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**5 — Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World****5 — Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World***Robert J. Chadwick and Derek R. Bulas*\***I. — Introduction**

With the expanded forms of credit available in today's credit markets, it is now common to see debtors with multiple credit structures, including first lien creditor groups, second lien creditor groups and unsecured noteholder or bondholder groups. Creditors within a credit agreement or note indenture can be broad and diverse, and include different parties with multiple views and priorities. *Ad hoc* creditors' committees provide a mechanism for creditor groups with similar claims and interests to work together to advance their common interests regarding a financially troubled company prior to and during formal insolvency proceedings.

There is no requirement or statutory framework under the *Companies' Creditors Arrangement Act*<sup>2</sup> (CCAA) or the *Bankruptcy and Insolvency Act*<sup>3</sup> (BIA) for the appointment or formation of creditors' committees in Canadian insolvency proceedings. Notwithstanding the lack of a statutory framework in Canadian insolvency legislation, debtors, key stakeholders and Canadian courts routinely recognize and accept *ad hoc* creditors' committees, particularly in respect of unsecured noteholder or bondholder groups in CCAA proceedings. As *ad hoc* creditors' committees appear most frequently in restructuring proceedings, and not liquidation or reorganization proceedings under the BIA, this paper focuses on such committees in CCAA proceedings.

While *ad hoc* creditors' committees can play a critical role in advancing a restructuring, the roles and functions of such committees can raise various legal and practical issues. This paper discusses some of the key legal and practical issues relating to *ad hoc* creditors' committees in CCAA proceedings and whether such committees add value to the Canadian restructuring process. In considering these matters, we examine and discuss the following subjects: (a) the formation, roles and development of *ad hoc* creditors' committees in Canadian insolvency proceedings; (b) recent amendments to the CCAA; (c) the key differences between *ad hoc* creditors' committees in CCAA proceedings and official committees in Chapter 11 proceedings under the US *Bankruptcy Code*;<sup>4</sup> (d) the benefits and challenges of *ad hoc* creditors' committees in CCAA proceedings; and (e) our conclusions.

**II. — Creditors' Committees in Canadian Insolvency Proceedings****A. — Lack of Statutory Framework**

There is no requirement or statutory framework under the CCAA or the BIA for the appointment or formation of creditors' committees in Canadian insolvency proceedings. While the BIA contemplates a form of creditors' committee through the appointment of inspectors, who generally act in committees in BIA liquidations and proposals, the role and duties of inspectors is primarily to act as the supervisors of the trustee on behalf of the creditors, and it is their function to instruct the trustee to take

whatever steps they consider appropriate in order to protect the estate and the creditors.<sup>5</sup> Moreover, in *BIA* proposals, creditors are entitled to elect inspectors, but these powers can be restricted by the debtor in the terms of its *BIA* proposal.<sup>6</sup>

Notwithstanding the lack of a statutory framework under the *CCAA* for the appointment or formation of creditors' committees, debtors, key stakeholders and Canadian courts have been willing to routinely recognize and accept *ad hoc* or informal creditors' committees in *CCAA* cases. In several *CCAA* proceedings, the practice has developed for the formation of *ad hoc* creditors' committees, particularly in respect of unsecured noteholder or bondholder groups. These types of *ad hoc* creditors' committees may be self-funding, but, in many cases, they have received court-approved funding from the debtor for their professional advisors, as they can play a key role in the development of a plan of compromise or arrangement and the restructuring of the debtor.<sup>7</sup> Similarly, Canadian courts have been willing to exercise their general authority under the *CCAA* to appoint representative counsel to represent the interests of vulnerable creditors, such as retirees or employees, where the formal representation of such creditors was considered necessary or important to the restructuring, and to require the debtor to fund the costs of such representative counsel.<sup>8</sup>

### **B. — Formation of Ad Hoc Creditors' Committees**

*Ad hoc* creditors' committees in *CCAA* proceedings are generally formed by two or more creditors that hold similar types of claims against the debtor and that engage counsel to advance their common goals and interests. These creditors can include groups of bondholders or noteholders, trade creditors, secured loan syndicates, holders of tort claims, landlords and other groups of investors or financial institutions. *Ad hoc* creditors' committees can be formed through the collaboration of similar creditors or through the actions and encouragement of the debtor, who is usually interested in trying to reach an agreement with a critical mass of creditors and/or solicit the support of critical creditors to their restructuring plan. It is common for groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a *CCAA* filing as part of out-of-court restructuring efforts and to continue to function as an *ad hoc* committee during the *CCAA* proceedings. Moreover, if a *CCAA* case is particularly complex and involves multiple classes of debt with different priorities and creditor structures, a number of different *ad hoc* creditors' committees may be formed to advance the common goals of such creditors.

### **C. — Why Form an Ad Hoc Creditors' Committee?**

There are several reasons why similarly situated creditors of a debtor may decide to join together to form an *ad hoc* creditors' committee, which can be grouped into the following general categories: (a) collective influence and action; (b) access and control of information; and (c) minimizing fees and expenses.

(a) *Collective Influence and Action* — One of the basic theories behind creditors' committees is that multiple creditors singing together in chorus is better than a cacophony of individual creditors each singing its own tune.<sup>9</sup> Accordingly, *ad hoc* creditors' committees speaking with one voice and through collective action in a *CCAA* proceeding can generally have more influence on the debtor, the Canadian court and ultimately the outcome of a *CCAA* restructuring than individual creditors acting alone. Moreover, "size really does matter" when it comes to *ad hoc* creditors' committees as debtors are far more willing to negotiate and work with a group of creditors holding substantial claims and voting power in the aggregate than with a series of individual creditors. In that regard, *ad hoc* creditors' committees can be particularly effective and instrumental as part of a consensual plan approval process where such committees hold substantial claims and voting power and are able to assist and support the debtor in meeting the statutory majority test under the *CCAA* for approval of a plan of compromise or arrangement.<sup>10</sup> If more than one-third of the amount of claims in a class are held by members of an *ad hoc* creditors' committee, they could effectively hold a "blocking position" in respect of the approval of the debtor's plan of compromise or arrangement under the *CCAA*. Further, *ad hoc* creditors' committees can assist the restructuring process in a variety of ways by, among other things, advancing credit, providing alternative financing or backstopping a rights offering as part of developing restructuring alternatives.<sup>11</sup>

Restructuring structures and alternatives are not unilateral decisions by any company. *Ad hoc* creditors' committees provide significant input to the restructured capital structure, the business plan and the restructuring direction of a company. The Canadian restructuring regime, similar to many other countries, requires a balancing approach to reach the end result of a restructuring. Such balancing approach can come in different forms, but the result of different stakeholder groups merging or coming together to find one restructuring solution is a key ingredient to any restructuring. *Ad hoc* creditors' committees are an important factor in reaching a proper and effective restructuring solution. *Ad hoc* creditors' committees need to be properly managed as many times they can be comprised of different views and interests and the lowest common denominator can advance restructuring solutions, which may not be the correct path. The debtor, its advisors and the advisors to an *ad hoc* creditors' committee can also play an important role in managing a successful restructuring for all stakeholders.

(b) *Access and Control of Information* — Members of an *ad hoc* creditors' committee generally receive detailed information regarding the debtor and its ongoing restructuring efforts. This information and related legal and financial advice may also be provided through the legal and financial advisors of an *ad hoc* creditors' committee. Moreover, members of an *ad hoc* creditors' committee can generally control their ability to remain unrestricted by deciding whether they would like to receive material non-public information ("MNPI") regarding the debtor so that they may continue to trade in the debtor's securities.

(c) *Minimizing Fees and Expenses* — Acting in an *ad hoc* creditors' committee and co-ordinating with other members of such a committee can significantly reduce the fees and expenses of creditors, particularly professional fees and expenses. Many times, an *ad hoc* creditors' committee is also used to communicate and discuss restructuring alternatives with a broader or different group of creditors, which may save on time and costs that would otherwise be incurred by the debtor or its professional advisors.

#### **D. — Roles and Functions of Ad Hoc Creditors' Committees**

The roles and functions of *ad hoc* creditors' committees in CCAA proceedings can be both active and passive. These functions can include the following: (a) negotiating the terms of a plan of compromise or arrangement or other restructuring or recapitalization plan with the debtor; (b) reviewing financial information and other disclosures on the debtor's operations and capital structure; (c) acting as a sounding board for the monitor; (d) assessing the governance of the debtor; or (e) assisting in monitoring a going-concern sale.<sup>12</sup> *Ad hoc* creditors' committees in CCAA proceedings do not typically have the authority to represent secured or unsecured creditors generally or to take any actions that are legally binding on parties. However, *ad hoc* creditors' committees that have been recognized and accepted by debtors, key stakeholders and Canadian courts in CCAA proceedings generally play a key role in advancing the interests of a restructuring or recapitalization and in structuring, negotiating and implementing a successful restructuring solution with the debtor that maximizes value for stakeholders.

The debtor and Canadian courts have the ability to recognize and work with creditor groups. To the extent that the debtor believes that the formation of an *ad hoc* creditors' committee is intended for litigation purposes only and in order to defeat the restructuring alternative proposed by the debtor and its key stakeholders, they can make the decision not to fund and work with them.<sup>13</sup> However, in many of such circumstances, the *ad hoc* creditors' committee will form and work together against the debtor notwithstanding that they are not being supported by the debtor. Below is a limited summary of recent CCAA restructurings that have included the active involvement of *ad hoc* creditors' committees.

<b>CCAA Matter</b>	<b>Date of Filing and Court</b>	<b>Type of Ad hoc Creditors' Committee</b>	<b>Restructuring Solution</b>
Opti	July 13, 2011, Alberta Court of Queen's Bench	<i>Ad hoc</i> Secured Noteholder Committee	Ongoing
Angiotech	January 28, 2011, British Columbia Supreme Court	<i>Ad hoc</i> Unsecured Noteholder Committee	Plan
Canwest	October 6, 2009, Ontario Superior Court of Justice	<i>Ad hoc</i> Unsecured Noteholder Committee	Plan

AbitibiBowater	April 17, 2009, Quebec Superior Court of Justice	Multiple <i>Ad hoc</i> Secured and Unsecured Noteholder Committees	Plan (including new equity in the restructured debtor)
Nortel	January 14, 2009, Ontario Superior Court of Justice	Multiple <i>Ad hoc</i> Creditors' Committees	Ongoing
Adanac	December 19, 2008, British Columbia Supreme Court	<i>Ad Hoc</i> Secured Noteholder Committee	Plan (including new equity in the restructured debtor)
Asset Backed Commercial Paper	March 17, 2008, Ontario Superior Court of Justice	Multiple <i>Ad hoc</i> Creditors' Committees	Plan
Quebecor	January 21, 2008, Quebec Superior Court of Justice	<i>Ad hoc</i> Unsecured Noteholder Committee	Plan
Calpine Canada	December 20, 2005, Alberta Court of Queen's Bench	Multiple <i>Ad hoc</i> Creditors' Committees	General settlement agreement and plan
Stelco	January 29, 2004, Ontario Superior Court of Justice	Multiple <i>Ad hoc</i> Creditors' Committees	Plan (including new equity in the restructured debtor)
Air Canada	April 1, 2003, Ontario Superior Court of Justice	<i>Ad hoc</i> Unsecured creditors' committee comprised of note holders, banks, lessors and trade creditors	Equity investment

### III. — Recent Amendments to the CCAA

In the most recent amendments to the *CCAA*, Parliament codified the existing practice of allowing Canadian courts in *CCAA* proceedings to recognize *ad hoc* creditors' committees and, in appropriate circumstances, to secure payment of the professional fees and expenses of such committees.<sup>14</sup> Section 11.52(1)(c) of the *CCAA* permits the court, on notice to the secured creditors who are likely to be affected by the security or charge, to make an order declaring that all or part of the property of a debtor company is subject to a security or charge in an amount that the court considers appropriate in respect of the fees and expenses of any financial, legal or other experts engaged by any interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under the *CCAA*.<sup>15</sup> *Canwest* and *Angiotech* are recent *CCAA* restructurings where Canadian Courts were satisfied that certain *ad hoc* unsecured noteholder committees constituted "interested persons" under section 11.52(1)(c) of the *CCAA*, such that the professional fees and expenses of these committees were entitled to the benefit of the administration charge in the applicable initial order.<sup>16</sup>

The *CCAA* does not contain any specific criteria for a court to consider section 11.52(1)(c) of the *CCAA*, whether the proposed amounts are appropriate and whether the charges should extend to the proposed beneficiaries as "interested persons". Some factors that might be considered by a Canadian court in respect of these matters under section 11.52(1)(c) of the *CCAA* include the size and complexity of the businesses being restructured; the proposed role of the beneficiaries of the charge; whether there is an unwarranted duplication of roles; whether the quantum of the proposed charge appears to be fair and reasonable; the position of the secured creditors likely to be affected by the charge; and the position of the monitor.<sup>17</sup>

### IV. — Official Committees in Chapter 11 Proceedings

Unlike the *CCAA*, the US *Bankruptcy Code* expressly permits the appointment of as many official committees by the Office of the United States Trustee ("US trustee") as is necessary to ensure adequate representation of creditors and equity holders in Chapter 11 proceedings.<sup>18</sup> The US trustee usually appoints an official unsecured creditors' committee ("UCC") in most large-scale Chapter 11 proceedings to represent and advance the interests of unsecured creditors where there are substantial assets at issue and a sufficient number of unsecured creditors express an interest in serving on the UCC.

The roles and functions of official committees, such as a UCC, in Chapter 11 proceedings can be very different from the roles and functions of *ad hoc* creditors' committees in *CCAA* proceedings. Some of the key differences relate to the following matters: (a) formation; (b) fiduciary duties; (c) governance; (d) access to MNPI and trading restrictions; (e) statutory rights and powers; and (f) payment of professional fees and expenses.

(a) *Formation* — Official committees are appointed by the US trustee, who determines both the size and composition of the committee, subject to potential intervention by the US bankruptcy court and the maxim that a creditors' committee should ordinarily be made up of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee.<sup>19</sup> Additional appointments or removals from official committees remain at the discretion of the US trustee, subject to review by the US bankruptcy court.<sup>20</sup> By contrast, *ad hoc* creditors' committees are generally not appointed or supervised by any type of governing body and members are usually free to join and withdraw from such committees at will.

(b) *Fiduciary Duties* — Official committees represent and advance the interests of unsecured creditors or equity holders as a whole. Accordingly, official committees have fiduciary duties to all members of the applicable class that they represent and are obligated to protect their collective interests.<sup>21</sup> By contrast, *ad hoc* creditors' committees do not generally have fiduciary duties to similarly situated creditors or creditors in the same class.<sup>22</sup> Moreover, members of *ad hoc* creditors' committees are generally not restricted from acting in their own self-interest and may take positions contrary to those taken by the other members of the committee.<sup>23</sup> In certain Canadian cross-border restructurings, there have been *ad hoc* creditors' committees and also a UCC formed under the Chapter 11 proceedings.<sup>24</sup>

(c) *Governance* — Official committees often function pursuant to official by-laws or processes that may govern, among other things, voting, privilege and confidentiality matters.<sup>25</sup> By contrast, *ad hoc* creditors' committees generally function without the use of formal by-laws. Moreover, there is no "one size fits all" strategy for the governance of *ad hoc* creditors' committees and the degree of formality under which they operate is often driven by the members and is addressed on a case by case basis.<sup>26</sup>

(d) *Access to MNPI and Trading Restrictions* — In fulfilling their fiduciary duties, members of official committees generally have access to and receive MNPI regarding the debtor and, therefore, these members cannot trade in the debtor's securities while in possession of such confidential information pursuant to securities law.<sup>27</sup> However, in an effort to permit institutions sitting on official committees to trade in the debtor's securities, US bankruptcy courts routinely approve trading walls and other procedures that are designed to ensure that MNPI obtained by official committee members is not shared with such member's securities trading personnel.<sup>28</sup> By contrast, members of *ad hoc* creditors' committees do not generally receive MNPI regarding the debtor nor are they subject to trading restrictions unless they specifically choose to receive MNPI regarding the debtor and become restricted.

(e) *Statutory Rights and Powers* — Official committees appointed under section 1102 of the US *Bankruptcy Code* are specifically empowered to: (a) consult with the trustee or debtor concerning the administration of the case; (b) investigate the acts, conduct, assets, liabilities, financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business and any other matter relevant to the case or to the formulation of a plan; (c) participate in the formulation of a plan, advise those represented by the committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan; (d) request the appointment of a trustee or examiner; and (e) perform such other services as are in the interest of those represented.<sup>29</sup> By contrast, *ad hoc* creditors' committees do not have any specific statutory rights and powers under the *CCAA* and nothing under the *CCAA* specifically requires the debtor to disclose information or to work with such committees in trying to develop a restructuring plan. Accordingly, in some *CCAA* cases, *ad hoc* creditors' committees may find their access to information limited and may find it difficult to compel an uninterested debtor to constructively work with them in advancing restructuring efforts.

(f) *Payment of Professional Fees* — The professional fees and expenses of official committees are entitled to be compensated from the debtor's estate.<sup>30</sup> By contrast, the professional fees and expenses of *ad hoc* creditors' committees are not entitled to payment from the debtor unless they can demonstrate that they are an "interested person" and fall under section 11.52(1)(c) of the *CCAA* or enter into alternative arrangements with the debtor.

## V. — Benefits and Challenges of Ad Hoc Creditors' Committees

### A. — Benefits of Ad Hoc Creditors' Committees

There are several benefits that *ad hoc* creditors' committees bring to the restructuring process in CCAA proceedings, which can be grouped into the following general categories: (a) increasing the efficiencies of the restructuring process; (b) protecting and advancing creditor interests; and (c) structuring and implementing a restructuring plan with the debtor.

(a) *Increasing Efficiencies of Restructuring Process* — *Ad hoc* creditors' committees can significantly increase the efficiency of the restructuring process in CCAA proceedings in a number of ways. First, such committees avoid duplicative filings with Canadian courts and permit the parties to co-ordinate motions and court attendances on a streamlined basis. Second, such committees can exchange ideas, structure and work together to develop restructuring alternatives and solutions. Third, acting in a committee, particularly a committee that holds substantial claims and voting power in the aggregate and that is able to negotiate a mutually agreeable restructuring plan with the debtor, can provide substantial comfort to the debtor that a critical mass of creditors is willing to support a proposed restructuring solution before commencing the formal plan approval process under the CCAA.

(b) *Protecting and Advancing Creditor Interests* — *Ad hoc* creditors' committees in CCAA proceedings can function as a "check and balance" to the debtor's activities and, in some cases, can also be used to "police the debtor". Functionally, this is similar to the role of the monitor in CCAA proceedings. However, the monitor, as a court-appointed officer, is required to be neutral and reasonable and is not a negotiator for creditors, while *ad hoc* creditors' committees can advance matters or positions in order to try and generate value to creditors.<sup>31</sup> Moreover, *ad hoc* creditors' committees have a direct economic interest in the debtor and their views or positions reflect real and direct input. Accordingly, *ad hoc* creditors' committees are in a better position than the monitor to constructively advance the interests of creditors, which enables them to be valuable participants in CCAA proceedings and to add value to the restructuring process.

(c) *Structuring and Implementing a Restructuring Plan* — *Ad hoc* creditors' committees in CCAA proceedings can play a key role in adding value to the restructuring process by structuring, negotiating, and implementing a restructuring plan or other restructuring solution with the debtor that maximizes value for all stakeholders. This role is especially true where an *ad hoc* creditors' committee represents a critical constituency of creditors that hold substantial claims and voting power in the aggregate and their support is critical to a successful restructuring.

### B. — Challenges of Ad Hoc Creditors' Committees

The benefits of *ad hoc* creditors' committees need to be balanced against the challenges of such committees, which can be grouped into the following general categories: (a) governance; (b) information control matters; and (c) lack of fiduciary duties.

(a) *Governance* — The governance and management of *ad hoc* creditors' committees in CCAA proceedings is, as the name suggests, *ad hoc* or informal, and may cause certain legal and practical challenges. While some *ad hoc* creditors' committees may establish formal by-laws or other processes to govern decision-making, voting, privilege and confidentiality matters, most *ad hoc* creditors' committees generally conduct business on an informal basis and make collective decisions through inter-committee discussions and then direct their counsel to take the specified action. Decision-making within *ad hoc* creditors' committees can also be influenced by vocal members and/or those members with the largest claims. Moreover, since membership in *ad hoc* creditors' committees is generally at will, the roster of members may change over the course of a CCAA proceeding. Changes in membership can impact the functioning of an *ad hoc* creditors' committee both internally, by changing the dynamic between members, and externally, if new members push the committee's goals in different directions, which could also run the risk of compromising the committee's credibility in the restructuring process.<sup>32</sup>

(b) *Information Control Matters* — A challenge that members of *ad hoc* creditors' committees usually face at some point in a CCAA proceeding is whether they want to receive MNPI regarding the debtor. The free flow of information is critical

to allow members of an *ad hoc* creditors' committee to make informed decisions that best advance their interests, and access to confidential information is important to receive a full understanding of the debtor's business and its restructuring options.<sup>33</sup> Receiving MNPI and becoming restricted may also benefit the restructuring process as it permits the debtor and the applicable restricted committee members to have fully informed discussions regarding restructuring matters. However, once a member receives MNPI regarding the debtor, it becomes restricted from trading its interests in the debtor's securities pursuant to securities law until such MNPI is no longer considered to be MNPI and/or such member has been "cleansed". These matters and the related cleansing mechanisms are usually addressed in confidentiality or non-disclosure agreements that may be entered into by the debtor and the applicable committee member before any confidential information is provided.

The decision on whether to become restricted is for each committee member to make. Each member must consider whether it wants to make an informed decision regarding the debtor by receiving MNPI and become restricted or if it wants to maintain its rights to freely trade its interests in the debtor's securities. Members of *ad hoc* creditors' committees that are large institutions may be able to establish a trading wall between individuals in the institution that receive MNPI and individuals who are involved in trading the debtor's securities.<sup>34</sup> However, trading walls may be impractical for smaller financial institutions or hedge funds that become members of *ad hoc* creditors' committees as generally only one individual or a small group of individuals are responsible for such member's investments, which makes it difficult to effectively create and maintain trading walls.<sup>35</sup> A further challenge in respect of MNPI may arise if some, but not all, members of an *ad hoc* creditors' committee decide to receive MNPI regarding the debtor and become restricted. In such circumstances, the *ad hoc* creditors' committee may become fractured and face additional governance challenges, including how key decisions are made and how meetings are conducted among restricted and unrestricted members.

(c) *Lack of Fiduciary Duties* — Members of *ad hoc* creditors' committees in CCAA proceedings do not generally have fiduciary duties to similarly situated creditors or other creditors in the same class nor are they subject to oversight by any type of governing body. As a result, *ad hoc* creditors' committees in CCAA proceedings are generally free to advance their own self-interests without any requirement to consider the interests of non-members.<sup>36</sup> Moreover, the lack of fiduciary duties imposed on *ad hoc* creditors' committees in CCAA proceedings could mean that they have less incentive (and no obligation) to be constructive participants in the proceedings, and could cause them to be detrimental to the restructuring process if they are acting selfishly or in a manner that is destructive or hinders the restructuring process.<sup>37</sup>

## VI. — Conclusion

The roles and functions of *ad hoc* creditors' committees in CCAA proceedings raise a number of legal and practical issues, which are not easily determinable and need to be addressed on a case by case basis. That being said, *ad hoc* creditors' committees have taken part in a number of recent CCAA proceedings, where, on balance, they have demonstrated that they can play a key role in advancing a restructuring to maximize value for stakeholders. The restructuring of debtors with multiple creditor structures under the CCAA can involve multiple creditor groups with numerous holders and diverse interests. *Ad hoc* creditors' committees provide a mechanism for these creditor groups, particularly those with direct economic interests, to constructively take part in the restructuring process. In the right circumstances, *ad hoc* creditors' committees work with the debtor in canvassing and developing restructuring solutions and alternatives, which, in many cases, is necessary to achieve and complete a successful restructuring under the CCAA.

### Footnotes

- \* Robert J. Chadwick and Derek R. Bulas, Goodmans LLP. The authors would like to thank Cody Cornale, student-at-law, for his assistance with research for this paper.
- 2 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA].
- 3 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA].
- 4 USC title 11 §§ 101-1532 [US *Bankruptcy Code*].
- 5 *Re Fishman* (1985), 56 CBR (NS) 316 (Ont SC); *Re Global Plastic Packaging Ltd* (2004), 2 CBR (5th) 217 (Ont Sup Ct).

- 6 Section 56 of the *BIA* provides that the creditors may appoint one or more, but not exceeding five, inspectors of the estate of the debtor, who shall have the powers of an inspector under the *BIA*, subject to any extension or restriction of those powers by the terms of the proposal.
- 7 See for example *Re Canwest Global Communications Corp*, CV-09-8396-00CL (Ont Sup Ct) and *Re Angiotech Pharmaceuticals Ltd*, S-110587 (BCSC).
- 8 See for example *Re Nortel Networks Corp* (2009), 53 CBR (5th) 196; additional reasons at (2009), 55 CBR (5th) 114 (Ont Sup Ct) and *Re Fraser Papers Inc*, CV-09-8241-00CL, 2009 CarswellOnt 6169 (Ont Sup Ct).
- 9 Robert J Rosenberg, Martin J Bienenstock, Hon Robert D Drain, Ramona D Elliott & Jeffrey L Jonas, "Ad Hoc Committees and Other (Unofficial) Creditor Groups: Management, Disclosure and Ethical Issues" (2008) 7 American Bankruptcy Institute Reorganization Committee Newsletter 261 at 263.
- 10 In order for a class of creditors to accept a plan of compromise or arrangement under the *CCAA*, holders of a majority in number and representing at least two-thirds in value of the class of creditors must cast votes in favour of the plan. Accordingly, if more than one-third of the claims of a particular class is held by members of an *ad hoc* creditors' committee, such committee's support becomes essential to a consensual plan approval process.
- 11 See for example *Re AbitibiBowater Inc*, 500-11-036133-094 (Qc SC), where members of the *ad hoc* unsecured noteholder committee backstopped the debtor's rights offering; *Re Canwest Global Communications Corp*, CV-09-8396-00CL (Ont Sup Ct), where members of the *ad hoc* unsecured noteholder committee replaced the existing lender in conjunction with a new lender, and *Re Opti Canada Inc*, 1101-09476 (Alta QB), where members of the *ad hoc* unsecured noteholder committee backstopped the debtor's rights offering.
- 12 Janis P Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003) at 82.
- 13 See for example *Re Smurfit-Stone Container Canada Inc*, CV-09-7966-00CL (Ont Sup Ct).
- 14 *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*, SC 2005, c 47; *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, SC 2007, c 36.
- 15 *CCAA*, s 11.52(1)(c). *BIA*, s 64.2(1)(c) contains similar language as *CCAA*, s 11.52(1)(c).
- 16 See *Re Canwest Global Communications Corp* (2009), 59 CBR (5th) 72 (Ont Sup Ct) and related initial order of the Honourable Madam Justice Pepall dated October 6, 2009 in *Re Canwest Global Communications Corp*, File No CV-09-8396-00CL (Ont Sup Ct) and initial order of the Honourable Mr. Justice Walker dated January 28, 2011 in *Re Angiotech Pharmaceuticals Ltd*, File No S-110587 (BCSC).
- 17 *Re Canwest Publishing Inc/Publications Canwest Inc* (2010), 63 CBR (5th) 115, ¶54 (Ont Sup Ct).
- 18 US *Bankruptcy Code*, *supra* note 3, § 1102.
- 19 Rosenberg et al, *supra* note 8 at 265; US *Bankruptcy Code*, *supra* note 3, § 1102(b)(1).
- 20 Rosenberg et al, *supra* note 8 at 265.
- 21 *Ibid.*
- 22 Rosenberg et al, *supra* note 8 at 264, 266; Evan D Flaschen & Kurt A Mayr, "Bankruptcy Rule 2019 and the Unwarranted Attack on Hedge Funds" (2007) 26:7 Am Bank Inst J 16.
- 23 *Ibid.* However, some US cases appear to suggest that *ad hoc* committees may owe fiduciary duties to non-committee members in certain circumstances. For example, in *Official Comm of Equity Security Holders v The Wilson Law Firm PC (In re Mirant Corp)*, 334 BR 787 (Bankr ND Tex 2005), the US Bankruptcy Court found that an *ad hoc* equity committee owed a fiduciary duty to equity holders as a whole and could not solicit rejection of a plan of reorganization with misleading information. Similarly, in the September 13, 2011 Opinion of the Honourable Madam Justice Walrath *In re Washington Mutual Inc et al*, Case No 08-12229, the US Bankruptcy Court found, *in obiter*, that members of an *ad hoc* noteholders' committee can be considered to owe fiduciary duties to other noteholders in the same class on the basis that: (1) since the members of the *ad hoc* noteholders' committee received material non-public information from the debtor, they became "temporary insiders" of the debtor and owed similar fiduciary duties as directors and officers of the debtor; and (2) the members of the *ad hoc* noteholders' committee held themselves out as representing the entire class of noteholders and assumed fiduciary duties to act in the best interests of the entire class of noteholders.
- 24 See for example *Re AbitibiBowater Inc*, Court File No 500-11-036133-094 (Qc SC).
- 25 Michael S Stamer, Scott L Alberino & Joanna F Newdeck, "Ad Hoc Committees in Chapter 11" (Paper delivered at the Thirty-Third Annual Southeastern Bankruptcy Law Institute, Atlanta, Georgia, 12-14 April 2007) at 4.
- 26 *Ibid.*

- 27 Rosenberg et al, *supra* note 8 at 266.  
28 *Ibid.*  
29 *Ibid* at 266-267; Stamer et al, *supra* note 24 at 11; US *Bankruptcy Code*, *supra* note 3 § 1103.  
30 Stamer et al, *supra* note 24 at 11; US *Bankruptcy Code*, *supra* note 3 § 330.  
31 Aubrey Kauffman & Stuart Brotman, "CCAA Versus Chapter 11 — An Examination of the Role of the Monitor" (2010) 22 BNA's Bankruptcy Law Reporter 1245 at 3.  
32 Rosenberg et al, *supra* note 8 at 265.  
33 See Eric B Fischer & Andrew L Buck, "Hedge Funds and the Changing Face of Corporate Bankruptcy Practice" (2007) 25:10 Am Bank Inst J 24; Rosenberg et al, *supra* note 8 at 268.  
34 *Ibid.*  
35 Fischer & Buck, *supra* note 32.  
36 Rosenberg et al, *supra* note 8 at 264, 266; Flaschen & Mayr, *supra* note 21. However, see US cases, *supra* note 22 that appear to suggest that *ad hoc* committees may owe fiduciary duties to non-committee members in certain circumstances.  
37 Rosenberg et al, *supra* note 8 at 271.

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