargain under section 65.12 of the BIA or section 33 of the CCAA?



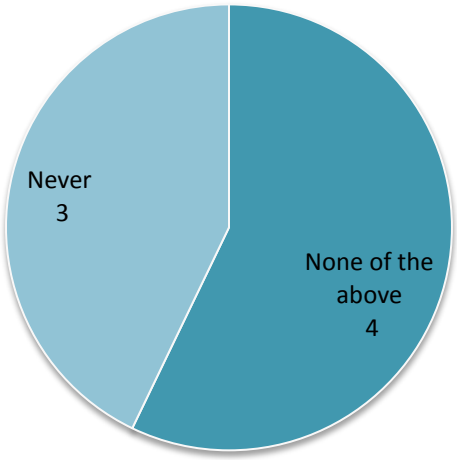
25. (a) Please indicate how often the strategy noted in the question above has been successfully applied to voluntarily revise a collective agreement without subsequent litigation between stakeholders for an order to serve notice to bargain.



26. Please indicate, in cases where parties attempted to revise a collective agreement, what percentage of insolvency proceedings involved a stakeholder applying to a court for an order to disclose information pursuant to section 65.12 of the BIA or section 33 of the CCAA.

Choice (Percentage)	# of responses
0	7
6 -10	1
Total:	**8**

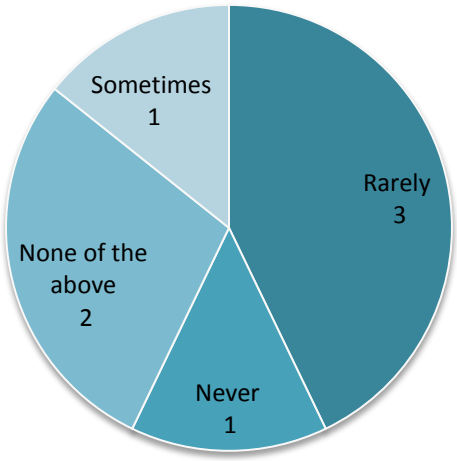
26. (a) Please indicate how often the strategy noted in the question above has been successfully applied to obtain a court order disclosing business or financial information of the company to the bargaining agent for the purposes of negotiating a revised collective agreement?



27. In your experience, what percentage of insolvency proceedings involved the bargaining agent claiming an equal amount for the value of concessions granted during negotiations for a revised collective agreement?

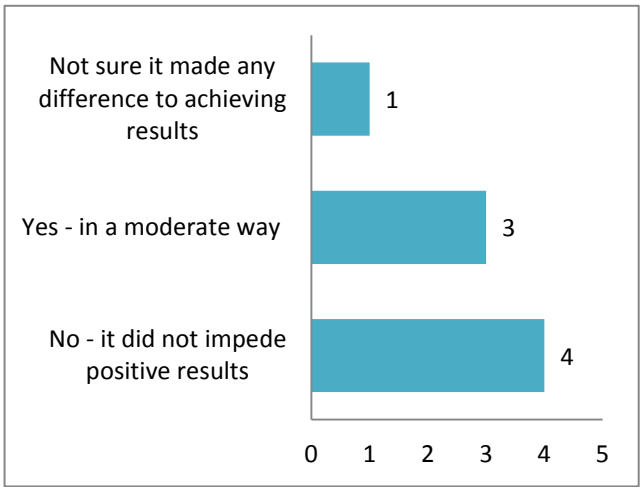
Choice (Percentage)	# of responses
0	4
1-5	1
6-10	1
51-70	2
Total:	**8**

27. (a) Please indicate how often the strategy noted in the question above allowed the bargaining agent to successfully recover funds from the distribution pool.

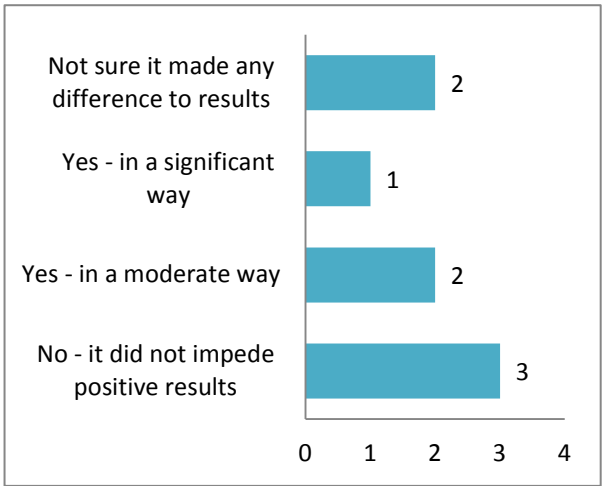


Part III - Your Opinion of the Impact of Section 65.12 of the BIA or Section 33 of the CCAA

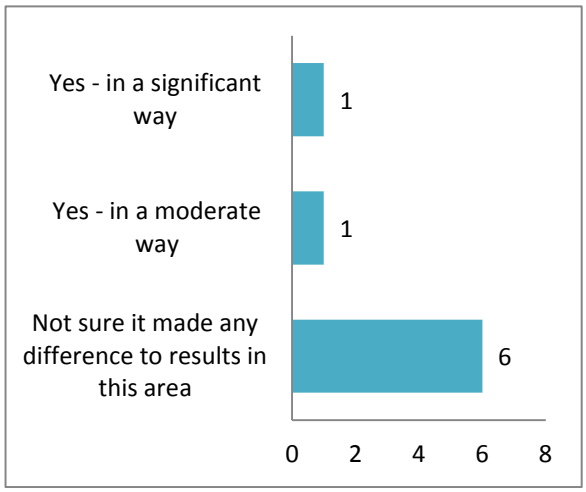
28. **Before** the bankruptcy and insolvency amendments that became effective on September 18, 2009, was it your experience that the statutory regime **in the BIA** was too onerous for you or your client to achieve positive results when attempting to resolve collective agreement disputes (i.e. grievances) or negotiate a revised collective agreement?



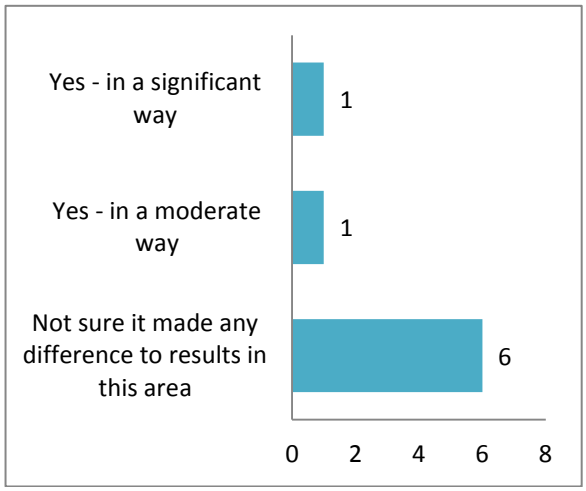
29. **Before** the bankruptcy and insolvency amendments that became effective on September 18, 2009, was the statutory regime **in the CCAA** too onerous for you or your client to achieve positive results when resolving collective agreement disputes (i.e. grievances) or negotiating a revised collective agreement?



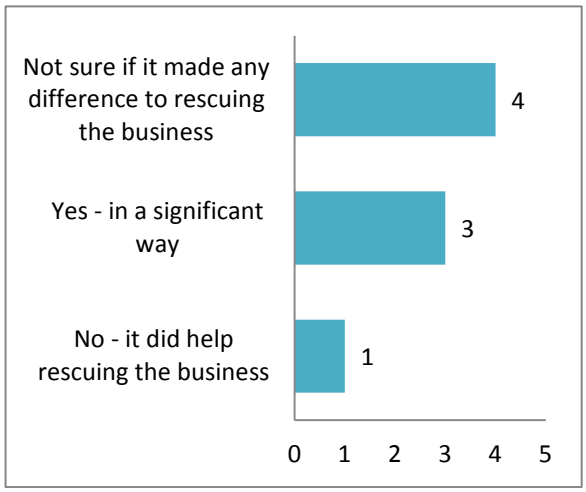
30. After the bankruptcy and insolvency amendments that became effective on September 18, 2009, was it your experience that the statutory regime **in the BIA** became too onerous for you or your client to achieve positive results when addressing collective agreement disputes (i.e. grievances) or negotiating a revised collective agreement?



31. After the bankruptcy and insolvency amendments that became effective on September 18, 2009, was it your experience that the statutory regime **in the CCAA** became too onerous for you or your client to achieve positive results when addressing collective agreement disputes (i.e. grievances) or negotiating a revised collective agreement?



32. Do you think the BIA and CCAA recognizing the continuing legal force of the collective agreement during insolvency and providing a method to negotiate collective agreement revisions created an excessive hardship preventing stakeholders from successfully rescuing a distressed business caught in bankruptcy proceedings?



Part IV - Demographic Information

33. Please indicate the primary type of practitioner you are when you are involved in bankruptcy and insolvency proceeding.

Type of practitioner	
A trustee	3
Counsel to the bargaining agent	2
Other	3
Total	**8**

Comments/other:
1 CRO
1 n/a
1 - Act as counsel to various stakeholders, not just to particular parties. Have never acted as counsel to bargaining agent though.

34. Please indicate how many years you have been practicing in the role noted above.