8-24-2021 1:00 PM

The Measure of a Monitor's Role

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

ABSTRACT

This study examines the monitor, a court-appointed officer under the Companies' Creditors Arrangement Act, in order to determine whether and how to best secure its independence. Concerns over the role are increasingly over whether it can maintain its supposed impartiality and avoid conflicts of interest. This study centers on its fiduciary duty, long discussed in the courts, as both problematic because it is not conclusively defined, and as the best means of establishing the monitor as a fair and impartial guardian of public confidence in Canadian insolvency law. By examining leading insolvency law theories, international and Canadian insolvency policy, and then the CCAA and insolvency and fiduciary caselaw, this study proposes codification of the monitor's fiduciary duty. The monitor's fiduciary duty remains an underexplored concept in the literature, and this study proposes clarification and certainty for that duty through its addition to the CCAA.

Keywords: bankruptcy, CCAA, collective action problem, creditors, fiduciary, insolvency, monitor.

SUMMARY FOR LAY AUDIENCE

When large companies find themselves close to being unable to continue paying their creditors, they may consider restructuring their business, usually by selling off parts of it, to return to financial stability. In Canada, the legislation most used for this is the Companies' Creditors Arrangement Act, 1985 (CCAA). This Act provides the mechanics for a successful restructuring, i.e. for a debtor company to reach a compromise with its creditors under a court's supervision. It is required that the court appoint a monitor, an officer that acts as impartial information intermediary between all interested parties, advising the debtor company and the court during the restructuring. The monitor is supposed to be independent of the parties, in that it is not supposed to favour any one party. The role is often referred to as that of an impartial watchdog, ensuring the debtor company adheres to what is required of it, and keeping the interested parties and the court updated during the proceedings. Yet the role is often placed in situations where it may have a previous or ongoing relationship with some of the parties, and may act in a way that is perceived as preferring a particular party's position.

The present study deals with one aspect of the monitor that has not been satisfactorily defined: its fiduciary duty. A fiduciary duty means that one party, the fiduciary, is to act in the best interests of the party to whom it owes the duty, with the utmost diligence, good faith, and loyalty. Since the monitor was first created by courts, it was held to owe a fiduciary duty to all of the parties to the CCAA process. This has never been conclusively determined by the Supreme Court of Canada, or by Parliament. This study seeks not only to clarify whether the monitor is a fiduciary, but to anchor its status as fiduciary by proposing that its fiduciary duty be added to the CCAA. The study argues that inclusion of the monitor's fiduciary duty in the legislation will protect its independence, clarify its role, and lead to a fairer process.

ACKNOWLEDGMENTS

I am immensely grateful to my supervisor and first reader, Alfonso Nocilla, and my second reader, Thomas G.W. Telfer, for sharing their insights and comments as I developed this project. I am also indebted to Professors Botterell, Sandomierski, and Trosow, along with my fellow graduate classmates, for sharing ideas, being receptive to my own, and providing the conditions for this project to come to fruition. Thank you.

TABLE OF CONTENTS

CHAPTER ONE

Introduction

There is no shortage of scholarly debate over the proper purpose of bankruptcy and insolvency law.[1] This Chapter examines the foundational concepts and theories from which stem common understandings of insolvency law. Part I considers major scholarly theories of the purposes and functions of bankruptcy and insolvency law. Part II considers how insolvency policy guides, written by international bodies, themselves influential upon domestic legislation, reflect such theories. Part III considers the relevance of these theories to proceedings under Canada's main corporate restructuring statute: the *Companies' Creditors Arrangement Act* (CCAA).[2] Part IV provides a concluding summary and introduces the next Chapter.

The Supreme Court of Canada has summarized the purpose of the CCAA as being: "to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[3] A decade later, the Court expanded on this statement, holding that the CCAA's objectives are simultaneously to maximize creditor recovery, protect the going-concern value of the debtor company, safeguard as best as possible the socioeconomic interests of employees and affected communities, and act as a bulwark of the credit system.[4] An examination of insolvency theory is helpful to understanding not only Canadian restructuring practice, but also the CCAA's stated policy goals. The CCAA pursues its objectives by, among other things, imbuing judges with broad discretionary powers, to be exercised in their supervisory

[1] The terms 'bankruptcy and insolvency law', 'bankruptcy law', and 'insolvency law' will be used interchangeably, to refer to the body of law that deals with companies who are or will soon be unable to pay debts as they become due. See e.g., Office of the Superintendent of Bankruptcy Canada, "Bankruptcy and Insolvency at a Glance" (2 December 2015), online:<www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br01545.html>.
[2] RSC 1985, c C-36.
[3] *Century Services v Canada (Attorney General)*, 2010 SCC 60 at para 15 [*Century Services*].
[4] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 42 [*Callidus*], citing Janis Sarra. *Rescue!: The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 14 [Sarra, "Rescue"].

role in CCAA cases.[5] In this unique supervisory capacity,[6] CCAA judges are assisted by the court-appointed monitor.[7] The role of the monitor, a court-appointed officer that serves as information intermediary, tasked with keeping creditors apprised of the financial condition of the debtor,[8] is crucial to the court's analysis of the parties' restructuring proposals.[9] Importantly, the monitor owes a fiduciary duty to all parties– it is obligated to act in the best interest of all parties to the proceedings.[10] It is in order to determine whether and to what extent the monitor's duty conflicts with the practice of insolvency law under the CCAA that this Chapter returns to first principles, (that is, insolvency theory and policy). The monitor's role can only be properly examined with a clear understanding of the theoretical underpinnings of its governing legislation.

My proposal is that the monitor's fiduciary duty, as understood in the jurisprudence, be codified in the CCAA as a fiduciary duty to the process, ensuring the fairness of the process in the pursuit of the CCAA's objectives. The function of this Chapter in the overall thesis is to identify the core principles and theories underlying insolvency law. From this foundation, Chapter Two will then narrow the focus onto the monitor, its duties, and its role within the CCAA regime. Chapter Three examines fiduciary law in Canada and the monitor' status as a fiduciary, drawing comparisons between the monitor and other fiduciaries in Canadian corporate and insolvency law. It concludes with my proposal for codification of the monitor's twofold fiduciary duty, namely, to act in the best interests of the collective of stakeholders in the restructuring and to ensure that the

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[5] *Callidus*, *ibid* at paras 47, 48, citing *Century Services*, *supra* note 3 at para 58.
[6] *Callidus*, *ibid* at para 47.
[7] *Ibid* at para 52.
[8] See e.g., Janis Sarra, *Creditor Rights and the Public Interest*, (Toronto: University of Toronto Press, 2016) at 26 [Sarra, "Creditor Rights"]; Richard H McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy*, (Aurora, Ont: Canada Law Book, 1994) ch 1 at para 1.2900; Roderick J Wood, *Bankruptcy and Insolvency Law*, (Toronto: Irwin Law, 2015) at 317 [Wood, "Bankruptcy"].
[9] *Callidus*, *supra* note 4 at para 52.
[10] Wood, "Bankruptcy", *ibid*; *Winalta Inc (Re)*, 2011 ABQB 399 [*Winalta*] at para 67 ("[a] monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders" *ibid*).

process is fair. Chapter Four concludes the thesis by providing the proposed language for codifying this fiduciary duty and addressing objections to my proposal.

The practice of insolvency law seems, at times, to be at odds with insolvency theory. The key takeaway of Chapter One is that theory and policy only tell part of the story. In order to fully grasp the mechanics of the CCAA, this Chapter undertakes an historical analysis of the CCAA. The Supreme Court of Canada in *Century Services* recognized that "incremental exercise of judicial discretion" has been the driving force in the evolution of the CCAA."[11] Further analysis reveals that secured creditors have provided much of the impetus for the inception and evolution of the CCAA, on an *ad hoc* basis through the courts. Understood in this way, the numerous insolvency theories reflected in the policy guides, and throughout the CCAA, are revealed often to reflect secured creditors' interests. Where the CCAA seems to favour other parties, these concessions operate to assuage the overt influence that secured creditors have over the legislative and judicial process of CCAA lawmaking. However, CCAA courts are most concerned with fairness, and therein lies the balance to be struck between powerful players—such as secured creditors—and other stakeholders in the process.[12] Accordingly, to the extent that secured creditors are so favoured, we should expect to see at least some disconnect between the CCAA's (judicially) stated objectives and the monitor's role in carrying out its duties in practice.

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[11] *Supra* note 3 at para 58; See also *Dylex Ltd (Re)* (1995), 31 CBR (3d) 106 (Ont Ct (Gen Div)) ("[t]he history of CCAA law has been an evolution of judicial interpretation" *Dylex*, *ibid* at para 10).

[12] *Callidus*, *ibid* at para 51 ("[t]he procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor… [which] requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights" *ibid*).

PART I – INSOLVENCY THEORY

Bankruptcy and insolvency law is unique not for its ability to readjust the entitlements born of other areas of the law, but because it can extinguish such entitlements entirely.[13] It is because of this feature of insolvency law that scholars have long debated what the purpose and function of insolvency law ought to be. One prominent author clarifies that:

> [i]n common law jurisdictions, it is now well established that bankruptcy law serves three principal functions: (1) to solve the "collective action problem" discouraging creditors from collaborating outside of bankruptcy and to provide a mechanism in bankruptcy legislation for the orderly liquidation of a bankrupt's estate and distribution of the proceeds among the creditors; (2) to enable basically viable enterprises to reorganize themselves to allow them to stay in business; and (3) to enable overextended debtors to make a "fresh start" by surrendering their non-exempt assets and obtaining a discharge for the balance of their debts.[14]

Notwithstanding the foregoing, there is still some tension regarding the importance to be afforded to each of these functions. Accordingly, this Part will first examine scholarly debate regarding the theoretical underpinnings of bankruptcy and insolvency law.

(i) Creditors' Bargain Theory (CBT)

Most modern debates over the purposes of bankruptcy and insolvency law can be traced to the CBT, formulated by Thomas Jackson in the 1980s.[15] CBT sees "bankruptcy as a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position."[16] The goal is to overcome the "collective action problem," that arises where creditors act on a narrowly self-interested basis, individually seeking to collect on their claims.[17] Without a mechanism for coordinating their

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[13] See e.g., Elizabeth Warren, "Bankruptcy Policy" (1987) 54:3 U Chicago L Rev 775 at 784–85 [Warren, "Bankruptcy"].

[14] Stephanie Ben-Ishai & Thomas G W Telfer, eds, *Bankruptcy and Insolvency Law in Canada: Cases, Materials, and Problems* (Toronto: Irwin Law, 2019) at 22.

[15] Thomas H Jackson, "Bankruptcy, Nonbankruptcy Entitlements, and the Creditors' Bargain" (1982) 91:5 Yale LJ 857.

[16] *Ibid* at 861.

[17] *Ibid* at 862.

collection efforts, the creditors are trapped in a collective action problem, each individually racing to collect from their mutual debtor before the other creditors can do likewise.[18] This race destroys the going concern value of the debtor's business, depleting the pool of assets available to the creditors as a group. CBT sets out how bankruptcy law solves this problem. Jackson's account begins with a recognition of pre-existing, nonbankruptcy entitlements.[19] Jackson rejects a view of bankruptcy that is aimed solely at "relieving an overburdened debtor from 'oppressive' debt."[20] Instead, Jackson sees bankruptcy as "[a] collective system that treats all claimants standing in the same relationship to the debtor alike… [and that provides] a sum "certain" for the uncertain amount that might be realized under an individualistic creditors' remedy system."[21] In other words, Jackson argues that bankruptcy law should be geared towards lowering the creditors' collection costs,[22] thereby maximizing the value of the pool of assets available to them.[23]

Importantly, CBT is supposed to effect "a net benefit: the secured creditor would be no worse off than before and the unsecured creditors could be made better off."[24] This focus on efficiency for all parties works because by respecting nonbankruptcy entitlements—especially those of secured creditors—the cost of collection is lowered, and unsecured creditors benefit without having a detrimental effect on secured creditor claims.[25] Jackson's reasoning here is that secured creditors "would have no reason to object to such an inclusion *if* left as well off as

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[18] *Ibid*.
[19] *Ibid* at 858.
[20] *Ibid* at 857.
[21] *Ibid* at 861 [footnotes omitted].
[22] *Ibid* at 869.
[23] *Ibid* at 865 ("the total pool of assets available to satisfy their claims may be increased through collective action… [so] one would expect them to agree to a collective system that deterred the sub-optimal behavior of the prisoner's dilemma, and… to capture and share the "going concern" value of *D's* business" *ibid*).
[24] *Ibid* at 870.
[25] *Ibid* at 869–70 (secured creditors' collection costs, when acting unilaterally, are passed on to the debtor, which "would increase the secured creditor's claim… [and] *pro tanto*, reduce the pool of assets available for the unsecured creditors and thereby increase their costs of credit" *ibid* at 869).

before."[26] Moreover the cost of the—secured and unsecured—creditors' positions in a pre-bankruptcy scenario are already factored in, given that secured creditors accept reduced interest payments in exchange for an increased chance of repayment, while unsecured creditors receive the reverse.[27]

Suspicious of attempts to circumvent nonbankruptcy entitlements, Jackson argues that the bankruptcy process is best reserved for complex situations that are unlikely to be resolved informally, that is, by private negotiation among the debtor and its creditors.[28] Such situations typically arise when there are large numbers of creditors. [29] Corporate debtors will typically have a constantly changing and growing group of creditors, [30] which is difficult to track and increases the cost of negotiations while decreasing the likelihood of a consensual agreement.[31] Nonetheless, Jackson's emphasis on preserving nonbankruptcy entitlements is the foundation of CBT:

> [t]he *presence* of a bankruptcy system does not mandate its *use*. The realization that a creditor could always initiate the bankruptcy process would deter attempts in any nonbankruptcy collective proceeding to provide any creditor with less than the minimum obtainable in a bankruptcy proceeding. The availability of a mandatory collective system in which distributions are governed by a set of statutory rules is, therefore, important because it stipulates a minimum set of entitlements for claimants that, in turn, provides a framework for implementing a consensual collective proceeding outside of the bankruptcy process.[32]

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[26] *Ibid* at 870 [emphasis in original].
[27] *Ibid* at 871 ("a secured creditor has already "paid" for this prior entitlement- really a higher probability of being repaid-through receipt of a lower return… [while] unsecured creditors have already been "paid" for allowing this prior entitlement and they receive a higher rate of return because of their lower priority [footnotes omitted]" *ibid*).
[28] *Ibid* at 860 (this would seem to suggest that in situations of financial distress absent the difficulties that precipitate the collective action problem, Jackson would proceed with informal resolution; see above discussion cited to note 25 for Jackson's detailed explanation).
[29] *Ibid*.
[30] *Ibid* at 866–67.
[31] *Ibid* ("the creditors themselves cannot be expected to negotiate this agreement, even though it would be in their joint interest to do so… [so this is where a] federal bankruptcy rule [steps in to provide a] mandatory collective system after insolvency has occurred" *ibid*).
[32] *Ibid* at 867 [footnotes omitted].

In Jackson's view, the justification for the formal bankruptcy regime is that it maximizes the value of the assets available to the creditors.[33] Bankruptcy, therefore, is a mechanism for vindicating the individual self-interest of creditors, which is done by resolving the collective action problem by which individual action would destroy value for the group. This is most evident from Jackson's consideration of the distinction between reorganization (i.e., restructuring)[34] and liquidation. He notes that so long as the principal objective or result is one where the pool of debtor assets is augmented, it does not matter whether bankruptcy leads to restructuring or liquidation.[35] As will be discussed in the later section on the CCAA, the question of whether to restructure or liquidate a debtor can be controversial. For Jackson, these concepts are one and the same, in that "reorganization, at least as a start, may be viewed as a *form* of liquidation… [where the debtor business is] sold to the creditors themselves rather than to third parties."[36] Both avenues serve the same purpose vis-à-vis generating returns for the creditors.[37] In short, creditors will prefer a reorganization where they expect it to generate greater returns for them than a liquidation—in such cases, in effect, the existing creditors are buying their debtor's business rather than selling it to a third party buyer because it is worth more to them than to any third party. Jackson's only caveat is that liquidation lends itself more easily to direct satisfaction of nonbankruptcy entitlements/claims, whereas reorganization produces difficult valuation of the same payments.[38] Jackson's view is that

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[33] It would be a stretch to say this is the *sole* purpose, as insolvency law also serves to resolve the collective action problem, which is also a principal function.

[34] The terms reorganization and restructuring will be used interchangeably throughout and are terms of art in Canadian law which are not defined in any statute.

[35] Jackson, *supra* note 15 at 864.

[36] *Ibid* at 893 [footnotes omitted].

[37] *Ibid* at 895 ("[w]hether the process be a piecemeal liquidation, a going concern liquidation *(i.e.*, a sale of the entity to a third party), or a reorganization liquidation *(i.e.*, a sale of the entity to the creditors), nothing in the form of the process seems to call for a different standard of *allocation among claims* (the second step) in one type of proceeding than in another" *ibid*).

[38] *Ibid* at 894 ("[i]n a reorganization, however, the proceeds from the "sale" out of which claims against the debtor will be paid will consist principally of new claims against the same enterprise… [making] the valuation of the payment to the claimants substantially more difficult" *ibid*).

insolvency law's compulsory, collective process resolves the collective action problem by imposing a stay on individual creditor actions. This makes it possible for the creditors to collectively pursue a value-maximizing outcome. Ultimately, Jackson's commitment to upholding pre-existing, nonbankruptcy entitlements produces a theory that views insolvency law as a helpful supplement to an established body of nonbankruptcy law, and whose main function is creditor wealth maximization.

(ii) Loss Distribution Theory (LDT)

Jackson's CBT focuses on addressing the policy goal of maximizing creditor recovery, which Elizabeth Warren views as a major shortcoming because it is too narrow of a policy goal.[39] For Warren, insolvency law is "an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors."[40] Warren sees distribution concerns as fundamental to insolvency law. Her approach, LDT, considers that there are multiple policy concerns and values, none of which reigns supreme, which are reflected in the way that insolvency law distributes the losses flowing from the debtor's insolvency among its different stakeholders.[41] Put another way, LDT departs from CBT's narrow search for maximizing value, into a wider search for an optimal compromise between competing claims against a limited pool of assets.[42] The policy of ensuring fairness and protecting the vulnerable is taken in LDT to be a necessary goal of insolvency law, evidenced by consistent comments from legislators and courts about safeguarding the average investor and offering protection for employees and businesses

[39] Warren, "Bankruptcy", *supra* note 13 ("the policies endorsed to support bankruptcy pronouncements are… asserted only obliquely, and they are rarely challenged directly" *ibid* at 776).
[40] *Ibid* at 777.
[41] *Ibid*; The term 'stakeholder' will be used to refer to all interested parties in a bankruptcy, whether creditor or non-creditor.
[42] "[d]iscussing the debtor-creditor system is much like focusing a camera… depending on where the focus is directed, different features of the system take on greater importance" *ibid* at 778.

alike.[43] For Warren, "[t]hese comments serve as reminders that Congress intended bankruptcy law to address concerns broader than the immediate problems of debtors and their identified creditors."[44]

Like Jackson, Warren is cognizant of the self-interested, survival mindset of the actors in insolvency law.[45] That is, she also recognizes that bankruptcy is very much "creditor-versus-creditor, with competing creditors struggling to push the losses of default onto others."[46] Contrary to Jackson, Warren's LDT focuses on distribution—both of losses and payments—as its central tenet, surpassing value maximization and the primacy of pre-existing entitlements.[47] As for the former, by its very nature the distribution of losses is an attempt to compromise claims in a way that looks beyond maximizing value, and towards spreading the consequences that led to default with a view to preserving the business.[48] This view necessarily favours reorganization to liquidation; it seeks to end up with the debtor emerging from the process with a viable ongoing business. On the latter point of the primacy of nonbankruptcy entitlements, Warren is highly critical of any hard and fast predetermination of winners and losers that unreasonably leaves the most vulnerable[49] stakeholders to bear the brunt of the losses.[50] What this means is that creditors, along with a broader community of stakeholders, will have to "defer some collection rights… in order to give the debtor an opportunity to continue as a viable business."[51]

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[43] *Ibid* at 788 (Warren's discussion solely encompasses the American system, however her points find direct parallels in Canada, as will be explored in the later section on the CCAA).
[44] *Ibid*.
[45] I.e. for every actor that gains, one or more actors have to suffer a loss, leading to a zero-sum game.
[46] Warren, "Bankruptcy", *supra* note 13 at 785.
[47] *Ibid*.
[48] *Ibid* at 787–88.
[49] See *ibid* at 786–88, 793 (Warren gives examples of several vulnerable groups: future tort claimants, customers, suppliers, employees, etc.).
[50] *Ibid* ("Congress… accepted the idea that bankruptcy serves to protect interests that have no other protection… [such as t]he older employee, the regular customer, the dependent supplier, and the local community… regardless of whether they have rights recognized at state law" *ibid* at 788).
[51] *Ibid* at 789.

LDT's focus on distribution centres around the individual self-interested creditor, given that even in the absence of insolvency law, creditors will seek to collect.[52] This inherent quality of bankruptcy and insolvency necessitates, for Warren, the policy considerations underscored in LDT. The fact that stakeholders are faced "with an inadequate pie to divide and the looming discharge of unpaid debts,"[53] means that care must be taken during the fight over slices of the pie to not overlook:

> inquiries into many issues, including who may be hurt by a business failure, how they may be hurt, whether the hurt can be avoided, at what cost it can be avoided, who is helped by the business failure, whether aid to those helped offsets the injury to those hurt, who can efficiently evaluate the risks of business failure, who may have contributed to the business failure, how they may have contributed, whether the contribution to failure serves other useful goals, who can best bear the costs of business failure, and who expected to bear the costs of business failure-just to name a few.[54]

Warren's conception thus leans towards public interest and away from the more law and economics approach preferred by CBT theorists. Warren's camp worries over not leaving any hungry mouths *now*, whilst Jackson's approach slices the pie based on *previously placed* orders of pie slices. In more technical terms, LDT seeks to set out an effective scheme, alleviating the negative consequences of distributional choices on certain vulnerable groups.

(iii) Baird's Reply to Warren: Resuscitating the CBT

Jackson and Warren represent opposing sides of insolvency law theory. The third voice in this debate, Douglas Baird,[55] attempts to restate CBT in response to Warren's criticisms. Baird's conception of insolvency law is that it: "is a procedure in which the actions of those with rights to the assets of a firm are stayed and the affairs of the firm are sorted out in an orderly way."[56] Baird,

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[52] *Ibid* at 790 ("[e]ven if there were no legal scheme to distribute the costs of default, the losses would be distributed… [whether] by creditor speed (who first backs up to the warehouse with big trucks) or strength (who can carry away the most while others look on) or by debtor favoritism (who gets the first call when the debtor decides to give up" *ibid*.)
[53] *Ibid* at 785.
[54] *Ibid* at 796.
[55] "Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren" (1987) 54:3 U Chicago L Rev 815.
[56] *Ibid* at 824.

like Jackson, stresses that insolvency law provides an *alternative* debt-collection process, running parallel to existing nonbankruptcy entitlements, in a situation involving *multiple* actors' rights.[57] The main difference between Warren's approach and that of Jackson and Baird is that the latter pair believe the distribution of losses is a question addressed outside of bankruptcy law, while the former believes this is *the* core issue in insolvency law.[58]

This is well-illustrated in Baird's consideration of secured creditor rights and noncreditor rights. For secured creditors, "[t]he idea is not to give them a *good* deal, but rather to approximate the *same* deal that they had outside of bankruptcy so that no one has an incentive to begin a bankruptcy proceeding simply because its distributional rule is different."[59] Accordingly, if changes need to be made to the nonbankruptcy rights of secured creditors, that is precisely where they should be made: in nonbankruptcy law.[60] As for noncreditors—and this reasoning applies to the wider array of stakeholders envisioned by Warren—Baird states that "[o]ne cannot say that bankruptcy is necessary to protect those without legally cognizable interests without first answering the question of why these individuals cannot be given such interests."[61] In other words, insolvency law does not operate to create rights but to procedurally employ existing nonbankruptcy rights.[62] Baird's reasoning is that if a stakeholder group is granted rights in bankruptcy that it would not otherwise have, this creates a perverse incentive for such a group to pursue bankruptcy,

[57] *Ibid*.
[58] *Ibid* at 815–16 ("[t]he issue, it must be noted, is not *how* losses from a firm failure should be distributed, but whether this question (however hard it may be to answer) is a question of the law generally (as Jackson and I would argue) or one peculiar to bankruptcy law (as Warren would argue)" *ibid* at 816).
[59] *Ibid* at 832.
[60] *Ibid*.
[61] *Ibid* at 828.
[62] *Ibid* at 827 ("existing bankruptcy law does not set substantive rights and its procedural rights can be understood only against the background of nonbankruptcy procedural rights" *ibid*).

and for opposing parties to avoid same, resulting in forum shopping.[63] Warren's suggestion that such parties be protected is thus a question that, for Baird, should be addressed outside of insolvency law, lest there be disparity between the two forums of debt-collection that results in increased costs.[64] Baird summarizes this as follows:

> Warren thinks that the benefits of bankruptcy justify additional burdens on creditors. But the issue is not whether the burdens on creditors in bankruptcy are just, but whether the burdens should exist only in bankruptcy. Creditors enjoy the benefits of the nonbankruptcy debt collection system as well. Why should they not have to take the rights of workers into account when they use that system? More to the point, taxing creditors differently depending on which enforcement mechanism they use invites troublesome forum shopping.[65]

CBT's view is that while the bankruptcy and nonbankruptcy debt collection mechanisms operate as an alternative to each other, this does not impose more or less importance on either method.[66] Baird also clarifies that CBT's emphasis on pre-existing nonbankruptcy entitlements does not "assume that whatever priorities are created under nonbankruptcy law are right."[67] CBT's acceptance of the parallel nature of these systems rests on their ability to resolve the collective action problem.[68] Importantly, the option of insolvency law does not imply a "reason for reassessing relative entitlements."[69] This brings the argument back full circle to the question of rights, which Baird reasserts is one that is best answered by upholding nonbankruptcy entitlements, and not of manufacturing fresh rights from insolvency law.[70] Take the example of the rights of

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[63] *Ibid* at 817–18 ("it will not do to advocate giving workers a special priority in bankruptcy but not elsewhere… [because if] workers enjoy a special priority only in bankruptcy, creditors will strive to resolve their differences outside of bankruptcy" *ibid*).
[64] *Ibid* at 824.
[65] *Ibid* at 818.
[66] *Ibid* at 827 ("[i]f these nonbankruptcy priorities bring no benefits of their own and if they bring normatively undesirable distributional consequences when the debtor's assets are insufficient, it would seem better to eliminate these priorities entirely, rather than merely create a separate enforcement mechanism that sometimes can be used to ignore them" *ibid* at 825).
[67] *Ibid* (in fact, Baird recognizes that "[t]hey frequently are not" *ibid*).
[68] *Ibid*.
[69] *Ibid*.
[70] *Ibid* ("[w]orkers should not have a different place in line simply because someone has been able to start a bankruptcy proceeding" *ibid*).

secured creditors, consistently referenced because they are the party with the strongest position in debt collection proceedings. Such creditors have a predetermined priority right, which allows them "a place in line; and having a place in line matters largely because some people may be shut out."[71]

This is the very thing that LDT seeks to avoid, by its focus on a fair and reasonable distribution of losses.[72] That is, as we observed in the previous section, Warren's conception of insolvency law is premised on a policy of encouraging the continuance of a debtor's business.[73] Baird takes issue with this, noting that not only does CBT purposefully avoid the question of which parties should endure losses,[74] but it also respects that "ownership of the firm is a question quite distinct from its survival."[75] This harkens back to recognition of creditors' self-interest and autonomy, but reformulates it to state that if the collective interest of creditors, as a "united front" is to shutter the business, then it is their prerogative to do so, whether inside of insolvency law or not.[76] Moreover, the ownership interests, most of which are stayed in insolvency law, do not bear on how the assets to which those rights are attached are used, or whether the business as a whole continues to operate.[77] Put simply, LDT's understanding of insolvency law as inherently seeking to keep a debtor's business going in spite of the wishes of a majority of creditors eschews law for policy preference, and does nothing to justify the use of insolvency law to achieve such an end.[78] Baird is clear that default does not imply a bankruptcy scenario, anymore than it implies a business

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[71] *Ibid* at 823.
[72] Note that Warren does not clearly define what she means by fairness; See e.g., Elizabeth Warren, "Bankruptcy Policymaking in an Imperfect World" (1993) 92:2 Mich L Rev 336 (here she vaguely refers to 'fairness arguments' as stating "that bankruptcy is a forum in which everyone parts with some rights in order to participate in a process that works for the collective good" *ibid* at 361) [Warren, "Policymaking"].
[73] Baird, *supra* note 55 at 828.
[74] *Ibid* at 823 (Baird also reminds us that CBT theorists "do not conceive this as a bankruptcy question" *ibid*).
[75] *Ibid* at 833.
[76] *Ibid* at 830.
[77] *Ibid* at 820 ("[t]o assert, as Warren does, that a creditor may need to sacrifice some of its ownership interest so that the firm might survive takes issue with most of what has been written about corporate finance over the last three decades" *ibid*).
[78] *Ibid* at 828.

has failed.[79] Shifting resources to ensure claims are upheld will always benefit some to the detriment of others.[80] What is crucial, is to understand that the above is the justification for the two possible paths to debt collection: "it is because default does not *always* raise a collective problem that there are two avenues… [wherein] bankruptcy's avenue of enforcement springs from the collective action problem."[81]

This again leads to the premise of the separation of insolvency law and nonbankruptcy issues upon which rests the foundation for CBT. In an attempt to ascribe to insolvency law that which is not unique to or even a component of it, e.g., loss distribution,[82] noncreditor protection,[83] etc., "one simply talks about social policy generally."[84] This is not to say that CBT is cold and heartless. Baird is careful to assert that vulnerable parties, such as retiring employees, are not afforded adequate rights, and that this merits changes in existing *nonbankruptcy* laws dealing with such topics.[85] His point—and Jackson's—as has been shown throughout, is merely that this problem should not find its solution in insolvency law.[86] It should find its solution in legislating outside of insolvency law to address such apparent shortcomings.

(iv) Reshaping CBT: The Authentic Consent Model (ACM)

Rizwaan Mokal offers what can be considered an alternate version of CBT: the ACM.[87] He contends that CBT contains an essential flaw that undermines its stated goal. Specifically, CBT

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[79] *Ibid* at 829.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid* at 822 ("[n]onbankruptcy priority rules distribute losses and will continue to do so regardless of whether a special set of bankruptcy priority rules exists" *ibid*).
[83] *Ibid* at 830 ("Warren is wrong to think that existing bankruptcy law cares about the rights of noncreditors… [given that a] bankruptcy judge takes these into account only when there is a dispute between those with legally cognizable claims" *ibid*).
[84] *Ibid* at 831.
[85] *Ibid* at 824.
[86] *Ibid*.
[87] Rizwaan Jameel Mokal, "The Authentic Consent Model: Contractarianism, Creditor's Bargain, and Corporate Liquidation" (2001) 21:3 Legal Stud 400 at 415 [Mokal, "ACM"].

states that when creditors negotiate their hypothetical bargain *ex ante*, that is, prior to the debtor's bankruptcy, they do so from behind a veil of ignorance. That is, the creditors do not know what relative position they will occupy—what their relative strengths and weaknesses will be—if their debtor becomes bankrupt. Consequently, the creditors can negotiate for a set of bankruptcy procedures that all of them would agree are fair: "since creditors do not know how well-placed they would be to race for the debtor's assets, they cannot bias the selection process so as to produce principles favouring them at the expense of others."[88] Mokal, however, points out that creditors in the real world are surely aware of their strength/leverage relative to other creditors, even if they cannot predict the outcomes of any particular transaction.[89] Creditors with such knowledge would thus not agree with each other *ex ante*, and would likely also renege on any such deal, changing positions in subsequent transactions, as their circumstances change relative to other parties.[90] The result is that strong creditors have no reason to concede their position and would insist on having priority within the hierarchical ranking of creditors in bankruptcy.[91] Mokal considers that Jackson may have conceived of the collective proceeding as still being worthwhile for stronger creditors because it addresses the fact that the race to collect increases costs for *all* creditors, and provides them with a "relative certainty of ranking *pari passu*."[92] However, Mokal considers these insufficient defences for CBT, in that they still fall short of incorporating the varying strengths of different creditors, and their respective knowledge thereof.[93] Mokal's position essentially "points

[88] *Ibid* at 410.
[89] *Ibid* at 411 ("[t]hey might not know how a particular transaction is going to turn out, but they are aware of whether they are systematically faster than their competitors, or of whether they wield special influence over the debtor, etc." *ibid*).
[90] *Ibid* at 412 ("[t]his ensures either that no agreement would be reached, or if reached, would be exploitative and oppressive of weaker parties" *ibid* at 440).
[91] *Ibid* at 412.
[92] *Ibid*.
[93] *Ibid* ("[t]hese arguments should reinforce the conclusion reached above, that different creditors would make different demands at the *ex ante* stage, and only some types of creditor would find the automatic stay to be in their interest" *ibid* at 413).

up the fact that Jackson's model merely reflects, and does not correct for, the relative inequalities of the creditors at an arbitrary point in time."[94]

The answer to this problem is to "deprive the creditors of the Creditors' Bargain of any knowledge of who they are."[95] Basically, Mokal suggests that the uncertainty of how a creditor's position may change once its debtor becomes insolvent necessitates a consideration of all possible interests which they may turn out to hold.[96] While creditors are aware of their current capabilities relative to other parties, they cannot confidently discern whether their position will be better if they move unilaterally, or collectively.[97] For this reason, they would necessarily consider the implications of participating in the collective regime.[98] Moreover, "the type of creditor who could do better without a stay is precisely the sort best able to cope with the effects of the stay if it is imposed."[99] ACM recognizes that the strongest players can calculate the effects of insolvency into their initial lending, thus making them able to subsume any negative effects of collective proceedings.[100] This means that a creditor, regardless of strength, may agree to a smaller asset pool through the collective regime, if such regime eliminates the possibility that they will turn out to be on the losing side of debt collection.[101]

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[94] Alfonso Nocilla, "Asset Sales and Secured Creditor Control in Restructuring: A Comparison of the UK, US and Canadian Models" (2017) 26:1 Intl Insolvency Rev 60 at 62 [Nocilla, "Asset Sales"]; See Mokal, "ACM" *supra* note 87 at 436–37 (he argues that CBT loses all of its normative and descriptive force because the individual creditors, acting purely in their own self-interest, have no reason to agree to the bargain nor to honour any bargain ex post, and therefore the hypothetical creditors in Jackson's model are not behind a true veil of ignorance).
[95] Mokal, *ibid* at 440.
[96] *Ibid* at 437.
[97] *Ibid* at 438.
[98] *Ibid*.
[99] *Ibid* at 439.
[100] *Ibid*.
[101] *Ibid* (Mokal notes that "[w]ell-financed repeat players can anticipate the effects of the stay on their own prospects, and can adjust their lending terms or their interest rates accordingly[,] … [and] are also likely to be well-diversified" *ibid*).

Importantly, like CBT, Mokal also stipulates that "[s]imply because an issue can "arise in insolvency" does not by itself mean it should be dealt with by insolvency law."[102] However, he notes that ACM takes a broader view than CBT, insofar as it does not limit "participation in the *ex ante* agreement to those who have contracted for legal rights to the debtor's assets once insolvency has occurred."[103] He does not significantly expand on these comments, noting only that a direct financial interest should not be the only prerequisite for consideration under insolvency law.[104] The ACM is also criticized for reaching the same policy position as CBT, or otherwise of suggesting a result which can be reached by using CBT.[105] For example, ACM focuses on reciprocity over self-interest, however Mokal seems to "blur the distinction… [where,] [a]t the level of application, reciprocity starts to look very like a proxy for long-term self interest relative to short-term self-interest."[106] Mokal's response to this criticism is to highlight the difference between CBT's *contractarian* nature and ACM's *contractualist* approach, whereby "the ACM is a 'justice as reciprocity' rather than a 'justice as mutual advantage' theory."[107] ACM's contractualist approach "designs its 'choice position',"[108] and thus once in the choice position, "parties are assumed to be motivated by rational self-interest alone."[109] In the choice position, the parties may strategize out of self-interest, but reciprocity is already assured by their necessary accounting for the possibility that they might turn out to hold some unfortunate position.[110]

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[102] *Ibid* at 420.
[103] *Ibid* at 423.
[104] *Ibid*.
[105] Anthony Duggan, "Contractarianism and the Law of Corporate Insolvency" (2005) 42:3 Can Bus LJ 463 at 465 [Duggan, "Contractarianism"].
[106] *Ibid* at 471 (Duggan observes that "[l]onger-term self-interest acts as a constraint on short-term individual self-interest in" CBT, which seems to be the function of reciprocity in ACM, *ibid*).
[107] Rizwaan Jameel Mokal, "Contractarianism, Contractualism, and the Law of Corporate Insolvency" (2007) 2007:1 Sing J Legal Stud 51 at 81, n 119 [Mokal, "Contractarianism"].
[108] *Ibid* at 81.
[109] *Ibid* at 83 (Mokal notes that "[i]t is the *construction of the choice position* which ensures that the self-interest of each party would be channelled along the path carved out by the demands of reciprocity" *ibid*).
[110] *Ibid* at 84, citing Mokal, "ACM" *supra* note 87 at 437.

<u>(v) Conclusions Regarding CBT and LDT</u>

From the above theoretical debate, we can draw the following conclusions regarding the purposes of insolvency law. First, insolvency law may be thought of as a means of solving the collective action problem that arises when creditors race to enforce their claims individually and thereby destroy the value of a common pool of assets. Insolvency law solves this problem by imposing a collective resolution process on all creditors. This is the key purpose of insolvency law according to CBT. This theory further contends that the sole purpose of insolvency law should be to maximize the value of the assets available to the bankrupt's creditors, leaving other concerns, e.g., broader socioeconomic considerations, for legislatures to address. So long as insolvency law respects nonbankruptcy entitlement—reflecting the hypothetical bargain that creditors would have struck *ex ante* acting in their individual self-interest—then insolvency is not an intrusion into the private, contractual rights of creditors. ACM departs from CBT here,[111] stating that it is *necessary* that creditors anticipate that they could turn out to be in a winning or losing position in insolvency, and *for that reason*, agree to the collective proceeding. Importantly, the CBT approach does not concern itself with the effects or consequences that stem from bankruptcy (i.e. socioeconomic implications). It merely situates itself in the pre-bankruptcy past, discerns economic rights, then travels to the bankruptcy present, and distributes claims so as to best respect said prior entitlements.

On the other hand, insolvency law may be thought of as a means of dealing with losses. It directs itself to the most reasonable distribution possible of the consequences of the debtor's inability to pay. This is the LDT side of the coin. From this perspective, insolvency law should not be so narrowly confined to money value and profit. Rather, insolvency law can properly direct itself to maximizing value, only if in doing so it also accounts for the vulnerability of a broader

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[111] Mokal's point is that creditors are *not* ignorant of the possibility that things could turn out poorly, and as such, they keep in mind—from the moment they contract to lend to the debtor—such contingencies.

array of stakeholders, impacted by the debtor's bankruptcy. Accordingly, insolvency law can be best defined as a means of *redistributing* losses so that no one group, or groups is unfairly overburdened.

A few criticisms are worth mentioning. Not all firms that fail actually enter bankruptcy proceedings[112] (and vice versa),[113] which raises the question: why should insolvency law seek to ascribe priority rights to vulnerable groups in one situation but not in the other?[114] This casts doubt on the scope of the vulnerability analysis of LDT, though it does not dispel the notion that such an analysis could be important. On another note, CBT is premised on an *ex ante*—i.e., forecasting a potential—scenario where creditors are either all 'alike',[115] or at least ignorant of what their creditor status will be in a bankruptcy scenario. This means the fairness of the insolvency law system, under CBT, hinges on equality between the parties, which is at best an extremely unlikely set of circumstances, as pointed out by the ACM. Therefore, if creditors are not on equal footing, their self-interest will be to protect the degree to which they are exposed to risk, further polarizing strong and weak creditors. In a negotiation among creditors of unequal leverage, one would expect those with the most leverage to wield it to obtain the most favourable terms.

One takeaway from the foregoing debates is that insolvency law is primarily focused on economic rights. Arguably, this supports the view of the CBT that the primary goal of insolvency

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[112] It should be further noted that in U.S. Chapter 11, a debtor need not be insolvent in order to file for protection and reorganize itself; See *Bankruptcy Code*, USC title 1, §109(d) [Code].

[113] Baird, *supra* note 55 at 829; See *Stelco Inc (Re)* (2004), 48 CBR (4th) 299 (Ont SCJ [Commercial List]) [*Stelco*] (for the flexible definition of 'insolvency' in Canadian restructuring legislation: "a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order… [otherwise] if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order" *Stelco, ibid* at para 40).

[114] Baird, *ibid* at 830 (Baird raises a similar point when questioning Warren's concerns for the 'vulnerable').

[115] Jackson, *supra* note 15 at 861.

law should be creditor wealth maximization. Nonetheless, to focus *solely* thereon is perhaps too narrow of a construction, and so an analysis of vulnerability should follow. Ultimately then, the question is whether insolvency law should include a more thorough consideration of vulnerable parties, or whether the proper solution is for legislatures to address these concerns outside of insolvency law. In short, value maximization as a singular focus is too narrow, and too large a focus on distribution of losses—for example on *redistribution*—is anathema to the effective satisfaction of claims stemming from fairly obtained economic rights.[116] What is perhaps most important, is that insolvency law provide a forum where strong and weak players alike are able to voice their opinions,[117] and which *fairly* reflects their strengths and weaknesses.[118]

As may be evident from the foregoing, the principal tension is over how wide of a net to cast when determining the alleviatory effects insolvency law should have on stakeholders of a debtor. This is still an ongoing discussion, which, as will be seen below, continues to polarize theorists.

(vi) Team Production Theory of Bankruptcy Reorganization (TPT)

One counter to CBT is the TPT, by Lynn LoPucki.[119] This theory is greatly influenced by Warren's LDT, in that it recognizes and seeks to address the interests of the broader groups making up creditor and noncreditor stakeholders of the debtor, with the goal of keeping the business operating.[120] Whereas CBT is premised on a hypothetical agreement between creditors from an *ex*

[116] See e.g., Mokal, "Contractarianism", *supra* note 107 at 90 (Mokal says that CBT rejects the notion that insolvency law is redistributive, and sees it as "redistributive in the relevant sense if and to the extent to which it alters the relative values of the pre-insolvency rights held by the various parties, most obviously, by vesting new rights in some which they do not have under the general law" *ibid*).
[117] See e.g., Rizwaan Jameel Mokal, "On Fairness and Efficiency" (2003) 66:3 Mod L Rev 452 at 452 [Mokal, "Fairness"].
[118] *Ibid* at 465 (Mokal provides an example: "[i]n the famous Creditors' Bargain model, for example, the unsecured creditors' alleged weaknesses are part of their very identity, and so should be reflected in the process through which consent is sought and fairness thus established" *ibid*).
[119] "A Team Production Theory of Bankruptcy Reorganization" (2004) 57:3 Vand L Rev 741.
[120] *Ibid* at 749 ("[such stakeholders] may include stockholders, creditors, executives, other employees, suppliers, customers, local governments, regulatory agencies, and others" *ibid*).

ante position, TPT centres "on the actual contracts entered into by team members,"[121] which are defined as "all who make firm-specific investments but are unable to protect those investments by direct contracting, personal trust, or reputation."[122] TPT depends on directors, who are afforded primacy,[123] insofar as they are the ultimate decisionmakers "over both the direction of the enterprise and the distribution among team members of production rents and surpluses."[124] Put simply, TPT recognizes the interdependency between the parties that make up a debtor's stakeholders, (both creditor and noncreditor), and their expectations of what they would receive in a bankruptcy scenario based on their respective contractual relations with the debtor.

For LoPucki, the way to solve the collective action problem is to place trust in the debtor's board to lead the team and oversee the maximization of value in insolvency.[125] LoPucki observes that directors "generally dominate the relationship"[126] between a firm's stakeholders. This is how the debtor and its stakeholders contract outside of bankruptcy, and so TPT merely extends this relationship, with its accompanying directorial leadership, to a restructuring under insolvency law.[127] The idea is that team members have this in mind at the moment they first join the team.[128] Team members are, on some level, aware that "[p]reservation of the firm's going concern value usually requires that much of the team remain in place and continue to produce during a reorganization… [though] adjustments to the team production arrangement may be necessary."[129] The initial contractual relations under TPT incorporate insolvency law and pre-emptively consent

[121] *Ibid* at 744.
[122] *Ibid* at 745.
[123] *Ibid* at 752.
[124] *Ibid*.
[125] *Ibid* ("[t]eam members choose to trust the board in part because they cannot trust each other" *ibid*).
[126] *Ibid* at 753.
[127] *Ibid* at 754.
[128] *Ibid*.
[129] *Ibid* (note that this should mean that if management is responsible for the firm's insolvency situation it should be ousted in favour of the team's best interests).

to a reorganization.[130] In other words, "[b]y leaving the board in full control, while at the same time limiting creditors and shareholders to their bankruptcy entitlements, the Team Production contract has, in effect, granted the non-legally enforceable entitlements of team member priority over the legally enforceable claims of creditors and interests of shareholders."[131] Much like Warren then, LoPucki favours restructuring to liquidation, insofar as the goal is, whenever possible, to keep the "team" together and its arrangement in place. The justification, says LoPucki, is that a going concern business will have assets with sufficient value to satisfy the team's entitlements *and* "assure creditors and shareholders of eventual payment of the liquidation values to which they are entitled."[132] TPT does not entirely dismiss liquidation, recognizing that a debtor should only remain operational if benefits from the continuation of the business exceed the value of its liquidation.[133] However, LoPucki asserts that TPT is capable of justifying reorganization over liquidation that could yield greater value.[134] He explains that "the sale should occur only when the directors choose to sell, the unambiguous contract of a team member entitles that member to a sale, or the sale is for the benefit of a non-team member."[135] A sale to a third party who pays a premium but then "default[s] on team entitlements reduces rather than increases social wealth."[136] The implication here is that the short term gain from the premium is outweighed by longer term gains from continuing to operate the business and thus benefitting its production team. Essentially, TPT considers insolvency law a useful tool for ensuring that a firm can meet the nonbankruptcy

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[130] *Ibid* at 755.
[131] *Ibid* at 758.
[132] *Ibid* at 763.
[133] *Ibid* at 764 ("[b]ecause the firm's decisions will affect some people who are not members of the team, this standard will permit the firm to externalize some costs, but the amount will be far below the amounts permitted under [CBT]" *ibid*).
[134] *Ibid* at 777.
[135] *Ibid* at 777–78.
[136] *Ibid* at 777.

entitlements of its team members.[137] That is, team members play dual roles, where: "the firm becomes an adversary to creditors and shareholders with respect to their formal claims, but continues to represent them as a fiduciary with respect to their team production entitlements."[138]

(vii) Economic Theory of the Firm

Whereas LoPucki directly challenges CBT, drawing more from Warren than from Jackson, Jassmine Girgis'[139] approach is closer to Jackson and Baird's focus on economic rights. Girgis draws a connection between the economic theory of the firm and insolvency law.[140] In essence, a corporation is taken to be made up of a composite of contractual relations, which "formation will occur so long as it is efficient to form it, meaning so long as it costs less to coordinate these activities within a firm than it does in the market."[141] The value of a firm as a going concern thus extends beyond its asset value, and into the development and preservation of this bundle of relations.[142] Corporate restructuring law is thought to support this notion of value, because it is typically aimed at the reorganization of a debtor with a view to maintaining going concern value, continuing the business with very few changes to the value-generating web of contracts.[143] Girgis questions whether this is still the case. Much of insolvency law was formulated at a period in time where the structure of a corporation was quite different from what it is today.[144] The proposition is: "if firm assets are less specific to their particular firms, and are more capable of being utilized

[137] *Ibid* at 764 ("[i]f necessary, the firm should use bankruptcy to reduce its formal obligations to creditors and shareholders sufficiently to meet those commitments" *ibid*).
[138] *Ibid*.
[139] "Corporate Reorganization and the Economic Theory of the Firm", in J Sarra, ed, *Annual Review of Insolvency Law, 2010* (Toronto: Carswell, 2010) [Retrieved from WestlawNext Canada] [Girgis, "Economic Theory"].
[140] *Ibid* ("[t]he dominant academic theory for the study of corporate law is economics, the school of thought that developed the nexus of contracts model to describe a corporation" *ibid*).
[141] *Ibid*, citing Ian R Macneil, "Contract: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law" (1978) 72 Nw UL Rev 854 at 865.
[142] Girgis, "Economic Theory".
[143] *Ibid*.
[144] *Ibid*.

in other firms, then they need not stay within the debtor firm to retain their value."[145] In simple terms:

> [k]eeping an insolvent company going is one of the main purposes of restructuring legislation, in order to maintain the company's going concern value. It is therefore an implicit acknowledgement that intangible value exists in the company when courts work with the creditors and creditors' claims are compromised in an effort to achieve a plan. Therefore, the entire reason behind restructuring is to save that going concern value, namely the elements of a firm that contribute to that intangible economic value.[146]

But if the nature of the corporation has changed such that assets need not remain with a firm to generate value, this in turn would invite some level of liquidation and raises questions about whether going concern value is firm-specific.[147] This harkens back to CBT, as then the focus of insolvency law—if one assumes that the nature of the corporation has indeed changed to this degree—is to recognize and uphold *economic rights*. Girgis is careful to note that restructuring proceedings may still be the appropriate choice for firms with certain kinds of assets and structures. For instance, looking at contractual relation networks, Girgis states that "part of the value in that network comes from the relationship between the individuals and the assets, so even assuming the transfer is possible, some value would nonetheless be lost if the assets were not transferred along with the network."[148] This is a point which, she recognizes, generates some debate in the literature, resulting in uncertainties over the viability of duplicating a firm's network.

Girgis' arguments raise concerns about changes in firms' assets and capital structures not being reflected by legislation. Referring to the trend of liquidations under the CCAA, for example, Girgis states: "the way courts have been responding to applications for liquidation under the *CCAA* may be a response to the changing nature of corporations and how they perceive restructuring

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145 *Ibid*.
146 *Ibid*.
147 *Ibid* ("[this school of thought states that] most of the value is tied up in assets that can be utilized by other companies (non firm-specific assets), or in assets that are not worth saving, making it unnecessary to try to save the financially troubled and insolvent company" *ibid*).
148 *Ibid*.

legislation can and should be dealing with it."[149] The point here is that by allowing the use of the CCAA—originally meant to maintain debtors' value as going concerns—to carry out the very thing it was enacted to avoid may signal that restructuring legislation has been outpaced by the evolution of the structure of the modern corporation. Accordingly, this view does not so much focus on issues of vulnerability or noncreditor concerns, but considers whether insolvency law currently reflects the true nature of firms and provides the necessary tools to maximize the value of an insolvent firm's assets.

(viii) Contract Bankruptcy

In keeping with the tradition of law and economics theorists, especially CBT, Alan Schwartz's approach also prefers to focus on the parties' initial, pre-insolvency, contractual decisions.[150] This approach envisions an insolvency system whose rules serve only two purposes: "[they are] necessary to protect the integrity of the system itself," or foster effective solutions *ex post* "when the parties cannot reach the efficient outcome on their own."[151] For Schwartz, insolvency law is aimed primarily towards maximizing firm value and lowering "the costs of realizing that value."[152] The state of insolvency law is such that parties are forced to renegotiate their contractual relations *ex post* to reach resolution.[153] Debtors are not permitted to contract for specific bankruptcy procedures, and so are not always able to contract with creditors in a way best

[149] *Ibid*.
[150] "A Contract Theory Approach to Business Bankruptcy" (1998) 107:6 Yale LJ 1807.
[151] *Ibid* at 1840.
[152] *Ibid* at 1814 (note that to the second requirement, Schwartz later adds: "while not worsening the parties' incentives to invest in the contracts they make" *ibid* at 1850).
[153] *Ibid* at 1832.

geared towards maximizing insolvency payments, such that “firms must [sometimes] pay too much for debt capital when projects are funded.”[154]

Schwartz considers insolvency law to be an integral part of business law.[155] However, “[o]ne size cannot fit all,”[156] and so the parties should be able to decide which system of insolvency law to use.[157] One of the central tensions in insolvency is that: “the firm’s managers or owners will prefer the bankruptcy system that is more likely to permit the firm to survive or to enable them to enjoy control privileges for a longer time if it ultimately fails[,]… [whereas] creditors will prefer the system that maximizes the firm's net expected insolvency return because creditors can recover only monetary returns.”[158] Moreover, these privileges are difficult or impossible to quantify in court, which is reflected in lending agreements’ inability to efficiently limit this spending, resulting in a “source of conflict between the firm and its creditors.”[159] This divergence in motivations, Schwartz contends, might be best resolved at the initial contracting stage, i.e., when lending is initially negotiated.[160] A debtor chooses an ideal insolvency system “when it picks the system that maximizes the sum of monetary returns and private benefits.”[161]

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[154] *Ibid* (“[t]he legal prohibition on contracting for bankruptcy systems is inefficient because the ban requires parties always to use "renegotiation contracts" even when other contracts would generate higher expected values for creditors” *ibid* at 1830).
[155] *Ibid* at 1839 (“because there are often many creditors whose interests may diverge… [and] [t]he firm also has no legal power to compel creditors to agree[,] [a] bankruptcy system is necessary to facilitate the parties' ability to renegotiate to ex post efficient outcomes” *ibid* at 1820).
[156] *Ibid* at 1850.
[157] *Ibid* at 1839 (note that ‘insolvency system’ does not connote electing a different jurisdiction, but rather the range of options available in insolvency, i.e., from reorganization to liquidation, and variations thereof; See *ibid* at 1823 for a detailed explanation of these systems).
[158] *Ibid* at 1821 (the ‘privileges’ Schwartz speaks of here are “the pleasure or status derived from running the firm, the excess consumption of leisure while employed, and the opportunity to continue to be paid a salary” *ibid* at 1824).
[159] *Ibid* at 1824.
[160] *Ibid* at 1820 (“[t]hat bankruptcy law must be concerned with ex post efficiency cannot of itself imply the irrelevance of ex ante efficiency as a policy goal… [which] raises the question of whether the conventional view that parties would be no better at coordinating ex ante bankruptcy bargains than they are at coordinating ex post renegotiations is correct” *ibid*).
[161] *Ibid* at 1824.

The problem then is that "[f]irms thus face the difficult problem of choosing between a suboptimal capital structure that would avoid bankruptcy or reduce bankruptcy costs and an otherwise optimal capital structure that will compel the firm, if insolvent, to use a suboptimal bankruptcy system."[162] As a solution, Schwartz proposes that a debtor can contract with multiple different creditors at different times to reach the most efficient outcomes vis-à-vis insolvency.[163] Efficiency here means selecting the insolvency system that allows for the best possible satisfaction of creditors of the protection and resolution of their eventual claims, in order that the debtor may receive the highest possible amount of funds therefrom.[164] Allowing this form of insolvency contracting lowers the cost of credit and affords the debtor with the best funding so that it may be less restrained in its choice of projects to undertake.[165] Since this form of contracting is not legal, what actually happens in practice is the *renegotiation* of the initial lending contract, which produces financing constraints for debtor firms.[166]

Schwartz's approach accordingly coincides with CBT, especially with Baird,[167] in that he sees "[t]he major goal of business law is to maximize social wealth… [and the] bankruptcy system best realizes… [this goal] by maximizing the value of bankrupt estates."[168] Additionally, Schwartz would limit objectives outside of wealth maximization, preferring instead to focus efforts on

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[162] *Ibid* at 1811.
[163] *Ibid* at 1833–34, 1836.
[164] *Ibid* at 1813 ("[a] bankruptcy system would increase the value of the firm in the failure state by solving the creditors' coordination problem… by ensuring that insolvent firms are not always liquidated[,] … only to reorganize firms whose going-concern values exceeded their liquidation values[,] … [or] auctioning firms to the market rather than reorganizing them" *ibid* at 1813–14).
[165] *Ibid* at 1813.
[166] *Ibid* at 1832.
[167] See e.g., *ibid* at 1818–19 ("[i]t is inefficient to reorganize firms to save jobs, and society has better means than bankruptcy to solve transition problems" *ibid*).
[168] *Ibid* at 1850 (though Schwartz does not define 'social wealth', he does offer the following: "[a] bankruptcy system best realizes the goal of maximizing social wealth by maximizing the value of bankrupt estates… [which] maximizes creditors' payoffs when firms fail and thus permits creditors to reduce the cost of debt capital. As a consequence, firms finance more projects and have better incentives to invest in these projects" *ibid*).

maximizing a debtor's insolvency value, and thus lowering the cost of debt financing.[169] Concerns like the "interests of the community" are thus not essential aims of insolvency law, because there are usually competitive substitutes for a debtor firm, which the community can weigh with the costs of retaining the debtor firm when it is seriously insolvent.[170] Similarly, Schwartz's approach might unfairly favor stronger parties at the negotiating table, particularly given the inherent obstacles for weaker, less experienced, and less commercially sophisticated parties. Like CBT, Schwartz prefers a contractarian approach, which limits insolvency legislation to addressing the collective action problem, and protects and upholds parties' nonbankruptcy entitlements. The ideal system for Schwartz is one that provides "parties with a default system, but also with a set of additional systems among which parties can choose,"[171] thus favouring minimal intervention by the state in the realm of insolvency law.

Like Schwartz, Baird's more recent take on insolvency law alongside Robert Rasmussen also strongly favours a free market approach.[172] These authors argue that "the ability of investors to contract among themselves and the presence of liquid markets for going concerns undercut the need for a law of corporate reorganizations."[173] Baird and Rasmussen distinguish between control and cash-flow rights; the former are "rights to deploy a firm's assets,"[174] and the latter "parcel financial claims[,]… specify[ing] how the returns from an enterprise should be distributed."[175] Crucially, and the source of many of Girgis's above arguments, the modern firm is structured with

[169] *Ibid*.
[170] *Ibid* at 1817–18.
[171] *Ibid* at 1850.
[172] Douglas G Baird & Robert K Rasmussen. "The End of Bankruptcy" (2002) 55:3 Stan L Rev 751.
[173] *Ibid* at 777.
[174] *Ibid* at 778 ("[c]ontrol is the ability to make decisions regarding the deployment of assets, including human capital…[and] can range from the decision to merge with another firm, to stop producing a current product, to change suppliers, and so on" *ibid* at 779).
[175] *Ibid* at 779.

a proactive strategy in place to deal with potential financial dire straits.[176] Investors contract among themselves over control rights, which Baird and Rasmussen say does away with many concerns purportedly addressed by insolvency law.[177] Insolvency law recognizes that when insolvency happens, control rights may shift from a firm's internal actors (i.e., the board), to creditors, which can lead to negative results.[178] Yet while this is a principal concern and raison d'être for insolvency law,[179] Baird and Rasmussen maintain that modern creditors can anticipate such difficulties, and know to restrain destructive use of control rights without it.[180]

These authors consider that such rights are not inherently intransigent, in that they are dispensed by corporate/securities law, and lending agreements, all of which can serve to allocate control in diligent, albeit different, ways.[181] Further, so long as these rights retain effective management when the firm is doing well, and replace management when it is not, there is no need for insolvency law to step in.[182] In the modern era, especially in the American and Canadian context, the debtor-in-possession (DIP) model of insolvency law provides senior creditors with a certain authoritative primacy.[183] That is, DIP financing means that a debtor's major lender(s) will exercise power over management tantamount to an overriding, supervisory authority.[184] Baird and Rasmussen are unphased by this however, stating: "the senior lender who will not be paid in full

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[176] *Ibid* at 778.
[177] *Ibid*.
[178] *Ibid* at 779 ("[t]he manager whose personal wealth is tied up in the firm's stock will have an incentive not to shut the firm down, even if the assets are worth more if sold piecemeal… [and a] secured creditor who can only recover what it is owed has the incentive to force an inefficient sale of its collateral when the proceeds of the sale will pay the creditor in full" *ibid* at 780).
[179] *Ibid* at 780 ("[t]he law of corporate reorganizations matters only when the capital structure of a firm fails to lodge control rights in the hands of someone who can exercise them competently" *ibid*).
[180] *Ibid*.
[181] *Ibid* at 782.
[182] *Ibid*.
[183] *Ibid* at 785.
[184] *Ibid* ("it is the lender, and not the Bankruptcy Code or the bankruptcy judge, that is deciding how long the managers will have to make a go of things" *ibid*).

will more likely exercise control in a sensible fashion than will managers whose net worth depends on continuation or a bankruptcy judge whose training is usually not in business operations."[185] Given the tendency of such lenders to prefer selling off assets, it is unsurprising that these authors conclude that big corporations are making use of restructuring legislation principally for liquidation.[186]

Quite aside from the tendency of senior (usually secured) creditors to dominate in this way, two major changes that call into question the value of restructuring law are the capital structure of the modern firm, and the market therefor.[187] Baird and Rasmussen point out that "[t]he specialized assets of a firm today are often intangible… [and in] a winner-take-all economy, such assets are likely to have value only for the firms that flourish and not the ones that encounter financial distress."[188] This means that even in a firm where value is derived from a team of individuals (intangible assets), it is rarely the case that value is inherently tied to their remaining in a *specific* firm.[189] Baird and Rasmussen suggest that value is instead found in the contracts that keep these individuals together, which, while incurring costs of their own, may be assigned to or drawn up for different firms, with infinite variability.[190] Even hard assets, like mines or breweries, are of little value if they are not accompanied by a promising business plan.[191] It is for these reasons that Baird and Rasmussen find it hard to justify insolvency law, stating: "[o]ne can point to neither the

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185 *Ibid* (they additionally remark that "rewriting the bankruptcy laws to limit the lenders' control inside of bankruptcy will simply make them increase the control they exercise outside of bankruptcy" *ibid*).
186 *Ibid* at 751.
187 *Ibid* at 753, 756.
188 *Ibid* at 758.
189 *Ibid* at 777 ("[a]s long as the team can be reassembled easily, the firm for which it works at any moment has little value in its own right" *ibid* at 773).
190 *Ibid* at 773.
191 *Ibid* at 767 (moreover, Baird and Rasmussen point out that "[f]irms constructed around such assets, however, have decreased in economic importance" *ibid* at 765).

size of a firm alone nor the existence of firm-specific assets to conclude that corporation reorganization law has an important role to play in our modem economy."[192]

(ix) Bankruptcy & Community Interests

Karen Gross's approach is critical of law and economics-oriented theorists, and more on-brand with Warren.[193] Gross finds such theories too restricted, given their narrow focus on quantifiable value.[194] She especially takes issue with their neglect of the interests of the community.[195] Further, Gross contends that law and economics theories of insolvency law take a negative view of human nature, categorizing it as inherently selfish as opposed to prone to a "desire for altruism."[196] Much like Warren, she advocates for an expanded view of insolvency law that would encompass more than just relations between debtor and creditors.[197] Gross approaches insolvency law from the perspective of communitarianism and feminism: "feminism addresses how to think about people and the world in which we live[,]… [which the] experiences of women have served to reveal,"[198] and "[communitarianism] views individuals as connected to each other and obligated to act in the interests of the good of the community, even if that curtails some individual freedom."[199] Together, these approaches contrast with law and economics insolvency

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[192] *Ibid* at 768.
[193] "Taking Community Interests into Account in Bankruptcy: An Essay" (1994) 72:3 Wash U L Q 1031.
[194] *Ibid* at 1035.
[195] *Ibid* at 1039.
[196] *Ibid* at 1038–39 ("assumptions that I believe underlie… [law and economics insolvency theory] are: (1) individuals are selfish and nonaltruistic (and hence disinterested in community concerns); (2) tastes and choices are unchanging and exogenous (and thus easily addressed through ex ante decision-making, usually in the form of a contract); and (3) interpersonal utility comparisons are impossible and that which we value can be expressed only in monetary terms" *ibid*).
[197] *Ibid* at 1040.
[198] *Ibid* at 1037.
[199] *Ibid* at 1036–37.

theorists' focus on individual rights,[200] with Gross's approach favouring an expanded, and more flexible economic modeling of value in insolvency.[201]

Taking community interests into account does not mean such interests necessarily coincide with a debtor firm's.[202] That is, it does not connote that failing companies *must* be saved.[203] Nor does it mean that community interests take priority over all other concerns.[204] Community interests are not *always* paramount but the inherent difficulty or impossibility of plugging them numerically into an equation should not *automatically* disqualify them.[205] Rather, Gross maintains that reshaping our understanding of value, and expanding the scope of considerations beyond what is quantifiable is the ultimate goal in optimizing our understandings in insolvency law.

(x) Conclusions About Insolvency Theory

The foregoing theories provide a variety of viewpoints on whether and to what extent the state should be the principal arbiter when a firm finds itself in insolvency. One thing most of these theories can agree on is that insolvency law resolves the collective action problem.[206] From there, deviations primarily centre on the scope of insolvency law (i.e., narrower focus on creditor recovery and wealth maximization, or broader consideration of socioeconomic concerns), and its adaptation to changes in business. Notably, those who advocate for a reduced role—or no role at all—for insolvency law state that changes in business/capital structures have far outpaced legislation meant to deal with much simpler structures. Such advocates favour a hands-off

[200] *Ibid* at 1036, 1040.
[201] *Ibid* at 1039, 1044.
[202] *Ibid* at 1033.
[203] *Ibid*.
[204] *Ibid* at 1032–33.
[205] *Ibid* at 1046.
[206] See David A Skeel Jr, "Taking Stock of Chapter 11" Syracuse L Rev [forthcoming in 2021] (Skeel suggests the collective action problem is no longer prevalent in Chapter 11, but notes that "this bargaining problem has been replaced by other bargaining failures— such as bilateral monopolies between the debtor and a key creditor, or between two creditors—to which the same logic applies" *ibid*).

approach, in light of the fact that a market for the sale of financially distressed firms exists. Critics argue the opposite, maintaining that these approaches lead to diminishing consideration of and protections for vulnerable stakeholders of a debtor firm. Accordingly, they seek to extend the scope of insolvency law. The theories also illustrate the sometimes implicit and sometimes explicit motivations of the parties, (i.e., debtor, and secured and unsecured creditors), and how these are reflected in the different proposed approaches to insolvency law. A clear understanding of the theories that attempt to make sense of insolvency law is crucial for any analysis that seeks to ascribe changes to the law. By situating these theories, and then observing how they manifest in insolvency policy, we can better understand the CCAA itself. Before turning specifically to the CCCA, the following section examines major Canadian and international policy guides and documents, to observe how insolvency theory figures into the building blocks of insolvency law.

PART II – THEORY REFLECTED IN POLICY: GUIDING INSOLVENCY LAW

(i) United Nations Commission on International Trade Law (UNCITRAL) & World Bank

UNCITRAL provides what is probably the most comprehensive policy and legislative guide for insolvency law: the *Legislative Guide on Insolvency Law* (the *Guide*).[207] This widely cited document is a result of consultations with stakeholders in the international insolvency community, geared towards creating a cohesive set of principles and suggestions on how to best structure national insolvency regimes.[208] The UNCITRAL guide provides a list of what it considers to be widely accepted objectives. These reflect many of the theories we have observed here. The list includes: promoting certainty in the market, maximizing asset value, balancing between reorganization and liquidation of a debtors' business, treating like creditors equally, fostering

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[207] United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law* (New York: UN, 2005) available at: <www.uncitral.org/pdf/english/texts/insolven/05-80722Ebook.pdf> [UNCITRAL].
[208] *Ibid* at *iii*.

"timely, efficient and impartial resolution[s]," preserving debtor assets for "equitable distribution to creditors," incentivizing transparency through information sharing, protecting existing creditor rights and priorities, and integrating a cross-border insolvency framework.[209]

Many of these objectives echo what has been found in the various theoretical approaches to be the most important feature(s) of insolvency law. For instance, in recognizing the need to maximize asset value, the *Guide* notes that this "is often furthered by achieving a balance of the risks allocated between the parties."[210] Likewise, equal treatment for creditors is not about being "treated identically, but in a manner that reflects the different bargains they have struck with the debtor."[211] The *Guide* thus consistently suggests a balance between opposing positions, such as distributing payment and distributing risk, the favourability of a reorganization versus liquidation,[212] and careful consideration of the preferences of stronger and weaker parties.[213] Importantly, the *Guide*'s view "is predicated on the basic economic theory that greater value may be obtained from keeping the essential components of a business together, rather than breaking them up and disposing of them in fragments."[214] The accuracy of this view is increasingly challenged, as we saw when considering Baird and Rasmussen, Girgis, and Schwartz, among others. Still, the *Guide* does not necessarily uphold reorganization as the *only* or even *leading* option available in the case of a corporate insolvency.

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[209] *Ibid* at 10–14.
[210] *Ibid* at 10.
[211] *Ibid* at 11.
[212] *Ibid* ("a balance has to be struck between rapid liquidation and longer-term efforts to reorganize the business that may generate more value for creditors, between the need for new investment to preserve or improve the value of assets and the implications and cost of that new investment on existing stakeholders" *ibid*).
[213] *Ibid* ("[a]n insolvency law needs to balance the advantages of near-term debt collection through liquidation (often the preference of secured creditors) against preserving the value of the debtor's business through reorganization (often the preference of unsecured creditors and the debtor)" *ibid*).
[214] *Ibid*.

It stipulates that the key is *predictability*,[215] and that an approach that has strong positive tendencies towards reorganization "should not result in establishing a safe haven for moribund enterprises."[216] The *Guide* essentially recommends that an insolvency scheme include a sampling of strategies suggested in the different theoretical approaches for dealing with insolvency concerns. It proposes that insolvency law balance different objectives by "reapportioning the risks of insolvency in a way that suits a State's economic, social and political goals,"[217] while cautioning against overloading insolvency law with issues that may be best resolved outside of it.[218] Perhaps most importantly, the *Guide* recognizes that "society is constantly evolving, [so] insolvency law cannot be static, but requires reappraisal at regular intervals to ensure that it meets current social needs."[219]

The World Bank has also developed a set of principles on effective insolvency systems, which it describes as "a distillation of international best practice on design aspects of these [insolvency law] systems, emphasizing contextual, integrated solutions and the policy choices involved in developing those solutions."[220] Though the World Bank's analysis contains some differences, its goal is to provide consistency with the UNCITRAL *Guide*.[221] As such, its enumerated principles do not significantly depart from the *Guide*'s, touching on each of the

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[215] *Ibid* at 15 ("[a]ll parties need to be able to anticipate how their legal rights will be affected in the event of a debtor's inability to pay, or to pay in full, what is owed to them" *ibid*).
[216] *Ibid* at 15.
[217] *Ibid* (on the surface, this is quite similar to Warren's redistributive approach).
[218] *Ibid* at 16 (this is reminiscent of CBT, and the *Guide* further states: "[t]o the extent that some interests may be regarded as being of lower priority than others, the establishment of mechanisms outside of the insolvency law may provide a better solution than trying to address those interests under the insolvency regime" *ibid*).
[219] *Ibid*.
[220] World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* (Washington: World Bank, 2016) available at <www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights> at 1.
[221] *Ibid* at 2 ("Bank staff has continued their participation in the UNCITRAL working groups on insolvency law and security interests and have liaised with UNCITRAL staff and experts to ensure consistency between the Bank's Principles and the UNCITRAL Legislative Guide on Insolvency Law" *ibid*).

objectives mentioned there, adding only that an insolvency system should operate harmoniously with a nation's existing legal and commercial business practices.[222] Likewise, the World Bank recognizes the need to balance competing theories and approaches to insolvency law, primarily through information sharing and stakeholder representation mechanisms.[223]

(ii) Industry Canada

In its review of Canadian insolvency legislation, Industry Canada—since renamed Innovation, Science and Economic Development Canada (ISEDC)[224]—also largely reflects UNCITRAL's balancing approach. In fact, its list of objectives for insolvency policy references an analysis of the *Guide* itself.[225] ISEDC states that "[t]he objectives underlying the BIA and CCAA include minimizing the impact of a debtor's insolvency on all stakeholders by pursuing an equitable distribution of the debtor's assets and, where possible, by rehabilitation of the debtor."[226] These are best achieved by legislation that embodies the same principles/objectives espoused by the UNCITRAL *Guide* and the World Bank.[227] Moreover, ISEDC stresses the important function of insolvency law in the economy, as it provides a measure of certainty in lending practices, which "influences credit market risks… [and] can affect the cost and availability of credit."[228]

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[222] *Ibid* at 20.
[223] *Ibid* at 20, 23.
[224] Geoffrey Morgan, "What happened to Industry Canada? Trudeau elevates scientific research in new cabinet role", *Financial Post* (4 November 2015), online: <financialpost.com/news/economy/what-happened-to-industry-canada-trudeau-elevates-scientific-research-in-new-cabinet-role>.
[225] Industry Canada, Fresh Start: A Review of Canada's Insolvency Laws (Ottawa: Industry Canada, 2014) at 7 [Industry Canada, "Fresh Start"], citing Wood, "Bankruptcy", *supra* note 8 at 4, citing UNCITRAL, *supra* note 207 at 14.
[226] Industry Canada, "Fresh Start", *ibid* at 6.
[227] *Ibid* at 7.
[228] Industry Canada, Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* (Ottawa: Industry Canada, 2014) [Industry Canada, "Statutory Review"].

(iii) Standing Senate Committee on Banking, Trade & Commerce

In 2003, the above Senate Committee carried out a review of insolvency legislation in Canada. In its report, it maintained that the essential ingredients for a successful insolvency system are: "fairness, accessibility, predictability, responsibility, cooperation, efficiency and effectiveness."[229] Of these, it maintained that fairness reigns supreme.[230] Like the UNCITRAL *Guide* and the World Bank, the Committee was careful to balance between the opposing positions of a free market-oriented approach and a rehabilitation-focused approach:[231]

> The redistributive effects of bankruptcy must be considered from the perspective of fairness, since bankruptcy-related losses for creditors may lead to higher costs of credit for those who pay their debts fully and in a timely manner. In some sense, fairness would dictate that the burden faced by those who pay their debts must not be too great because of the actions and omissions of those who do not.[232]

Notwithstanding these statements, the Committee uses language that seems to favour the approaches of Warren and Gross. It states that insolvency law "must consider the social and economic costs of bankruptcy and ensure that these costs are minimized and shared appropriately… [and] must also facilitate the efficient reallocation of resources in the event of bankruptcy."[233] Ultimately, the Committee also reflects on the need to balance between reasonable rehabilitative measures for debtors with spreading the losses amongst creditors equitably.[234]

(iv) Joint Task Force on Business Insolvency Law Reform

Around the time of the above Committee's report, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals came together to deliver

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[229] *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and Companies' Creditor Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce (November 2003) at 5 [Standing Senate Committee Report].
[230] *Ibid* ("Canada's insolvency system must be – and must be perceived to be – fair" *ibid*).
[231] For further examination of these approaches, see the text accompanying note 243.
[232] Standing Senate Committee Report, *supra* note 229 at 5–6.
[233] *Ibid* at 7.
[234] *Ibid*.

the Joint Task Force on Business Insolvency Law Reform Report (the JTF Report).[235] Among its consideration of Canadian insolvency legislation, reforms, and concerns, the JTF defined the principles which guided their recommendations. These were largely the same objectives that we have seen in the above documents: "going concern solutions that can minimize the economic and social costs resulting from insolvency"[236] are generally preferred to liquidations (unless there is more value in the latter),[237] this is a *business* decision best left to the parties and not to the courts,[238] and insolvency law needs a proper balance of flexibility and certainty to foster creative solutions and workable transactions.[239]

(v) Conclusions Regarding Insolvency Policy

The preceding policy documents illustrate attempts to balance between opposing approaches in insolvency law theory. The result is typically recommendations which address key concerns and proposed solutions examined in the theory. Policy recommendations and proposed principles/objectives usually take a middle ground approach, although the scope is always broader than a singular focus on creditor recovery and wealth maximization. In the following pages, a specific insolvency statute, the CCAA, is examined to observe how theory and policy take root in the practice of restructuring law in Canada. The review of theory and policy thus far situates many of the issues in the CCAA caselaw and literature. As is discussed below, the balancing approach observed in insolvency policy finds purchase in judges' understandings of the objectives of the CCAA.

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[235] Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals, Joint Task Force on Business Insolvency Law Reform, *Report* (15 March 2002) (Chair: AJF Kent) [JTF].
[236] *Ibid* at 8.
[237] *Ibid* at 9.
[238] *Ibid*.
[239] *Ibid* at 10.

PART III – THE CANADIAN BANKRUPTCY & INSOLVENCY LAW REGIME

Canada has two principal insolvency law regimes,[240] the CCAA and the *Bankruptcy and Insolvency Act* (BIA).[241] The CCAA has been defined as "an enactment intended to permit a compromise or arrangement between an insolvent company and its unsecured and secured creditors, or any class of them."[242] This is more than the Act itself says about its purposes,[243] though the key principles of the CCAA may be summarized as follows:

> 1. Some insolvent companies are more valuable as going concerns than they are on liquidation.
>
> 2. Contracts with creditors, trading partners and other stakeholders must be adjusted to preserve the insolvent company as a going concern.
>
> 3. Due to the threat that creditors may exercise their enforcement rights and the complexity and interdependency of adjustments with a large number of constituencies, a formal system of reorganization under court supervision is required.
>
> 4. The decision to reorganize should be made with the consent of the debtor.[244]

Even more perplexing, the CCAA does not define key terms like 'restructuring', 'plan of arrangement', or 'compromise'.[245] This makes it an Act that has historically depended on the interpretation of the courts.[246] Like its counterparts throughout the world, the CCAA serves as a continuous experiment in the application of insolvency law theory, both in its development through caselaw, and through the writings of scholars who have sought define its theoretical underpinnings. The Supreme Court of Canada in *Callidus* aptly summarized this: "[u]ltimately, the relative weight that the different objectives of the CCAA take on in a particular case may vary based on the factual

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240 In reality it has three, however the *Winding-up and Restructuring Act*, RSC 1985, c W-11 is most limited in application, as it only applies to a few industries and types of corporations.
241 RSC 1985, c B-3.
242 McLaren, *supra* note 8, ch 1 at para 2.50.
243 There is no express purpose clause in the CCAA, and only its long title points to its purpose; See CCAA, *supra* note 2 ("[a]n Act to facilitate compromises and arrangements between companies and their creditors" *ibid*, before s 1).
244 McLaren, *supra* note 8, ch 2 at para 2.100.
245 Karma Dolkar, "Re-Thinking Rescue: A Critical Examination of CCAA Liquidating Plans" (2011) 27 BFLR 111 at 112.
246 *Ibid*.

circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval."[247] As discussed directly above, analysis of the CCAA yields a variety of theoretical approaches, which may be described "as a fusion of two competing theories on the policy of bankruptcy and insolvency law," CBT and LDT.[248] Some authors have also suggested that there is no clear theoretical basis for the CCAA.[249]

The overarching principle in Canadian insolvency law is *fairness*,[250] which informs the approval of the plan of arrangement under the CCAA, and is also inseparable from a court's analysis, regardless of what issues are before it. One extreme manifestation of fairness is consideration of the public interest, which may be explained as meaning that insolvency law "reaches beyond purely commercial interests to [encompass] multiple interests affected by firm failure."[251] In the first part of this Chapter, we observed theories around the purpose and function of insolvency law. The opposing elements of CBT and LDT are reflected in the objectives of the CCAA. This is because there is a spectrum of theory, from which the Canadian insolvency law regimes draw their defining principles. Janis Sarra outlines three basic approaches: Market Theory, Debt Collection Theory, and Rehabilitation Theory.[252] Briefly, Market Theory, as its name denotes, gives primacy to the operation of the market, whereby insolvency law serves only "to clarify priority of creditors' claims, to assist with liquidation or the smooth transition of control to creditors."[253] Accordingly, this theory prefers skeletal/flexible legislation, and leaves it to the

[247] *Supra* note 4 at para 46.
[248] *Ibid* at 115.
[249] *Ibid*, citing Andrew J F Kent et al, "Canadian Business Restructuring Law: When Should a Court Say "No"?" (2008) 24 BFLR 1 at 5.
[250] Janis Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in Janis Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016* (Toronto: Carswell, 2016) [Sarra, "Oscillating"].
[251] *Ibid*.
[252] Sarra, "Creditor Rights", *supra* note 8 at 34–42.
[253] *Ibid* at 34.

freehand of the market to determine how best to "maximize creditor return," whether through restructuring or liquidating.[254] On a similar note, Debt Collection Theory is also focused on economic rights but "differs from pure market theory because it endorses state intervention to assist with collective action problems."[255] The sole purpose of insolvency law for Debt Collection Theory is to maximize the pool of assets, promoting the most efficient distribution thereof to creditors.[256] Finally, Rehabilitation Theory is principally about *preservation* of the debtor as a going concern, (i.e., continuing to operate).[257] This theory takes the stance that "insolvent corporations may be so important to national or local economies that these interests take precedence over original capital investments… [such that] the state is justified in compromising existing creditor claims in order for the debtor corporation to attract new capital."[258]

As may be evident given the discussions in Parts I and II, none of these theoretical approaches alone defines insolvency law or policy, nor do they provide the sole influence for the CCAA. For instance, Market Theory is not practical, given that there is significant state intervention into the market outside of insolvency law, including "securities regulation and corporations and competition statutes."[259] We have already explored the shortcomings of Debt Collection Theory, which is principally that it is too narrow. Like Market Theory, both are "limited in their analysis because their definition of interest recognizes only equity and debt capital investment in the firm… [ignoring] other investments that contribute value and which may be vitally important to decision making in terms of wealth maximization."[260] Lastly, Rehabilitation Theory lacks economic sense, in that certain debtors will necessarily be better off liquidating, and

[254] *Ibid*.
[255] *Ibid* at 37.
[256] *Ibid*.
[257] *Ibid* at 42.
[258] *Ibid*.
[259] *Ibid* at 36.
[260] *Ibid* at 41.

a policy of keeping a firm going no matter what may only result in a gain for shareholders and, ultimately, an inevitable liquidation.[261] The spectrum of theory thus ranges from barebones legislation and little government interference, (Market Theory)—Debt Collection Theory is closest to Market Theory, but not as extreme—to comprehensive legislation and a strong role for the state (Rehabilitation Theory). Where does this leave us?

The CCAA draws from each of these theories in turn. Market Theory underscores the importance of the business of the debtor, in that a successful plan must be a "viable business plan."[262] However, such a plan must also take heed of the socioeconomic environment in which a firm operates, taking care to account for factors beyond simple repayment of creditors.[263] Warren's LDT is closer to the extreme of Rehabilitation Theory, which theory inspires our consideration of the public interest, along with other vulnerability and fairness analyses. Rehabilitation Theory also delineates our default rule of preferring reorganization to liquidation. One last point is worth noting, and that is that the CCAA also has the principal objective of "mitigating collective action problems."[264] As will be explored further in Chapter Two, one of its means of achieving this objective is by employing the monitor as a neutral information intermediary. This flows directly from Debt Collection Theory, and perhaps more specifically from Jackson and Baird's understanding of how collective proceedings that operate in harmony with nonbankruptcy entitlements provide the best possible venue for mediating bankruptcy and insolvency. The CCAA thus embraces multiple policy objectives,[265] drawing from the whole spectrum of theories. But is

[261] *Ibid* at 42.
[262] *Ibid* at 36.
[263] *Ibid*.
[264] *Ibid* at 38.
[265] *Ibid* at 54 ("[w]here there are multiple policy objectives, successful turnaround must be measured against multiple indicia, including maximizing creditor recovery, preservation of investments, and maximization of going-concern value where possible" *ibid*).

this a satisfactory explanation for the change from its 1933 use to avoid liquidation,[266] to the current practice of liquidating CCAAs? Is it enough to say that the CCAA's objectives and policy goals are undulating? What does this mean as regards the purpose and function of insolvency law? Courts and scholars have long grappled with the tension between using the CCAA for a restructuring (rescue) or a liquidation (sale). Exploration of the arguments for and against each approach help to reveal much about the CCAA's theoretical core.

Reorganization may be understood simply as "arrangements between debtors and creditors under which the creditors agree to accept something less than full and timely payment of their debts."[267] The resulting reduction of creditor claims comes about through a careful balance between preservation and modification of existing legal rights.[268] Though the CCAA has historically been understood to prefer reorganization where possible,[269] "[i]t should be kept in mind, however, that the purpose… is not to force a reorganization of the company so that it survives at all costs… [but] to facilitate a reorganization that is fair under the circumstances."[270] After all, liquidations can often incur lower costs than the deliberative process of negotiating a restructuring,[271] and courts have increasingly approved such transactions where they yield better results.[272] The main tension seems to be not only that the CCAA was not designed for such sales, but also that "[w]hen liquidation is avoided and the firm continues in business, junior classes of claimants are able to use uncertainty over the value of the firm to argue for more favourable

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[266] For a discussion on this original purpose, see Stanley E Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25:6 Can Bar Rev 587.
[267] Wood, "Bankruptcy", *supra* note 8 at 307.
[268] McLaren, *supra* note 8, ch 1 at para 1.3100.
[269] Wood, "Bankruptcy", *supra* note 8 at 311 ("the objective of restructuring law is said to be the rescue and rehabilitation of financially distressed commercial enterprises, as opposed to the piecemeal liquidation of their assets" *ibid*).
[270] McLaren, *supra* note 8, ch 2 at para 2.150 ("[p]rimarily, the CCAA was designed for corporate restructurings, an Act under which a debtor prepares to adjust operations in an attempt to return to the realm of solvency" *ibid* ch 4 at para 4.2356.8).
[271] Wood, "Bankruptcy", *supra* note 8 at 313.
[272] McLaren, *supra* note 8, ch 4 at para 4.2357.6.

treatment."[273] The flipside is that stronger, often secured, creditors typically prefer a liquidation, and so may exert pressure to pursue one, regardless of whether it would produce the best value for the creditors as a whole.[274] This perhaps stark practice is not new. In fact, "[t]he Act as it was originally envisaged facilitated the resolution of differences between the corporate debtor and the secured financier… [wherein] unsecured creditors had no leverage over the debtor."[275]

The "CCAA process is geared towards the development of a plan of arrangement that will be presented before the creditors for their acceptance or rejection."[276] Understood in this way, liquidating CCAAs alter the process, making use of the flexibility of the statute to facilitate "diminution of the private law rights of a third party or the granting of a judicially authorized preference usually in favour of commercially sophisticated and powerful creditors."[277] This tension between restructuring and liquidation is also present, albeit somewhat differently, in the United States counterpart to the CCAA: Chapter 11 of the *Bankruptcy Code*.[278] American commentators suggest that to conceive of creditor recovery maximization as the topmost objective of insolvency legislation "is putting the cart before the horse."[279] Like Canadian scholars who maintain that the CCAA is primarily intended to facilitate restructurings, (where possible), these American commentators stress that "[r]ehabilitation remains a predominant, if not the predominant, objective."[280] Interestingly, they also recognize the influence of creditors,

[273] Wood, "Bankruptcy", *supra* note 8 at 422.
[274] Roderick J Wood, "Rescue and Liquidation in Restructuring Law" (2012) 53:3 Can Bus LJ 407 at 408–09 [Wood, "Rescue"].
[275] McLaren, *supra* note 8, ch 1 at para 1.2350.
[276] Wood, "Rescue", *supra* note 272 at 410, citing *Century Services*, *supra* note 3 at paras 15–18, 70.
[277] Wood, "Rescue", *ibid* at 413 [footnotes omitted].
[278] Code, *supra* note 112, USC title 11 §§ 101-1532.
[279] Harvey R Miller & Shai Y Waisman, "Is Chapter 11 Bankrupt?" (2005) 47 BCL Rev 129 at 170.
[280] *Ibid*.

particularly powerful senior/secured creditors, and suggest that insolvency legislation needs to be strengthened to realign it with the goal of rehabilitation, and lessen the effects of creditor control.[281]

Two elements of the theoretical debate and CCAA policy maelstrom are especially noteworthy. These are that history has revealed a slow but sure change in the use of insolvency legislation, and that strong/secured creditors are one of the most influential parties. Indeed, these themes are so pervasive, that conceivably observing them together should reveal a deeper understanding of the CCAA, and Canadian insolvency law generally.

The answer to lingering questions is perhaps as simple as considering the history of the legislation. In *Century Services*, the Court states: "[i]n order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence."[282] In her recent book,[283] Virginia Torrie traces the history of the CCAA, and offers an analysis that might resolve these leftover questions. Torrie notes that, from its inception as a remedy for bondholders,[284] to its current use, the CCAA has essentially remained a 'secured creditor statute'.[285] To summarize Torrie's text is beyond the scope of this project, however a few key points will suffice to outline her argument. As stated, the Act's inception as a bondholder remedy favoured the interests of secured creditors, being the bondholders themselves. At this time, based on the nature of credit, such bondholders not only had a security interest, but also stood to

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[281] *Ibid* (these authors further contend that "[t]he Chapter 11 model is desirable because it allows the issue to be considered on a case-by-case basis instead of abdicating these important policy considerations to the free market regime under the assumption that private rights and maximization of recoveries will produce socially optimal outcomes" *ibid* at 176).
[282] *Century Services, supra* note 3 at para 11 [emphasis in original].
[283] *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020).
[284] *Ibid* at 29.
[285] *Ibid* at 29, 165 ("[c]ompany reorganizations of this period were heavily weighted in favour of bondholders' interests and held clear advantages for other senior secured creditors, the debtor company, and its shareholders" *ibid* at 33).

profit from the continuing success of the debtor company, much like today's equity(share)holders.[286] Skipping ahead a few years, while there were complaints that the CCAA was not being used fairly, interest groups representing bondholders and unsecured creditors—after many years negotiating—came together to agree to a restructuring statute that would still protect the weaker (unsecured) creditors.[287]

Over the next few decade, from the 1950s until the 1980s, CCAA underwent a period of scant use as the Canadian economy soared before facing its next recession(s).[288] At this time, finance had undergone its own changes, the most significant of which, in terms of the CCAA, was that companies were borrowing from banks instead of raising money in the capital markets.[289] These lenders "relied on the priority and strength of their security vis-à-vis other secured and unsecured creditors, and displayed little interest in coordinating with smaller creditors in cases of debtor default."[290] Such lending practices, especially the lack of precautions banks exercised, led to some being dangerously exposed to defaulting debtors.[291] As provincial and federal governments stepped in to avoid economic catastrophe, their solution was to offer funding for the restructurings of afflicted lenders.[292] As Torrie puts it: "[d]uring the 1980s recession, courts, banks, and the provincial and federal governments effectively (re)affirmed corporate reorganization through insolvency law and receivership as a commercially and politically desirable response to

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[286] *Ibid* at 26 ("[t]he key elements of bondholder floating charges under Canadian trust deeds were the long-term nature of the credit arrangement and the charge on the business undertaking as part of the security for the loan[,]… [thus giving] bondholders an interest in the long-term success of the company[,]… [such that] the presumptive response to debtor failure by bondholders… was to restructure the enterprise" *ibid*).

[287] Ibid at 74–75 ("[t]he minutes of the meeting indicate that the two organizations had conferred beforehand and had agreed on a compromise that would address both positions: limiting the CCAA to companies with outstanding bond issues under a trust deed and running in favour of a trustee[,]… [which] would ensure that companies could not use the act to take advantage of their junior and unsecured creditors" *ibid*).

[288] *Ibid* at 89.

[289] *Ibid*.

[290] *Ibid* at 90.

[291] *Ibid* at 92.

[292] *Ibid*.

the insolvency of large firms."[293] This government solution was met with no opposition, as it had one of the strongest votes of confidence on its side, that of secured creditors.[294]

The reason, Torrie argues, why secured creditors have been so well positioned to have their interested reflected in the CCAA is by virtue of its skeletal nature and strong reliance on the judiciary.[295] Insolvency law in Canada does not undergo consistent, rapid, or even wide-reaching reform, and so "there is significant scope for new ideas to infiltrate and influence CCAA law developments via case law rather than through the relatively rare instances of formal insolvency law reform in Canada."[296] By pursuing change in the courts, secured creditors keep the impetus of legal rule changes on their side, because while they may lose out on the occasional case, they will typically be able to "advocate a specific outcome in one case, but leave their options open about how potential future cases might be resolved."[297]

Torrie's analysis is persuasive in that it demonstrates how an understanding of historical context elucidates the workings of insolvency law, in this case of a specific statute: the CCAA.[298] The cyclical nature of the economy, and the changing nature of some of its components—like credit—precipitate changes in this unique area of the law designed to respond to negative economic consequences. The "actors" understandings of the CCAA in a given time have been significantly shaped by the broader context of their respective place in history."[299] Similarly, our understanding of the CCAA, a statute of multiple objectives, spanning the gamut of the theoretical spectrum, is

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[293] *Ibid*.
[294] *Ibid* at 93–94.
[295] *Ibid* at 166 ("[t]hrough progressive interpretations of the act, courts granted access to Canada's only insolvency regime capable of facilitating complete company reorganizations, and assumed a prominent role in policy making and lawmaking in this area" *ibid*).
[296] *Ibid* at 156.
[297] *Ibid* at 168.
[298] *Ibid* at 165 ("[a]lthough the text of the CCAA was essentially untouched for forty years, the broad, contextual paradigm shift that took place in Canadian society during that period formed a new lens through which later actors approached the statute" *ibid*).
[299] *Ibid*.

perhaps also influenced by our place in history. Viewed this way, it makes more sense why courts place more or less weight on value maximization, debtor rehabilitation, and the correlating choice of whether to restructure or liquidate. The answer, one lawyers are often criticized for resorting to, is that *it depends*, although following Torrie it would be more correct to say: *it depends on the historical context*.

At the outset of this Chapter, we considered that the common law has widely accepted that insolvency law functions to mitigate the collective action problem, reorganize healthy businesses so they might continue, and rehabilitate debtors so they may begin anew.[300] In the context of the CCAA, a more accurate understanding might be that the first is a given, and the second and third are negotiable, depending on the circumstances of the day.

PART IV - CONCLUSION

This historical analysis provides a lens through which we can examine the statute, its influence, and the sources of its continued use in much higher definition. For instance, the change in the judiciary in the 1980s and 1990s into a "far more policy-conscious and even activist" bench seems to coincide with the pronouncement of LDT and related theories that supported a larger than economics approach to insolvency law.[301] This too seems to reflect Torrie's notion that historical context informs actors' understandings of the CCAA and their role therein. Likewise, Girgis' observations about the changing, or already changed, nature of the structure of modern firms perhaps suggest that we are at a point in history where legislation dealing with business may need to adapt to this evolution. As we have travelled through time from nearly a century ago, where this statute merely remedied bondholders, we can observe the confluence of interests and protections

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[300] Ben-Ishai & Telfer, *supra* note 14, at 22.
[301] Torrie, *supra* note 283 at 90 ("Chief Justice Laskin transformed the SCC into a modern, policy-conscious institution that assumed a far greater role in *developing* Canadian law rather than merely settling disputes" *ibid*).

that today make up a very flexible and highly used statute. LDT, and the extreme of Rehabilitation Theory, has surely influenced an increased regard for unsecured creditors, and the oversight and intermediary role played by the monitor, originally a creation of the courts.[302] Likewise, the rising trend in liquidating CCAAs surely draws on value maximization, a central tenet of CBT. What the CCAA does that has differentiated it from other insolvency law statutes, is that it allows judges the discretion to act on instances of unfairness or foul play, when the actors in a proceeding impinge on one of the CCAA's multiple policy objectives. In some cases, value maximization will be the goal, whereas in others, preservation may very well be the desired outcome.[303] Yet no matter the scenario, the CCAA by necessity operates to subdue the collective action problem, and asks judges to only approve a plan that most fairly resolves disputing claims while preserving the best possible value. As Janis Sarra has stated:

> Any restructuring plan devised must create efficiencies and enhance the value of the corporation such that it will be able to successfully compete in the market place. *Insolvency law must be situated in the social and economic context in which corporations operate, recognizing that multiple factors affect restructuring decisions, beyond narrow assessment of commercial requirements on an individual case-by-case basis*.[304]

Extending this multi-theory, or multi-policy, understanding, along with Torrie's historical approach, we can better discern the nature of the practice of CCAA today. The CCAA is not simply the product of applying the theories we have observed to real-world cases. Such legislation is often the product of a confluence of contributing factors, such as abstract ideas, ardently defended interests, and the adequacy of the institutions responsible for its application.[305] Courts have observed that it is the *flexibility* of the CCAA scheme which "permits a broad balancing of these [multiple] objectives and the multiple stakeholder interests engaged when a corporation faces

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[302] McLaren, *supra* note 8, ch 1 at para 1.2900.
[303] See e.g., *Callidus*, *supra* note 4 at para 46.
[304] Sarra, "Rescue", *supra* note 4 at 36 [emphasis added].
[305] Thomas G W Telfer, "Ideas, Interests, Institutions and the History of Canadian Bankruptcy Law, 1867-1880" (2010) 60:2 U Toronto LJ 603 at 620 [Telfer, "History"].

insolvency."[306] As mentioned at the outset, this flexibility is embodied in the broad discretion afforded to CCAA judges, whose repeated practices have, over time, been codified to form part of the legislative scheme.[307] The monitor itself is a creature of CCAA judicial discretion,[308] which, as will be observed in the following Chapter, is often located at the centre of the court's balancing of the CCAA's multiple policy objectives. Accordingly, Chapter One's literature review of insolvency theory, coupled with its examination of those theories in insolvency policy, clarify the underpinnings of Canadian insolvency law. Study of the CCAA itself revealed it to be a product of these underpinnings, in combination with pressure exerted by secured creditors, themselves likely using theory and policy in their arguments for why the law should function as it does today. At this moment in the CCAA's history, pressures are again mounting, only this time the concern is around the independence of the monitor.

This project will suggest that the history of the CCAA, through its cases and its legislative amendments, is leading toward further codification of the monitor's role via its fiduciary duty. Consequently, the rest of this study assumes the three broad functions of insolvency law in the common law tradition to be true, but understands that they may wax, wane, and be supplemented according to changes in the surrounding historical environment. In the following Chapter, the focus shifts to the monitor, tracing the history of its role, slowly unpacking the law around it to reveal its theoretical/policy inclinations, strengths, weaknesses, and considering how best to model this role going forward. Chapter Two will reveal many of the problematic aspects of the role, centering on its fiduciary duty as both a cause for concern and the potential solution.

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[306] *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014 at para 103[*Essar*].
[307] See e.g., *Callidus*, *supra* note 4 at paras 67, 86, 91 ("[s]ince 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate" *ibid* at para 86).
[308] See Kent et al, *supra* note 249.

CHAPTER TWO

Introduction

The CCAA is Canada's main statute for restructuring insolvent corporations.[309] Its broad purpose is to "facilitate compromises and arrangements between companies and their creditors."[310] Central to the CCAA's purpose is the role of the court-appointed monitor.[311] Given the skeletal nature of the CCAA, courts have historically employed an approach pairing liberal interpretation with judicial discretion to "extend the limited words [in the legislation], and create needed tools and remedies."[312] The monitor is a trustee and insolvency professional,[313] appointed by the court in its initial application order,[314] to function as the court's "eyes and ears."[315] It supplements the court's supervisory role with much-needed expertise.[316] This Chapter examines the role of the monitor, the scope of its powers, and its obligations to remain independent and avoid conflicts of interest. The monitor is crucial to the proper functioning of the CCAA regime. At the same time, commentators have raised valid concerns about the monitor's role and its independence in light of the scope of its powers. In Part I, I will review the history and evolution of the monitor's role. Part II examines the concerns with the monitor's role raised by commentators and in the jurisprudence. In Part III, I consider whether the CCAA regime has sufficient checks and balances to address the

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[309] Courts have held that the statute can also apply to partnerships and other business entities; See e.g., *Re Forest & Marine Financial Corp*, 2009 BCCA 319 at paras 13–22, 30; *Priszm Income Fund (Re)*, 2011 ONSC 2061 at paras 26–28; *Canwest Publishing Inc (Re)*, 2010 ONSC 1328 (Commercial List) [*Canwest*]; *Calpine Canada Energy Ltd (Re)*, 2007 ABQB 504 [*Calpine*]; *Lehndorff General Partner Ltd (Re)* (1993), 17 CBR (3d) 24 (Ont SCJ [Commercial List]).
[310] CCAA, *supra* note 2.
[311] *Callidus*, *supra* note 4 at paras 47–48, 51–52 (respectively: the importance of the court's central supervisory role, and the extension thereof through the monitor).
[312] Richard B Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. Sarra, *Annual Review of Insolvency Law 2005* (Toronto, Carswell, 2006) [Retrieved from WestlawNext Canada].
[313] CCAA, *supra* note 2, s 11.7(1); See also BIA, *supra* note 241, s 2 "trustee".
[314] *Ibid*, s 11.7(1).
[315] See e.g., *Callidus*, *supra* note 4 at para 52, citing *Essar*, *supra* note 306 at para 109; *Nelson Education Limited (Re)*, 2015 ONSC 3580 (Commercial List) at para 35 [*Nelson*]; *Winalta*, *supra* note 10 at para 68, citing Kevin P McElcheran, *Commercial Insolvency in Canada* (Markham: LexisNexis Butterworths, 2005) at 236.
[316] Jones, *supra* note 312.

concerns explored in Part II. Finally, I will conclude that the monitor's role, as currently conceived, requires clarification so that it may perform its intended functions properly. Chapter Three will then specifically address the monitor's fiduciary duty, ultimately suggesting that it be codified in response to concerns that it is unclear and that the role is generally exposed to conflict of interest.

PART I – ORIGINS OF THE MONITOR

The inception of the monitor can be traced back to a common practice of CCAA courts in the 1980s and 1990s to appoint an accounting firm to perform a supervisory role in the proceedings. This unique role was inspired, in part, by the role of the interim receiver, appointed under section 46 of the BIA.[317] The BIA interim receiver is charged with overseeing the property of the debtor, often for the purpose of selling such, and in some instances exercising control over aspects of its business.[318] It too acts as a court-appointed officer, and owes a fiduciary duty to all parties with an interest in the proceedings.[319] In early CCAA caselaw, courts likened monitors to interim receivers,[320] and later stressed that the two roles served distinct purposes and functions.[321] Prior to the 1997 amendments to the CCAA which codified the monitor's role and made it mandatory,[322] it was common practice for "creditors seeking enhanced disclosure from debtor corporations"[323] to pursue this appointment. Given the strategic value of selecting the party to play

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[317] Kent et al, *supra* note 249 at 13; BIA, *supra* note 241.
[318] BIA, *ibid* at s 46(2).
[319] Wood, *supra* note 8 at 507, citing *Re Newdigate Colliery Ltd*, [1912] 1 Ch 468 (CA) [*Re Newdigate*], *Ostrander v Niagara Helicopters Ltd* (1974), 1 OR (2d) 281 (HCJ).
[320] See e.g., *Northland Properties Ltd (Re)* (1988), 29 BCLR (2d) 257 (SC) [*Northland Properties*]; *Canadian Co-operative Leasing Services v Price Waterhouse Ltd* (1992), 128 NBR (2d) 1 (QB) at 63; *Stokes Building Supplies Ltd (Re)* (1992), 100 Nfld & PEIR 114 (TD) at 5 [*Re Stokes*].
[321] See e.g., *Ultracare Management Inc v Zevenberger (Trustee of)* (1994), 50 ACWS (3d) 1232 (Ont CJ [Gen Div]): "[t]he work and mandate of a receiver whether appointed privately or by the Court differs from that of a monitor. The former liquidates; the latter, preserves." *ibid* at 14; *United Used Auto & Truck Parts Ltd (Re)*, 2000 BCCA 146 at paras 13–15 [*United Auto*].
[322] See *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, RSC 1997, c 12 [1997 Act].
[323] Janis Sarra, "Ethics and Conflicts, the Role of Insolvency Professionals in the Integrity of the Canadian Bankruptcy and Insolvency System" (2004) 13:3 Intl Insolvency Rev 167 at 177 [Sarra, "Ethics"].

this role, debtors soon circumvented creditors and asked the court to choose their own accounting firms.[324] Although these early appointments were tasked with "acting as a "watchdog" and reporting to the court on the financial affairs of the company,"[325] the fact that debtors' accounting firms—often their auditors[326]—were selected, raised questions about their independence and impartiality.[327] The courts took the view that the appointed role functioned as an extension of their CCAA supervisory capacity,[328] and "originally grounded the appointment of a court officer in their inherent jurisdiction."[329] That is, courts saw a way to keep an eye on the parties via their appointed watchdog. The first[330] usage of the term "monitor" is traced to *Northland Properties*,[331] where Trainor J, as he then was, said: "I am satisfied that I have jurisdiction to appoint an interim receiver and spell out the responsibilities of that office such that his true role would be that of a monitor or watchdog during this interim period."[332]

The rationale for this practice of appointing monitors, prior to the 1997 amendments, can be summarized as follows. Its inception in the 1980s coincided with an economic crisis, such that "[t]he appointment of monitors was perceived by the courts and the credit community as a compromise between transferring management of the ailing enterprise into entirely new hands, on one hand, and putting their faith in existing management not to run the business further into the

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324 Kent et al, *supra* note 249 at 13.
325 Douglas I Knowles QC, "To Liquidate or Restructure Under the CCAA? The Monitor's Conflicting Duties" in J. Sarra, *Annual Review of Insolvency Law 2005* (Toronto, Carswell, 2005) [Retrieved from WestlawNext Canada].
326 Andrew J F Kent & Wael Rostom, "The Auditor as Monitor in CCAA Proceedings: What Is the Debate?", in J Sarra, ed, *Annual Review of Insolvency Law, 2003* (Toronto: Carswell, 2003) [Retrieved from WestlawNext Canada].
327 Sarra, "Ethics", *supra* note 323 at 177.
328 David Mann & Neil Narfason, "The Changing Role of the Monitor" (2008) 24 BFLR 131 at 133; This notion has since been adopted by the Supreme Court of Canada, see e.g., *Callidus, supra* note 4: "[w]e pause to note that supervising judges are assisted in their oversight role by a court appointed monitor" *ibid* at para 52.
329 Tevia R M Jeffries, "Releases of Court Officers at Discharge: If Anyone Can Show Just Cause Why This Court Officer Should Not Be Released, Speak at the Discharge Hearing or Forever Hold Your Peace", in J Sarra, ed, *Annual Review of Insolvency Law, 2015* (Toronto: Carswell, 2015) [Retrieved from WestlawNext Canada] [Jeffries, "Releases"].
330 See Knowles, *supra* note 325; Mann & Narfason, *supra* note 328 at 133; Jeffries, "Releases", *ibid*.
331 *Northland Properties, supra* note 320.
332 *Ibid* at 17.

ground, on the other."[333] In addition to its watchdog role, the monitor was seen as a means of mitigating certain costs, especially those pertaining to court challenges for better disclosure of debtor financial information.[334] This is where the monitor as an information intermediary ensures the free flow of information to the stakeholder collective, in a cost-effective manner. Finally, given the complexities inherent in a CCAA case, the guidance and leadership of an expert in such matters came to be an increasingly necessary and useful element.[335]

In its early years, and up until the time of its codification in 1997, the role of the monitor could be defined as follows. First and foremost, the monitor is an officer or agent of the court, and in that capacity "owes a fiduciary duty to all the parties and an obligation to ensure that one creditor is not given an advantage over any other creditor."[336] As considered above, a central justification for the role was that the monitor safeguarded creditors' interests as a whole, by supervising and reporting on the debtor's activities to the court.[337] The strong role of the courts in developing CCAA law and practice produced a role that is adaptable, varying case-by-case.[338] Although the ultimate responsibility for supervising the CCAA process rests with the courts, judges make use of the monitor as an adaptable tool through which to exercise the court's authority and pursue the

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[333] Jacob S Ziegel, "The Personal Liabilities of Insolvency Practitioners Under Insolvency Legislation: A Comparative Analysis of Canadian, English, and American Positions", in J Sarra, ed, *Annual Review of Insolvency Law, 2006* (Toronto: Carswell, 2006) [Retrieved from WestlawNext Canada] [Ziegel, "Liabilities"].
[334] Sarra, "Ethics", *supra* note 323 at 177.
[335] See e.g. *Consumers Packaging Inc (Re)* (2001), 27 CBR (4th) 197 (Ont SCJ) at para 2 [*Consumer Packaging*] ("[t]he recommendation of such a court officer experienced in the insolvency field as KPMG is should normally carry great weight… [h]ere as well" *ibid*); See also *Callidus*, *supra* note 4 at para 52 ("[t]he monitor is an independent and impartial expert… providing an advisory opinion to the court" *ibid*).
[336] *Siscoe & Savoie v Royal Bank* (1994), 157 NBR (2d) 42 (CA) at 9 [*Siscoe*].
[337] Ziegel, "Liabilities", *supra* note 333.
[338] Yaad Rotem, "Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada" (2008) 3:1 Va L & Bus Rev 125 at 141 ("[t]he Monitor is a court-appointed official whose mission, although it may vary from case to case, is first and foremost to supervise the reorganization… [though its] main role is to be an information intermediary" *ibid* at 130); See also Vern W DaRe & Alfonso Nocilla. "Bestriding the Narrow World: Is It Time to Bifurcate the Role of the CCAA Monitor?", in J. Sarra, *Annual Review of Insolvency Law, 18th ed, 2020* CanLIIDocs 3594 at 225.

CCAA's objectives.[339] The 1997 amendments, which codified the role in section 11.7,[340] upheld this flexibility, "confirming that the court maintains the discretion to craft the role… to carry out any other functions the court may direct."[341] The CCAA monitor is currently most concretely defined by the following sections of the Act.[342] First, its appointment in the initial order by the supervising judge:

> **11.7** (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*…
>
> (2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company
> (a) if the trustee is or, at any time during the two preceding years, was
> (i) a director, an officer or an employee of the company,
> (ii) related to the company or to any director or officer of the company, or
> (iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or
> (b) if the trustee is
> (i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or
> (ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i)…
>
> (3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.[343]

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[339] See e.g., *Re Stokes*, *supra* note 320 at 5–6; *Callidus*, *supra* note 4 at paras 46–48, 52; Julie Himo & Arad Mojtahedi, "The Evolving Role of the Eyes and Ears of the Court: Empowering the CCAA Monitor to Initiate Legal Proceedings Against Third Parties", in J. Sarra, *Annual Review of Insolvency Law, 18th ed, 2020* CanLIIDocs 3594 ("the flexibility afforded to the courts has been a hallmark of the Canadian insolvency regime, and has allowed for creative use of the acts and their adaptability to conduct ever-more complex restructuring matters efficiently" *ibid* at 126); See also DaRe & Nocilla, *supra* note 338 at 230.
[340] CCAA, *supra* note 2.
[341] Knowles, *supra* note 325; CCAA, *supra* note 2 at ss 11, 23(1)(k) (the court has the power to "make any order that it considers appropriate in the circumstances," which specifically includes directing the monitor to carry out additional functions, *ibid*).
[342] Note that the following sections do not provide an exhaustive list of all sections of the CCAA dealing with the monitor, but merely provide the most pertinent sections.
[343] CCAA, *supra* note 2.

Next, the general duties and functions of the monitor, subject to modification by the court,[344] are found in section 23. These include publishing consistent and timely public notices concerning claims,[345] investigating and reviewing the debtor's state of affairs,[346] reporting thereon,[347] filing various reports based on the fruit of its investigations with the court,[348] advising the court on the soundness of any proposal or plan,[349] and making all reports and opinions publicly available,[350] among other things. Finally, the monitor is bound to "act honestly and in good faith… [when] exercising any of his or her powers or in performing any of his or her duties and functions."[351] Together, these sections, along with the court's inherent and statutory jurisdiction,[352] and section 11 discretionary power,[353] allow CCAA judges to appoint and configure the role of the monitor in each case according to the particular facts of the day.[354]

At its most basic configuration, the monitor's essential role bridging information gaps is part of the CCAA's response to the collective action problem in insolvency.[355] The collective action problem occurs when individual creditors act unilaterally to enforce their claims, frustrating the efforts of creditors claiming thereafter, and ultimately reducing the value that a collective

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[344] *Ibid*, s 23(1)(k).
[345] *Ibid*, s 23(1)(a).
[346] *Ibid*, s 23(1)(b)–(c).
[347] *Ibid*, ss 23(1)(c)–(d.1).
[348] *Ibid*.
[349] *Ibid*, s 23(1)(i).
[350] *Ibid*, ss 23(1)(e), (j).
[351] *Ibid*, s 25, referencing BIA, *supra* note 241, s 13.5 (prescribed Code of Ethics for trustees).
[352] *Callidus, supra* note 4 at paras 65–67, citing *Century Services, supra* note 3 at paras 61–62, 65; See generally G R Jackson & Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J Sarra, ed, *Annual Review of Insolvency Law, 2007* (Toronto: Carswell, 2007) [Retrieved from WestlawNext Canada].
[353] CCAA, *supra* note 2.
[354] *Ibid*, s 23(1)(k).
[355] Noah Zucker, Gabriel Faure & Jocelyn T Perreault, "Creditor Activism in CCAA Proceedings: Beyond the Vote", in J Sarra, ed, *Annual Review of Insolvency Law, 2019* (Toronto: Carswell, 2019) [Retrieved from WestlawNext Canada].

proceeding generates.[356] Chapter One alluded to the monitor's function as a guiding force which, by virtue of its assumed neutrality, brings parties together as a collective while still respecting their individual claims. Moreover, the monitor can unburden creditors from their need to investigate the debtor on an individual basis, through its own policing and reporting on the debtor's affairs, reducing associated costs. This function is especially beneficial because it produces information that the court will defer to when making its final decisions.[357] As such, the monitor allays creditor concerns over transparency, providing a sense of security to the process.[358] The monitor is "the eyes and ears of the court,"[359] and advises the court in determining "the fairness of any proposed plan of arrangement and on orders sought by parties."[360] One experienced monitor explains that the typical monitor analyzes the debtor with regards to its past and projected financial trajectory, considers available options for increasing the business' viability, and studies the debtor's competitors, its capital structure, and respective market.[361] On the basis of these considerations, the monitor then prepares its reports and recommendations.[362]

Since its creation by the courts in the 1980s, and following its codification in 1997, the monitor's role "has developed from one of passive observer to one of active participant."[363] Beginning as a supervisory role that was primarily concerned with disseminating information and

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[356] See e.g., *Sharab Developments Ltd v Zellers Inc* (1999), 65 BCLR (3d) 67 (CA) at para 45; Sarra, "Rescue", *supra* note 4 at 4.

[357] Himo & Mojtahedi, *supra* note 339 at 128; *Consumers Packaging*, *supra* note 335 at para 2; *PCAS Patient Care Automation Services Inc (Re)*, 2012 ONSC 2778 (Commercial List)at paras 10–12 (court did not approve inclusion of certain fees because these were not approved in the monitor's report).

[358] Himo & Mojtahedi, at 120, 122 ("the monitor's main purpose has been to reassure the lenders of the impartiality of the process and to provide an objective assessment of the financial position of the debtor and management's efforts to restructure the business while a plan of arrangement is being developed… to ensure that the debtor stayed the course and did not use the CCAA for an improper purpose" *ibid* at 122).

[359] *Essar*, *supra* note 306 at para 109.

[360] *Callidus*, *supra* note 4 at para 52; CCAA, *supra* note 2, s 23(1)(i).

[361] Michelle Grant & Tevia R M Jeffries, "Having Jumped Off the Cliffs, When Liquidating Why Choose CCAA over Receivership (or vice versa)?", in J Sarra, ed, *Annual Review of Insolvency Law, 2013* (Toronto: Carswell, 2013) [Retrieved from WestlawNext Canada].

[362] See CCAA, *supra* note 2, at ss 23(1)(b)–(d).

[363] Mann & Narfason, *supra* note 328 at 132.

extending the courts' presence beyond the courtroom, the monitor has become more involved in mediation and negotiation, actively stepping into its capacity as an expert with an increasing focus on advising and leading the process.[364]

The careful crafting of the role over time has resulted in a wide range of duties and responsibilities. It has been remarked that "in the majority of cases, the monitor's role and influence extends beyond that of watchdog."[365] Indeed, the broad authority conferred on the court by section 11 of the CCAA has led parties to request "an expansion of monitors' powers to cover numerous types of duties in a variety of circumstances."[366] For instance, the information intermediary now also typically advises and makes recommendations based on that information, usually in the form of monitor's reports.[367] This advisory role consists of "providing business judgment, negotiation skills and financial advice."[368]

When a monitor is endowed with broader authority, it is referred to as a "super monitor,"[369] and its multifaceted role has been likened to trying to wear multiple hats, often at once.[370] This is especially common in mid-market cases, where "the monitor usually has to be active for two major reasons: (1) the debtor may not have the management horsepower to direct a restructuring, and (2)

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[364] *Ibid*.
[365] Stephanie Ben-Ishai & Stephen J Lubben, "Sales or Plans: A Comparative Account of the "New" Corporate Reorganization" (2011) 56 McGill LJ 591 at 603; See also Rotem, *supra* note 338 at 144–45; Jeffries, "Releases", *supra* note 329.
[366] Jeffries, "Releases", *ibid*.
[367] Kent et al, *supra* note 249 at 16.
[368] Sarra, "Ethics", *supra* note 323 at 178.
[369] See e.g., *Nortel Networks Corp (Re)*, 2015 ONSC 2987 (Commercial List) [*Nortel*] ("[i]n this case the Monitor is acting under what is now referred to as a "super monitor" order of October 3, 2012 in which the Monitor was authorized to exercise any powers which may be exercised by a board of directors" *ibid* at para 42).
[370] *Winalta, supra* note 10 at para 80; Sarra, "Ethics", *supra* note 323 at 174; Anna Lund, *Trustees at Work: Financial Pressures, Emotional Labour, and Canadian Bankruptcy Law* (Vancouver: UBC Press, 2019) 2 at 43 (Lund writes in the broader context of trustees, though what she says is directly applicable: "[t]rustees wear a number of different hats[:]… they serve many masters" *ibid*).

cost — the debtor cannot afford to pay financial advisors, legal counsel, *and* the monitor."[371] In the nearly five decades since the CCAA was revived,[372] the matters and parties with which it was enacted to contend have grown far more complex.[373] The monitor has increasingly been molded into an expanded version of its original watchdog role,[374] as the expert called in to make sense of and guide the parties through these growing intricacies.[375] It has an established—and respected[376]—status as independent expert, and its reports are not only viewed with credibility by the court but are often difficult to successfully challenge.[377]

The monitor is not only the court's appointed officer, it acts as a guide to the debtor, and safeguards the interests of creditors as a whole.[378] One author states that "[i]n taking on the larger role of overseeing the restructuring process, monitors become advisors to the debtor company, but are also protectors of the creditors and other stakeholders, and finally, must be the "eyes and ears"

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371 Peter P Farkas, "Defining (and refining) the role of the Monitor" (2010) 72 CBR (5th) 159 [Retrieved from WestlawNext Canada]; See also Sarra, "Ethics", *supra* note 323 at 184 ("[i]n small and mid-market workouts under the *CCAA*, the auditor is more likely to act as monitor because there are not sufficient assets remaining to pay for the costs of both" *ibid*).

372 Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Restructuring Law in Canada" (2014) 56:1 Can Bus LJ 73 at 74 [Nocilla, "History"] ("[r]esurrected in the 1980s, it [the CCAA] has gradually become Canada's statute of choice for resolving large, complex corporate insolvencies" *ibid*).

373 John I McLean & David P Bowra, "Conflicts and the Modern CCAA Monitor" in J. Sarra, *Annual Review of Insolvency Law 2011* (Toronto, Carswell, 2011) [Retrieved from WestlawNext Canada] ("[t]hey now often involve entities that operate in multiple jurisdictions, complex business structures and groups of companies or partnerships, and complex accounting and financial operations" *ibid*).

374 Kent & Rostom, *supra* note 326 ("[i]n most *CCAA* cases the monitor plays a far broader role than watchdog, and indeed the watchdog role is largely irrelevant… [i]n practice, the monitor plays an expanded role" *ibid*); McLean & Bowra, *supra* note 373 ("[t]he emergence and use by the courts of "model orders" that contain additional duties has further enlarged the mandate of the monitor" *ibid*); Denis Ferland, "The Evolving Role of the Monitor, Confidential Information and the Monitor's Cross-examination, a Québec Perspective", in J Sarra, ed, *Annual Review of Insolvency Law, 2011* (Toronto: Carswell, 2011) [Retrieved from WestlawNext Canada].

375 McLean & Bowra, *ibid*.

376 *Ibid*; Tevia R M Jeffries, "Unsecured Creditors' Committees in Canada and the United States: Does the Canadian Monitor Play a More Effective Role in Restructuring?", in J Sarra, ed, *Annual Review of Insolvency Law, 2012* (Toronto: Carswell, 2012) [Retrieved from WestlawNext Canada] [Jeffries "Unsecured"].

377 McLean & Bowra, *ibid*; Kent et al, *supra* note 249 at 16, Kent & Rostom, *supra* note 326; Jeffries, "Unsecured", *ibid*; McLaren, *supra* note 8 ch 4 at para 4.1070 (McLaren discusses this difficulty in the context of a monitor's decision-making power: "[w]here the monitor is bestowed the powers that allow it in anyway to render a decision, the burden of proof for refuting any of the monitors [sic] decisions rests on the party who substantially asserts the affirmative of the issue" McLaren, *ibid*).

378 Marc S Wasserman et al, "Protecting Canadian Creditors: The Evolving Role of the Monitor in Cross-Border Proceedings" (2010) 26 BFLR 167 at 170.

of the court, all at once."[379] It must carry out these responsibilities in accordance with impartiality,[380] a duty to act in the best interests of *all* parties,[381] a fiduciary duty,[382] and an overall duty of good faith.[383] The balancing required to juggle the monitor's multiple roles *and* adhere to the above obligations can lead to actual and perceived conflicts of interest.[384]

PART II – DIFFICULTIES WITH THE ROLE OF THE MONITOR

The monitor's role is burdened with the pressure to stay neutral, in the midst of multiple clashing interests, its growing responsibilities, and the persuasiveness of the parties. Describing the monitor's uneasy role within the CCAA scheme, Knowles writes:

> Applying for protection under the *Companies' Creditors Arrangement Act*… is similar to a sick, but not terminally ill, patient going to the hospital emergency room… The Monitor is instrumental in assessing the treatment options and their application. However, where a Monitor takes on conflicting roles in a CCAA proceeding, he or she may wind up acting as both healthcare professional and undertaker, which raises the question of whether a Monitor can, in fact, successfully carry out these roles in tandem.[385]

The most basic example of a seemingly inherent conflict in the monitor's role is that it is expected to "provide an independent assessment of the business and financial affairs of the debtor that can be relied upon by the court and by the creditors,"[386] while simultaneously acting as a guide to the debtor through the proceedings.[387] The danger here is of helping the debtor to navigate the

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[379] Ferland, *supra* note 374.
[380] See e.g. *Nelson*, *supra* note 315 at para 35 ("[i]t is critical that in this role a monitor be independent of the parties and be seen to be independent" *ibid*).
[381] See e.g. *Laidlaw Inc (Re)* (2002), 34 CBR (4th) 72 (Ont SCJ [Commercial List]) at paras 2–3 [*Laidlaw*].
[382] *Winalta*, *supra* note 10 at para 80 ("[a] monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders" *ibid* at para 67).
[383] CCAA, *supra* note 2, s 18.6; See also *Bhasin v Hrynew*, 2014 SCC 71 at paras 92–93 [*Bhasin*].
[384] Sarra, "Ethics", *supra* note 323 at 178.
[385] *Supra* note 325.
[386] Wood, "Bankruptcy", *supra* note 8 at 393.
[387] *Ibid*.

proceedings without becoming or being perceived as its representative.[388] This concern is explored below in further detail.

(i) The Debtor & Monitor Relationship

As noted earlier, even prior to 1997, the monitor was commonly the debtor's auditor. This practice was controversial because it is hard to contemplate a better example of perceived bias than a pre-existing relationship. The 1997 CCAA addition of section 11.7 recognized this conflict, stating that:

> **11.7**(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company
>
> (a) if the trustee is or, at any time during the two preceding years, was…
> (iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company.[389]

Curiously, the practice of courts is typically to accept the debtor's auditor as monitor appointee,[390] usually with the justification that "[i]n many cases, the monitor also acts as financial advisor to the debtor, and this tends to make the CCAA process cheaper and faster."[391]

Cost savings is often heralded as the primary rationale for this practice,[392] though potential pitfalls may be serious. For instance, the former auditor now monitor may be tasked with scrutinizing transactions that it participated in as advisor prior to the monitor appointment.[393]

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[388] *Ibid* ("[t]he monitor or trustee must attempt to guide the debtor through the process without becoming an advocate or mouthpiece for the debtor" *ibid*); *Winalta*, *supra* note 10 ("[b]ias, whether perceived or actual, undermines the public's faith in the system… a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest" *ibid* at para 82); Standing Senate Committee Report, *supra* note 229 at 185.
[389] *Supra* note 2.
[390] Farkas, *supra* note 371.
[391] JTF, *supra* note 235 at 52.
[392] Jeffries, "Unsecured", *supra* note 376; See also Sarra, "Ethics", *supra* note 323 ("[a]llowing auditors to act as monitors can arguably assist in reducing both premature and deferred liquidations by encouraging the debtor's directors and officers to file in a timely manner and determine whether there is a viable business plan" *ibid* at 185–86); See e.g. *Hickman Equipment (1985) Ltd (Re)* (2002), 214 Nfld & PEIR 126 (TD) at paras 8, 23, 49 [*Hickman*].
[393] Jeffries, "Unsecured", *ibid*.

Moreover, the timing of the initial order, under which the monitor is appointed,[394] can work against creditors.[395] Not only is it common that "most creditors are not in court at the time of the initial order," but "courts now expect [that] a "proposed" monitor's report be filed at the time of the initial order."[396] This means that the debtor's monitor appointee has already been working with the debtor,[397] which raises concern of possible bias. It should be noted that although the CCAA is traditionally a debtor-driven process, the rising trend of creditor-driven CCAAs suggests that the concern over monitors being too pro-debtor may be somewhat downplayed.[398] Creditor-driven CCAAs, however, raise their own concerns, wherein certain creditors and creditor groups—typically stronger, secured creditors—may themselves be unfairly favoured by the monitor.[399] Looking back before the immediate proceedings, "the depth and duration"[400] of the relationship may also strongly suggest a conflict that outweighs cost savings.[401] This potential difficulty is not exclusive to one party, as conflict may stem from a "relationship or prior engagement(s) or involvement with an insolvent company, its creditors, shareholders, board of directors or other stakeholders."[402]

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[394] CCAA, *supra* note 2, s 11.7(1).
[395] Farkas, *supra* note 371.
[396] *Ibid*.
[397] *Ibid.*,
[398] See generally Luc Morin & Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs", in J Sarra, ed, *Annual Review of Insolvency Law, 2019* (Toronto: Carswell, 2019) [Retrieved from WestlawNext Canada]; See also Vicki Tickle, "A Friend in Times of Need: Monitors in Conflict and How Amici Curiae Can Help Courts Protect the Integrity of CCAA Proceedings" 9:1 IIC Art [Retrieved from WestlawNext Canada].
[399] See Nocilla, "Asset Sales", *supra* note 94 at 80; Tickle, *ibid*; DaRe & Nocilla, *supra* note 338 at 241, citing Sarra, "Oscillating", *supra* note 250.
[400] Jane O Dietrich & Gregory Prince, "Alternative Approaches to the Appointment of Insolvency Officers" 6:6 IIC Art (WestlawNext Canada).
[401] See also Sarra, "Ethics", *supra* note 323 ("[t]he auditor as business advisor of the debtor should be prohibited from being monitor… [and] the auditor that has become too closely involved in the debtor management's decision making should be precluded from being monitor, as that involvement may impair its ability to provide an impartial opinion" *ibid* at 187).
[402] *Ibid*

At the same time, an auditor's familiarity with the debtor company is also considered one of the justifications for appointing it as the monitor.[403] There are a variety of synergies potentially gained from appointing a debtor's former auditor to the role of monitor. For example, "the auditor knows the corporation inside and out, has already established working relationships with management, and is cheaper to employ… [and] can also utilize his knowledge of the firm to formulate a restructuring."[404] Likewise, the monitor's expertise is crucial,[405] and when coupled with knowledge of and an existing relationship with the debtor, "it may be easier to overcome management's concerns about filing."[406] The expanded "super monitor" is also a consideration here, as "if it is appropriate for the monitor in substance to act as financial advisor as well as a watchdog then the concern about the auditor being too close to the debtor's management appears to be irrelevant."[407] Yet if the monitor is too close to the debtor's management, it may find its view on restructuring options narrowed. Moreover, the flexibility of the monitor's role "confuses the conflict analysis," because debtor's auditors have traditionally been considered unsuitable to act as receivers, a function which monitors may, in effect, fulfill in many cases.[408] Additionally, expanding the duties of monitors—i.e., into super monitors—would necessarily magnify the potential for actual and perceived conflicts.[409] Notwithstanding the foregoing pros and cons, it is generally accepted that so long as there is full and transparent disclosure of such past

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[403] Rotem, *supra* note 338 at 149; Wood, "Bankruptcy", *supra* note 8 at 389 ("[t]he auditor is generally the accounting professional who is most knowledgeable about the business affairs of the company and best able to assemble the financial information required in connection with the commencement of restructuring proceedings" *ibid*).
[404] Ben-Ishai & Lubben, *supra* note 365 at 603.
[405] Rotem, *supra* note 338 at 159 ("[n]otwithstanding the controversial selection of the firm's own auditor, appointing an accountant as Monitor will mean that the role is assumed by a professional with expertise in collecting and processing financial and economic data" *ibid*).
[406] Kent & Rostom, *supra* note 326; See e.g., *Royal Oak Mines Inc (Re)* (1999), 11 CBR (4th) 122 (Ont SCJ [Commercial List]) at 2.
[407] *Ibid*.
[408] *Ibid*; See generally Morin & Motjahedi, *supra* note 398; Grant & Jeffries, *supra* note 361.
[409] See e.g., DaRe & Nocilla, *supra* note 338 at 244, 249.

relationships,[410] and no "material objection from interested parties,"[411] the court will approve the auditor as monitor. As this decision occurs at the outset of proceedings, it does not necessarily reflect changing attitudes as proceedings continue, and perceived bias(es) that may or may not arise.[412]

(ii) The Monitor & the Sales Process

One of the more controversial practices that has emerged in the past few decades is the use of the CCAA to authorize sales of substantially all of the debtor's assets.[413] The monitor is at the center of these CCAA sales, as it is responsible for providing the court with a fairness and reasonableness opinion.[414] Beyond this statutory obligation, the monitor typically plays an active role in the negotiations leading to the sale,[415] and may have even proposed the sale.[416] On one hand, the monitor's involvement can benefit creditors because monitors "can use the threat of withholding their approval to negotiate with the debtor."[417] On the other hand, this can lead to private negotiations between debtor and monitor, which not only creates a perception of bias, but

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[410] JTF, *supra* note 235 at 52.
[411] Kent & Rostom, *supra* note 326.
[412] As Sarra writes: "[o]ne issue is whether the efficiencies generated by the dual role, in terms of more timely proceedings, reduction of information asymmetries and confidence of officers, are sufficient to overcome any perception of bias" Sarra, "Ethics", *supra* note 323 at 184; Dietrich and Prince voice a similar point: "[a] fundamental principle in Canada with respect to the appointment of a monitor and/or receiver is the balancing of efficiency and cost-saving with the desire and requirement to ensure an insolvency officer is free of conflict, can act independently and is not subject to undue influence from an insolvent company, its board or shareholders, creditors or other stakeholders" *supra* note 400.
[413] Kent & Rostom, *supra* note 326; Nocilla, "Asset Sales", *supra* note 94: ("the emphasis of most *CCAA* proceedings has shifted away from the objective of reorganizing the debtor as such toward the sale of the debtor's assets… typically planned before the debtor company has applied for *CCAA* protection… [and] an abridged process is carried out in which the debtor's assets are marketed and sold… [with] either no formal plan of arrangement or the plan simply provides for the distribution of the sale proceeds to the debtor's creditors" *ibid* at 373).
[414] CCAA, *supra* note 2, s 23(1)(i).
[415] Kent & Rostom, *supra* note 326.
[416] See e.g., *Consumer Packaging*, *supra* note 335 ("[t]he Monitor KPMG as an officer of the court has analyzed the fall out of a liquidation scenario which would be materially worse than the proposed OI deal which the Applicants, the Monitor and Deutsche Bank as financial advisor recommend as the only viable transaction available to the Applicants" *ibid* at para 2).
[417] Kent et al, *supra* note 249 at 17 (this is strong leverage to use given the requirement of the fairness opinion, and the high standing of monitor reports in court: "[t]he debtor knows that, as a practical matter, it will be difficult to obtain court approval for a major transaction without having the monitor's prior approval" *ibid*).

"has the odd result that one of the key negotiating parties has no direct economic stake in the outcome of the case."[418] Further, the monitor is principally an information intermediary, which means that it will be required to be "on the one hand, an architect of the plan and of the meeting process, and on the other hand… [present] the merits of the plan and of the meeting process to approve it."[419] In any event, the monitor's approval can all but ensure court approval of the sale. However, although the monitor's analysis carries great weight with the court, its value also depends heavily on how independent the analysis is.[420]

This is further compounded if a "dual-track process" is pursued, whereby a restructuring plan is formulated for a company under CCAA protection, while the debtor also solicits offers for its assets, all under the guidance of the monitor.[421] This might produce a "diametric conflict," given that the monitor would be attempting to keep the business operating while also seeking to sell off its assets.[422] On the other hand, in order to preserve going concern value pending a potential purchase of the debtor company, the monitor must ensure the business is operational.[423] Otherwise, liquidation of the assets may result in piecemeal sales for lesser value. In *Nelson*,[424] the court ordered that the monitor be replaced because the monitor's affiliate had served as a financial advisor to the debtor for two years prior to the CCAA proceedings.[425] The affiliate had advised in the structuring of the proposed sale. The court stated that the monitor had "been front row and

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[418] *Ibid*.
[419] McLean & Bowra, *supra* note 373.
[420] Ben-Ishai & Lubben, *supra* note 365 at 605 ("it is clear that the monitor plays a crucial role in the quick-sales process, as their approval can either "make or break" the transaction" *ibid*).
[421] Knowles, *supra* note 325.
[422] *Ibid* ("[i]n such circumstances, a Monitor, who is obliged to assist the company in its efforts to restructure, is also acting as a liquidating receiver… a diametric conflict could arise" *ibid*).
[423] In extreme cases, this has led to courts appointing the monitor to operate the business; See e.g., *843504 Alberta Ltd (Re)*, 2003 ABQB 1015 at para 4 (monitor appointed to run debtor's operations) [*Re 843505*]; *Syndicat national de l'amiante d'Asbestos inc v Jeffrey Mines Inc* (2003), 40 CBR (4th) 95 (QC CA) at para 39 (monitor ran the debtor's mining operation) [*Mine Jeffrey*].
[424] *Supra* note 315.
[425] *Ibid* at para 39.

centre in the very sales process… and has engaged in negotiations on behalf of [the debtor] Nelson."[426] In this case. the court was careful to say that no actual conflict arose.[427] The case is important, however, because it signals a high-bar for impartiality and the monitor's independence. Indeed, the court in *Winalta* highlighted the need to avoid any *perception* of—and of course *actual*—bias, in order to safeguard public faith in the insolvency system.[428] Nevertheless, the dual-track process, and accompanying two-fold monitor role, is subject to the contexts of each individual case. Although it appears an inherent conflict, if the goal of the CCAA is maximizing value for creditors (and other stakeholders), then this dual role might be necessary.[429] Alternatively, "if the monitor is highly involved in developing a plan of arrangement or a reorganization strategy, the monitor may be viewed as an advocate for the plan and the perception of the monitor's independence can be threatened."[430]

(iii) Multiple, Divergent Interests

One of the justifications for collective insolvency regimes like the CCAA is that they help to resolve a collective action problem.[431] Thomas Jackson succinctly defines the collective action problem in the insolvency context:

> Each creditor, unless assured of the other's cooperation, has an incentive to take advantage of individual collection remedies, and to do so before the other creditor acts. Unless each creditor individually attempts to "beat out" the other, that creditor will fare worse than the other. Yet this race not only creates costs for the individual creditors… it is also likely to lead to a premature termination of a debtor's business, because each creditor will consider only that creditor's own advantage from racing, instead of the disadvantages imposed on

[426] *Ibid*.
[427] *Ibid* at paras 31–32, 37.
[428] *Supra* note 7 at para 82.
[429] See e.g., Rotem, *supra* note 338 ("when considering that there should not exist any tendency to restructure, but rather the only goal ought to be maximizing the proceeds for claimholders, such a conflict does not seem to be a serious threat" *ibid* at 144, n 113).
[430] Jeffries, "Unsecured", *supra* note 376.
[431] See e.g., Baird, *supra* note 55 at 827; Sarra, "Creditor Rights", *supra* note 8 at 31.

> creditors collectively. Thus, each creditor must participate in collectively non-optimal "advantage-taking" simply to avoid being taken advantage of.[432]

The CCAA is not exempt from this problem, and, as previously mentioned, the appointment of the monitor is intended to provide part of the legislative scheme's solution to the collective action problem.[433] Yet arguably when the monitor is thrown into the mix, an altogether new obstacle arises.

Put simply, not only are debtors and creditors typically—though not always—at cross purposes, but creditors "are not a homogenous group."[434] How then is the monitor, with its accompanying baggage of duties and responsibilities, supposed to act in the best interests of *all* these parties?[435] Ideally, the monitor is a neutral expert, appointed by the court because of its "expertise in collecting and processing financial and economic data."[436] It wields this expertise in protecting the expression of creditor democracy, by assessing a plan that a majority has voted for, and presenting its reasonableness to the court.[437] This ideal may be muddied by the reality that the monitor cannot please all parties, and "on occasion, one or more stakeholders will disagree with the monitor's recommendation and will have complaints about the process, and perceive bias and other failings on the part of the monitor, even where there are none."[438] Given that perceived bias

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[432] *Supra* note 15 at 862 [footnotes omitted]; See also Mancur Olson Jr, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1965) at 1–3**.**

[433] Zucker et al, *supra* note 355 ("[m]ostly, this collective action problem is solved in *CCAA* proceedings by the mandatory appointment of the monitor as a court officer" *ibid*).

[434] McLean & Bowra, *supra* note 355; Tickle, *supra* note 398 ("CCAA proceedings by their very nature, typically involve numerous parties with competing interests, all of whom are, at best, disappointed to be unpaid and forced to wait for their share (if any) of limited funds… conflict between parties is a virtual certainty" Tickle, *ibid*).

[435] See e.g., Lund, *supra* note 370 ("trustees have a number of different roles, serving parties whose interests can conflict" *ibid* at 43); Sarra, "Creditor Rights", *supra* note 8 at 145.

[436] Rotem, *supra* note 338 at 159.

[437] See e.g., *Home Depot of Canada Inc v 93237055 Québec Inc*, 2020 QCCA 659 [*Aquadis*]; "[t]he Monitor is putting into effect the collective will of the creditors expressed through their unanimous vote approving the Plan… [and] [g]iving effect to creditor democracy reflected in the *CCAA* is a sound basis for a court to approve the Plan" *ibid* at para 81 [footnotes omitted].

[438] Tickle, *supra* note 398.

is just as deadly as actual bias in this context,[439] even the appearance of a monitor siding with or acting for one or more parties can be determinative.[440] Though cases where monitors were found to have acted in conflict are few,[441] the divergence of interests is nonetheless in constant tension with the monitor's numerous duties. One direction that courts have taken—as will be discussed directly below—is to hold that a monitor's neutrality is malleable.

(iv) Malleable Neutrality

In *Winalta*, a comprehensive judicial discussion of a monitor's duties, the Alberta Court of Queen's Bench said that bias—whether perceived or actual—is to be avoided through the monitor's exercise of its professional neutrality.[442] The Ontario Superior Court permitted space for straying from strict neutrality in its 2017 decision in *Urbancorp Cumberland 2 GP Inc, (Re)*,[443] stating that the monitor is a neutral party until or unless granted the kind of powers that necessitate advocating a particular position.[444] As will be seen in the below cases, the court opined that neutrality may only be subverted in pursuing facilitation of the restructuring.[445] The court in *Urbancorp* decided against allowing the monitor to pursue an action, because it did not find it to advance the restructuring purpose and served only to direct attention to a disagreement between creditor groups.[446] The court explicitly stressed that, while "[c]reditors are free to spend their money and face the consequences," the monitor "acts with the *imprimatur* the Court… [and] is far more constrained."[447]

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[439] *Nelson*, *supra* note 315 at para 37; *Winalta*, *supra* note 10 at para 82.
[440] Tickle, *supra* note 398.
[441] See e.g., *Nelson*, *supra* note 315; *Winalta*, *supra* note 10.
[442] *Winalta*, *ibid* at para 82.
[443] 2017 ONSC 7649 [*Urbancorp*].
[444] *Ibid* at para 18.
[445] *Ibid* at para 22.
[446] *Ibid* at para 21 ("the Monitor pits the current creditors against a group of creditors… [w]hy is this a fight for the Monitor rather than the creditors who stand to benefit from the claim" *ibid*).
[447] *Ibid* at para 26.

In 2017, the Ontario Court of Appeal in *Ernst & Young Inc v Essar Global Fund Limited*,[448] explained that a monitor is neutral and only takes positions "in support of a restructuring purpose."[449] The court observed that a CCAA trial judge's supervision of the monitor is enough to safeguard against biased or otherwise unfair conduct.[450] The court in *Essar* did not specifically address the lower court's statement that "[w]hile it is the case that normally a Monitor, as an officer of the court, is to be neutral in its role and not take sides in favour of one stakeholder against another, there are exceptions."[451] The lower court was referring specifically to section 23(1)(k),[452] which as previously noted,[453] grants courts the broad discretion to give the monitor additional powers. In *Essar*, the appellate court looked instead at section 23(1)(c),[454] which the court noted is likely to "frequently place a monitor at odds with the shareholders or other stakeholders."[455] Both courts seem to arrive at the same place, which coincides with *Urbancorp*: a monitor is neutral unless a court decides it may sidestep neutrality to help the restructuring along.

The Quebec Court of Appeal provides the most recent decision on monitor neutrality, in the context of a contest over whether the monitor in question could be given the power to pursue an action in the name of creditors.[456] In that case, as in *Essar*, the court defended a monitor's ability to take a position on the basis of section 23(1)(c).[457] However, the court went further than both the

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[448] *Essar*, *supra* note 306.
[449] *Ibid* at para 119.
[450] *Ibid* at para 123.
[451] *Ernst & Young Inc v Essar Global Fund Ltd et al*, 2017 ONSC 1366 (Commercial List). at para 34 [*Essar Global*].
[452] CCAA, *supra* note 2.
[453] For the parameters of s 23(1)(k), see the text accompanying note 344.
[454] CCAA, *supra* note 2 ("[t]he monitor shall… make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings" *ibid*, s 23(1)(c)).
[455]*Essar*, *supra* note 306 at para 117.
[456] *Aquadis*, *supra* note 437 at paras 21–22.
[457] *Ibid* at para 61.

lower and appellate court in the Ontario cases, stating that: "[a]s long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate *CCAA* purposes, it now appears inescapable that the neutrality it must maintain is attenuated."[458] Thus, *Aquadis* provides a firm summary of the common theme in these cases, that the court decides if and when the monitor may "drop its cloak of neutrality."[459] If neutrality is malleable, what does this say of the monitor's strongest duty, that of a fiduciary for all parties involved?

(v) Fiduciary Duty

At the heart of the role is its fiduciary duty. It is the most important duty, because it cements the understanding of the monitor as being 'one for all': the eyes and ears of the court.[460] Although crucial, "[a]n under-explored aspect of the conflicts issue is precisely to whom the fiduciary obligation of monitors is owed."[461] In an early case, prior to the 1997 codification of the role, the New Brunswick Court of Appeal maintained that the monitor owes a fiduciary duty to all parties.[462] In the 2002 case of *Re Hickman Equipment (1985) Ltd*,[463] the court considered the monitor's role as being similar to a receiver, and thus a receiver's fiduciary duty formed the standard for the monitor's own.[464] The Alberta Queen's Bench made the same comparison in *Re 843504*,[465] where it clarified that the court-appointed officer "owes a duty to treat all creditors reasonably and fairly," and, "[l]ike a court-appointed receiver or liquidator, its duties are those of a fiduciary."[466] This comparison is not without merit, because as mentioned previously, a court-appointed receiver—

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458 *Ibid* at para 73.
459 *Urbancorp*, *supra* note 443 at para 22.
460 Sarra, "Ethics" *supra* note 323 at 181 ("the need for the monitor to be accountable to the court and to all stakeholders and to be objective in performance of its obligations is key to the court's continued recognition of and deference to the monitor's opinion" *ibid*).
461 *Ibid* at 180.
462 *Siscoe*, *supra* note 336 at 9.
463 *Hickman*, *supra* note 392.
464 *Ibid* at paras 47–49.
465 *Re 843505*, *supra* note 423.
466 *Ibid* at para 19.

as opposed to a privately appointed receiver—is a court officer "and acts in a fiduciary capacity in relation to all parties who have an interest in the assets under receivership."[467] Yet the monitor functions as a much further extension of the court's supervisory capacity, and thus "serves a broader statutory objective."[468]

In 2002, the Ontario Superior Court in *Laidlaw* stated that the monitor "must objectively look out for and be concerned for the interests of all stakeholders… but looked at in a reasonable way… there must be an air of reality to the analysis."[469] The court in *Laidlaw* did not clarify what constitutes an air of reality, nor did it provide guidance for this suggested analysis. The Ontario Court of Appeal set out limits for the monitor's fiduciary duty in the 2006 case of *Ivaco Inc (Re)*.[470] In *Ivaco*, the court refused to recognize a fiduciary duty owed to pension beneficiaries, arguing that the monitor's powers, though expanded beyond those in section 11.7(3),[471] did not rise to the level of equating its duty to the fiduciary duty owed by the relevant companies.[472] The Ontario Court of Appeal in *Essar* cited *Ivaco* for the proposition that "a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach."[473]

In the 2011 seminal case on a monitor's fiduciary duty, *Winalta*¸ the Alberta Court of Queen's Bench did not consider limitations when laying out the essentials of the duty. The court

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[467] Wood, "Bankruptcy", *supra* note 8 at 507; See e.g., *Ostrander*, *supra* note 319 ("[as] an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest" *ibid* at para 6).
[468] *United Auto*, *supra* note 321 at para 22.
[469] *Laidlaw*, *supra* note 381 at paras 2–3.
[470] (2006), 83 OR (3d) 108 (CA) [*Ivaco*].
[471] CCAA, *supra* note 2; the section the court was discussing in *Ivaco* has since changed, such that the judgment should be read as referring to what is currently section 23(1).
[472] *Ivaco*, *supra* note 470 at paras 49–52 ("I do not think it can be fairly said that the Monitor "stands in the shoes of the Companies" … [a]s the Monitor was neither a plan administrator nor a successor employer, it can owe no fiduciary duty to the members of the four plans" *ibid* at paras 49, 52).
[473] *Essar*, *supra* note 306 at para 119, citing *Ivaco*, *ibid* at paras 49–53; See also *1231640 Ontario Inc (Re)*, 2007 ONCA 810 [*Re 1231640*] ("[a] monitor's powers are limited and a court-appointed monitor does not stand in the shoes of the company nor owe fiduciary duties to creditors" *ibid* at para 51).

stated that the monitor's fiduciary duty is owed to the stakeholders,[474] and is paramount to maintaining "the public's confidence in the insolvency system."[475] In that case, the monitor was accused of favouring one creditor over others, providing it with a report not disclosed to other creditors.[476] The court offered clarification about monitors that wear multiple hats, stating "there may be heightened sensitivity about the work of a CCAA monitor who has chosen to wear two hats… due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice."[477] The court's suggestion was that monitors should always operate with transparency, eliminating "[s]ecrecy [which] breeds suspicion."[478] The court in *Nelson* followed *Winalta*, stressing that "[i]t is critical that in this role a monitor be independent of the parties and be seen to be independent."[479]

As may be evident from the foregoing, there is some discrepancy with regards to the understanding of the monitor's fiduciary duty. Is a fiduciary duty owed to all parties, or only in respect of the parties with whom the monitor is engaging? Does the monitor always owe fiduciary duties to the stakeholders in a restructuring, or do the monitor's fiduciary duties only arise when the court grants powers to the monitor that by their nature attract fiduciary obligations? Given the immense responsibility that a fiduciary duty typically carries, it seems odd that some decisions ascribe it to monitors automatically, while other decisions only do so depending on the circumstances. Similarly, the evolution, or devolution, of the duty is strange, where pre-1997 cases recognized a duty to all parties and recent cases restrict its application. The Supreme Court of Canada has yet to clarify the monitor's fiduciary duty, so the latest pronouncement is the Ontario

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[474] *Winalta*, *supra* note 10 at para 67.
[475] *Ibid* at para 73.
[476] *Ibid* at para 72.
[477] *Ibid* at para 80.
[478] *Ibid* at para 81.
[479] *Nelson*, *supra* note 315 at para 35, citing *Winalta*, *ibid* at paras 67–68.

Court of Appeal's limited view of the duty in *Essar*. This issue begs clarification, for if the monitor's neutrality is malleable, can it be said that a monitor is truly independent? This question will be further explored in Chapter Three.

PART III – EVALUATING EXISTING CHECKS & BALANCES

While the above concerns are not without merit, "the overwhelming evidence from the case law is that monitors are highly ethical and skilled professionals; and there is no question that they have contributed significantly to the reputation of Canada's restructuring regime."[480] The simplest assurance that one need not worry over the monitor's impartiality is that it has no financial stake in whether there is a restructuring or liquidation, or any payment of claims.[481] While monitors are paid for their services, their fee is a recognized payment under the Act, and does not typically attract concerns of bias.[482] Notwithstanding this uncontroversial aspect of proceedings, monitors and their firms represent a business, one which looks to establish long-term relationships and a respectable client base.[483] There is therefore the possibility that underlying these appointments is not only the history between the parties, but also the "the prospect or hope of future engagements."[484]

Monitors must also be trustees and licensed professionals,[485] subject to a variety of ethical guidelines.[486] For instance, monitors must adhere to the Canadian Association of Insolvency and Restructuring Professionals (CAIRP) Rules of Professional Conduct.[487] The CAIRP rules

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480 DaRe & Nocilla, *supra* note 338 at 244.
481 Jeffries, "Unsecured", *supra* note 376.
482 *Ibid*; See e.g., CCAA, *supra* note 2, s 11.52(1)(a).
483 McLean & Bowra, *supra* note 373.
484 *Ibid*; See also Sarra, "Ethics", *supra* note 323 at 184.
485 See CCAA, *supra* note 2, s 11.7(1); See also *BIA*, *supra* note 241, s 2 "trustee".
486 Jeffries, "Unsecured", *supra* note 376.
487 "Rules of Professional Conduct and Interpretation", (August 2018) online: <https://cairp.ca/rules-prof-conduct.html>.

generally stipulate that insolvency professionals must remain objective, and are to dispel any influence or relationship which would tarnish that objectivity or give rise to a conflict of interest.[488] These rules are also presented as a minimum standard, meaning insolvency professionals are expected to go above and beyond these ethical guidelines in practice.[489] Aside from these professional obligations, the monitor is also subject to a variety of checks and balances within the CCAA regime, geared towards safeguarding independence.[490]

One of the provisions in the Act that functions to protect the integrity of CCAA proceedings is section 18.6, which came into force in 2019.[491] This is the duty of good faith, which applies to all 'interested persons'[492] in the proceedings, and is also an organizing principle at common law when entering into and performing contracts.[493] Good faith generally requires a party to be "honest, candid, forthright or reasonable" in their contractual performance.[494] When applied to the monitor, good faith promotes transparency, which is crucial for quelling any suspicions of bias/conflict.[495] Monitors are also subject to direct oversight by the Office of the Superintendent of Bankruptcy, which is responsible for investigation of any complaints of monitor misconduct.[496]

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488 *Ibid*.
489 *Ibid*.
490 Neil Narfason, "Evolving Role of the Monitor and the Question of Monitor Independence", in J. Sarra, *Annual Review of Insolvency Law 2006* (Toronto, Carswell, 2006) [Retrieved from WestlawNext Canada].
491 Jassmine Girgis, "A Generalized Duty of Good Faith in Insolvency Proceedings: Effective or Meaningless?" (2020-2021) 64 CBLJ 98 at 98–99 [Girgis, "Generalized Duty"], citing Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, RSC 2019, c 29, 42nd Parl., 2019, cl 152 (assented to June 21, 2019).
492 This term is not defined in the Act, although section 11.9(3) does define *economic interest* in the context of an order for disclosure of financial information.
493 CCAA, *supra* note 2, s 18.6; *Bhasin*, *supra* note 383 at paras 64–66, 92–93; See also *Potter v New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 at para 99.
494 *Bhasin*, *ibid* at para 66.
495 *Winalta*, *supra* note 10 at para 81.
496 See CCAA, *supra* note 2, ss 27–29(1).

Similarly, courts are given extensive powers of discretion over proceedings under section 11 of the CCAA.[497] While they typically limit themselves to a supervisory role,[498] courts have the ability to use orders so as to proactively police the monitor (and other parties).[499] These courts also tend to be highly specialized commercial lists,[500] with substantial expertise in CCAA matters. This affords CCAA judges a unique role in protecting the process.

Market forces also play a role in encouraging monitors to practice in an efficient and ethically professional manner.[501] Those insolvency professionals with a reputation for impartiality and effective problem-solving skills will naturally be chosen over their less-favoured colleagues.[502] Such monitors will balance a passive observer role with that of a more active adversarial role. The latter promotes "an adversarial environment in which information is brought to the forum" by multiple parties, because the monitor is constantly holding the debtor accountable for dealing with other parties to the process with transparency.[503]

This transparency can be further promoted, in certain cases, by the appointment of a Chief Restructuring Officer (CRO). This is usually done in the initial order,[504] which sets out that the CRO is "to steer the insolvent firm through the negotiation for a plan and the restructuring

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[497] See e.g., *Stelco Inc (Re)* (2005), 75 OR (3d) 5 (CA) at paras 38, 44 [*Re Stelco*].
[498] *Callidus*, *supra* note 4 at paras 47–49, citing *Century Services*, *supra* note 3 at paras 61–62, 65; Jackson & Sarra, *supra* note 352.
[499] McLaren, *supra* note 8 ("in determining the appropriate role and powers of a monitor… the court should ensure that the role and powers granted by way of court order do not place a monitor in a position either (i) as a advocate for the debtor or any other party or (ii) where its ability to act impartially is impaired" *ibid*, at ch 4 para 4.900).
[500] Jackson & Sarra, *supra* note 352 ("appellate courts have recognized the speed at which commercial courts must act to be of assistance in restructuring cases and have expressed a willingness to defer to the expertise of specialized divisions of the courts" *ibid*); See e.g., *Algoma Steel Inc v Union Gas Ltd* (2003), 63 OR (3d) 78 (CA)at para 16.
[501] Narfason, *supra* note 490.
[502] *Ibid* ("market forces work to ensure that the opportunities for a monitor with a tendency to favour a particular class of stakeholders will be greatly diminished. A monitor who is seen as a "homer" for an interested party will soon lose all credibility both with the courts and with lenders and others who are regular players in the insolvency arena" *ibid*).
[503] Rotem, *supra* note 338 at 160 ("an adversarial process is sometimes the best way to unveil the truth" *ibid*).
[504] Sarra, "Rescue", supra note 4 at 350.

process."[505] Depending on the circumstances, the CRO may assume some of the functions of the CEO or board of directors, otherwise it takes on enhanced senior management responsibilities.[506] The main advantage of the CRO is that it is typically a restructuring expert, and it brings a fresh perspective into proceedings.[507] Additionally, as a court-appointed officer, the CRO is subject to direct judicial supervision, as opposed to internal accountability measures typical between a debtor's board of directors and management.[508] However, many of the same issues already discussed which plague the monitor also affect the CRO, namely bias and an unclear fiduciary duty.[509] The CRO is also not required to be a licensed professional, nor is it subject to oversight by the Office of the Superintendent of Bankruptcy.[510] CRO fees can also be performance-driven, which can cause it to favour some stakeholders' interests to the exclusion of others, potentially creating a perception of bias.[511] All of this is to say, while a CRO may be appropriate and a great boon in some cases, it is not without its own imperfections, some of which may outweigh its positive effects.

PART IV - CONCLUSION

The monitor is a key component of the CCAA restructuring regime. Its role as agent of the court, combined with its expertise, make it an important leadership figure for all stakeholders, and

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[505] Sarra, "Creditor Rights", *supra* note 8 at 146; Sarra, "Rescue", *supra* note 4 at 350.
[506] Sarra, "Rescue", *ibid* at 350, 352.
[507] *Ibid* at 350 ("CRO tend to be "turnaround experts" who can take over control of the restructuring" *ibid*).
[508] *Ibid* at 353; Sarra, "Creditor Rights", *supra* note 8 at 147.
[509] Sarra, "Rescue", *supra* note 4 (Fiduciary Duty: "[i]f a CRO has taken over the oversight or management… arguably the CRO also acquires a statutory duty of care and should consider the interests of all stakeholders… another view is that the CRO's objective is to maximize enterprise value or the value of fixed capital claims while managing the turnaround of the company; that it is appointed as an officer of the company, although the appointment is approved by the court… the issue of fiduciary obligations of CRO [remain] an open question" *ibid* at 353; Bias: "[w]here most of the CRO's compensation is performance-incentive driven, if performance is typically measured by return to creditors, there is some risk that the CRO will fail to recognize or take into account the interests of all stakeholders. Where the CRO is selected by the interim financing lender, there may also be a risk of the CRO deferring to the interests of the interim financing lender to the detriment of other creditors' interests" *ibid* at 354).
[510] *Ibid* at 354.
[511] *Ibid* at 147; Sarra, "Rescue", *supra* note 4 at 353; See e.g., *Royal Bank v Cow Harbour Construction Ltd*, 2011 ABQB 96 (the court grapples with the issue of a completion fee for a CRO).

a guide for the debtor and the court. The monitor is involved at the initial order, in the planning and negotiating of the restructuring, and finally at the court approval stage. It steers the debtor through the complexities of proceedings, and ensures that stakeholders are adequately informed. However, these functions and responsibilities may spread the monitor thin, particularly as regards its independence and ethics.[512] The monitor's neutrality and fiduciary duty are not entirely clear. Likewise, while there is a code of ethics the monitor must follow, and a requirement that it proceed in good faith, the nature of the CCAA process still allows room for bias. A monitor caught up in a two-track process is but one example. Arguably, the ethical framework of an insolvency professional serving as monitor would be strengthened by a clearly defined legal duty encompassing CAIRP guidelines and best business practices. The underexplored source of the monitor's impartiality needs a closer examination and reformulation. Both goals are discussed in the next Chapter.

[512] Sarra, "Ethics", *supra* note 323 at 178 ("[t]hese multiple roles may be needed, yet the issue is whether they create a real or perceived conflict with the obligation of the monitor to monitor the debtor on behalf of all stakeholders" *ibid*).

CHAPTER THREE

Introduction

In common law systems, individuals who are vested with the power to act on behalf of others are obligated under law to act with the highest integrity and selflessness. Where this relationship requires extensive responsibilities,[513] those vested therewith are called fiduciaries, of which one of the most underexplored examples is the monitor under the CCAA.[514] The monitor owes a fiduciary duty to all parties involved in a CCAA case,[515] and yet its current role sometimes necessitates that it deviate from the strict requirement of neutrality.[516] This curious practice may have the ill effect that the monitor favours some parties over others, constituting a significant departure from the strict impartiality supposedly imposed by fiduciary obligations.

This Chapter proposes changes to the monitor's role, that are intended to maximize its utility while respecting its duties as a fiduciary. This necessarily requires consideration of fiduciary law first principles, as well as the question of whether the monitor can effectively perform the duties of a fiduciary. Accordingly, Part I of this Chapter examines the law of fiduciary duties in Canada. Next follows a brief synthesis of how a monitor's fiduciary duty is currently understood by Canadian courts and commentators. Then, in Part II, I will examine the fiduciary duties of the court-appointed receiver and Canadian directors and officers, focusing on their similarities in balancing the interests of various parties. A further comparison will be made by examining the

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[513] Mark Vincent Ellis, Keith G Fairbairn & Michael P J McKendry, *Professional Fiduciary Duties*, (Scarborough, Ont: Carswell, 1995) ch 3 at 3-6 ("where the agency calls into existence a wide breadth of responsibility on the part of the agent it is clear that the agent thereby acts under the guise of fiduciary fidelity" *ibid*); See also *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 33 (agent-principal relationship is typically regarded as requiring fiduciary obligations) [*Elder Advocates*].

[514] *Supra* note 2.

[515] *Siscoe*, *supra* note 336 at 9; See also *Winalta*, *supra* note 10 at para 67.

[516] See e.g., *Aquadis*, *supra* note 437 at para 73; *Essar*, *supra* note 306 at para 119; *Urbancorp*, *supra* note 443 at para 22.

Unsecured Creditors' Committee, itself a fiduciary in the American counterpart to the CCAA: Chapter 11.[517] Once these comparisons are made, I will present suggested solutions to monitor conflict of interest in Part III. I will argue in Part IV that the monitor owes a fiduciary duty to the CCAA process, beholden to the CCAA's multiple objectives. My proposal is for codification of this duty within the CCAA, such that the monitor would owe a duty to the process, abiding by the standard of fairness and the pursuit of CCAA objectives, in the best interests of the stakeholder collective. I will conclude in Part V with some comments about the need to ensure that the role of the monitor is properly reconfigured so as to effectively and proactively avoid conflicts of interest, while serving all parties to a CCAA proceeding impartially and fairly.

PART I – FIDUCIARY DOCTRINE

The definition of a fiduciary in Canada is imprecise.[518] In simple terms, "where one party has placed its 'trust and confidence' in another and the latter has accepted—expressly or by operation of law—to act in a manner consistent with the reposing of such 'trust and confidence,' a fiduciary relationship has been established."[519] While a fiduciary stands in a position of trust—sometimes referred to as a trustee—and the duty flows from a beneficiary, these terms merely reflect the roots of fiduciary law (i.e., in trust law), and do not necessitate the presence of a formal trust.[520] The fiduciary is held to the highest standards regarding its conduct with respect to the beneficiary. It owes a duty "of utmost good faith (*uberminae fides*), which itself imports a

[517] Code, *supra* note 112, USC title 11 §§ 101-1532.
[518] Leonard I Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada" (1996) 24:1 Man LJ 60; See e.g., *Hodgkinson v Simms*, [1994] 3 SCR 377 at 407 [*Hodgkinson*]; See also *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 [*Lac Minerals*].
[519] Ellis, Fairbairn & McKendry, s*upra* note 513 ch 1 at 1.
[520] *Ibid* ch 1 at 1–2, citing *Guerin v R*, [1984] 2 SCR 335 at 376 [*Guerin*]; See Editors of Encyclopaedia Britannica, "Trust" in *Encyclopedia Britannica*, online: <https://www.britannica.com/topic/trust-law> ("[t]rust, in Anglo-American law, a relationship between persons in which one has the power to manage property and the other has the privilege of receiving the benefits from that property" *ibid*).

requirement that the fiduciary act towards the beneficiary with a heightened sense of loyalty and fidelity."[521] The mechanics of a fiduciary duty are as follows:

> one should think of the fiduciary relationship as a transfer of powers from the beneficiary, *B*, to the fiduciary, *F*. The powers transferred by *B* to *F* originally belonged to the former and, in fact, still do. *B* has merely loaned the powers to *F* within the ambit of their fiduciary relationship; they do not become *F*'s own possession. *F* is duty-bound to use these powers in the same manner as *B* would, subject to any constraints *B* imposes on their use. *F* may not exceed these imposed limits or else [may] be liable for breach of duty; the purpose of *F*'s duty is to act within the parameters established by *B* through the latter's transfer of powers, [and] not exceed them.[522]

Before such requirements are imposed, a fiduciary obligation must be found, which is not a straightforward analysis.[523] In *Guerin v R*,[524] the Supreme Court of Canada explained that identifying a fiduciary relationship depends on "the nature of the relationship, not the specific category of actor involved."[525] The Court then went on to set out three useful considerations for determining the existence of a fiduciary relation in *Frame v Smith*,[526] which it adopted in *International Corona Resources Ltd v Lac Minerals Ltd*:[527]

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics: (1) The fiduciary has scope for the exercise of some discretion or power. (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests. (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[528]

The analysis begins with the facts of the particular relationship being examined in each case,[529] as opposed to rigidly applying pre-existing categories of fiduciary duty.[530] Such categories serve as

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[521] Ellis, Fairbairn & McKendry, *ibid* ch 1 at 2, citing *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592 at 607 [*CanAero*].
[522] Rotman, *supra* note 518 at 68.
[523] Anthony Duggan, "Fiduciary Obligations in the Supreme Court of Canada: A Retrospective" (2011) 50 Can Bus LJ 453 at 454 [Duggan, "Fiduciary"], citing *A (C) v Critchley* (1998), 60 BCLR (3d) 92 (CA) at para 75.
[524] *Supra* note 520.
[525] *Ibid* at 384 (the Court additionally noted that "[t]he categories of fiduciary, like those of negligence, should not be considered closed" *ibid*).
[526] [1987] 2 SCR 99, Wilson J, dissenting [*Frame*].
[527] *Lac Minerals*, *supra* note 518.
[528] *Frame*, *supra* note 526.
[529] *Lac Minerals*, *supra* note 518 ("the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship" *ibid*).
[530] *Guerin*, *supra* note 520 at 384; *Lac Minerals*, *ibid*.

guides but are not the only places where a fiduciary obligation may be found.[531] Two decades after *Lac Minerals*, the Court grappled with the still lingering difficulties surrounding the determination of a fiduciary duty in *Galambos v Perez*,[532] and *Alberta v Elder Advocates of Alberta Society*.[533]

Galambos dealt with whether vulnerability of the beneficiary —i.e., the third characteristic in the *Frame*/*Lac Minerals* analysis—is determinative of a fiduciary obligation. In that case, the Court stated that "to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly."[534] Instead, the proper analysis is to look at "the position of the parties that *results from* the relationship which gives rise to the fiduciary duty [rather] than with the respective positions of the parties *before* they enter into the relationship."[535] Moreover, the Court clarified the concept of existing categories of fiduciary relationships, which it referred to as *per se* fiduciary relationships. These "are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents."[536] Importantly, the Court noted that in some instances, such as in a solicitor-client relationship, "not every legal claim…will give rise to a claim for a breach of fiduciary duty."[537] The difficulty in such cases lies in discerning which responsibilities flow from the fiduciary relationship and which do not.[538]

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[531] *Guerin, ibid*; *Lac Minerals, ibid*.
[532] 2009 SCC 48 [*Galambos*].
[533] *Elder Advocates, supra* note 513.
[534] *Galambos, supra* note 532 at para 67; See also Rotman, *supra* note 518 at 67 ("[t]he fiduciary relationship creates vulnerability; vulnerability does not create the fiduciary relationship" *ibid*).
[535] *Ibid* at para 68, citing *Hodgkinson, supra* note 518 at 406.
[536] *Galambos, ibid* at para 36, citing *Lac Minerals, supra* note 518.
[537] *Galambos, ibid*.
[538] *Ibid* at para 37, citing *Lac Minerals, supra* note 518 ("[a] claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary…not all lawyers' duties towards their clients are fiduciary in nature" *Galambos, ibid*).

In order to have a fiduciary obligation, there must be "an undertaking of loyalty,"[539] and discretionary power to affect the beneficiary's interests.[540] The undertaking of loyalty concerns acting in the best interests of the beneficiary,[541] while the beneficiary's interests are defined as any "legal or vital practical interests."[542] Both these requirements are restatements of the *Frame*/*Lac Minerals* characteristics, i.e., scope for discretion of power by the fiduciary and the ability therewith to affect the beneficiary. The Supreme Court also noted that fiduciary obligations will only be found where the fiduciary is found to "have expressly or impliedly undertaken them."[543] Importantly, in determining whether there has been an implied undertaking, the Court says it will consider "professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty."[544] Like the undertaking, the discretionary power is also to be scrutinized if it involves the giving of advice, which "will not necessarily on its own support the existence of an ad hoc fiduciary duty; its absence, however, negates the existence of such a duty."[545]

In *Elder Advocates*, the Court reaffirmed its position on the insufficiency of vulnerability as a determinative factor of fiduciary obligations.[546] It further classified the *Frame*/*Lac Minerals* characteristics as "hallmarks,"[547] and restated that "the evidence must show that the alleged

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[539] *Galambos, ibid* at para 69, citing *Hodgkinson, supra* note 518 at 404–07; *Norberg v Wynrib*, [1992] 2 SCR 226 ("fiduciary relationships... are always dependent on the fiduciary's undertaking to act in the beneficiary's interests" *Norberg*, *ibid* at 273).
[540] *Galambos, ibid* at paras 70, 83 (note that this combines the first two characteristics listed in *Frame*/*Lac Minerals*); See also *Norberg*, *ibid* at 275 (such power is necessary for a fiduciary to carry out its role).
[541] *Galambos, ibid* at para 66; Ellis, Fairbairn & McKendry, *supra* note 513 ch 1 at 3, citing *Regal (Hastings) Ltd v Gulliver*, [1942] 1 All ER 378 (HL) at 381 [*Gulliver*] ("[t]he law requires the fiduciary to act in a manner consistent with the best interests of the beneficiary in all matters related to the undertaking of trust and confidence" Ellis, Fairbairn & McKendry, *ibid*).
[542] *Galambos*, *ibid* at para 70.
[543] *Ibid* at paras 71, 77.
[544] *Galambos*, *supra* note 532 at para 79.
[545] *Ibid* at para 84, citing *Hodgkinson, supra* note 518, *Lac Minerals, supra* note 518.
[546] *Elder Advocates*, *supra* note 513 at para 28.
[547] *Ibid* at para 29 ("[a]s useful as the three "hallmarks" referred to in *Frame* are in explaining the source fiduciary duties, they are not a complete code for identifying fiduciary duties" *ibid*).

fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary."[548] Expounding on the meaning of a beneficiary's interests, the Court stated that these may range from property interests to other legally recognized interests.[549] For instances falling outside of the recognized categories of fiduciary relations, the Court provided the following framework:

> for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*; (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[550]

The above is a synthesis of the *Frame*/*Lac Minerals* characteristics and their restatement in *Galambos*. "Vulnerability" points to the discretionary power and its potential to impact the beneficiary. The essential element of an undertaking—mentioned in *Norberg*, *Hodgkinson*, and *Galambos*[551]—is defined alongside clarification as to whom it is given, and the need for it to affect such parties' interests. Finally, the Court is careful to underscore vulnerability as a *result*, stating that the effect of the fiduciary's actions must have the possibility of affecting the beneficiary negatively. This is the reason typically cited for invoking equity to protect the beneficiary.[552]

Fiduciary obligations thus function to protect beneficiaries by imposing a high standard on fiduciaries as regards their responsibilities.[553] Recall that a fiduciary must act with the

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[548] *Ibid* at para 30, citing *Galambos*, *supra* note 532 at paras 66, 71, 77–78, *Hodgkinson*, *supra* note 518 at 409–10.

[549] *Ibid* at para 35 (the Court also noted that "[i]n the traditional categories of fiduciary relationship, the nature of the relationship itself defines the interest at stake… [whereas] a party seeking to establish an *ad hoc* duty must be able to point to an identifiable legal or vital practical interest that is at stake" *ibid*).

[550] *Ibid* at para 36.

[551] See *supra* note 539 and accompanying text.

[552] See e.g., Ellis, Fairbairn & McKendry, *supra* note 513 ch 1 at 3; *Lac Minerals*, *supra* note 518; Rotman, *supra* note 518 at 91 ("[i]t is precisely because fiduciary relationships create vulnerability in beneficiaries, rather than vice-versa, that fiduciary doctrine seeks to protect beneficiaries through the imposition of its harsh sanctions" *ibid*).

[553] Ellis, Fairbairn & McKendry, *ibid* ch 1 at 5 ("[i]t is clear that the law imposes an extremely high degree of fidelity" *ibid*).

beneficiary's best interests in mind, and any departure from this is a breach of the duty.[554] Under this reasoning, fiduciaries must not only avoid *actual* but *possible* conflicts of interest.[555] This can be especially complicated when it comes to certain professions, particularly where fiduciaries may act without a full understanding of their legal obligations to beneficiaries.[556]

PART II – COMPARING DIFFERENT TYPES OF FIDUCIARIES

Professionals engaged in providing financial advice, (e.g. accountants and investment counselors),[557] are examples of occupations, that courts tend to consider as involving *ad hoc* fiduciary relationships.[558] This is a result of the advisory nature of the relationship between the professional and their clients/beneficiaries, wherein they use their special knowledge/skills to steer their clients towards a particular course of action.[559] The consequences of misdirection via faulty or misguided advice or actions by such fiduciaries therefore directly impacts the beneficiaries' financial interests. The Supreme Court of Canada in *Hodgkinson* stressed the importance of a factual analysis in determining when these types of occupations trigger fiduciary obligations: "where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all

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[554] *Ibid* ch 1 at 3, citing *Gulliver*, *supra* note 541 at 381 ("[i]t is the fact of a departure from adherence to the beneficiary's best interests, rather than an evaluation of the fiduciary's motive in the departure, that constitutes a breach of fiduciary duty" Ellis, Fairbairn & McKendry, *ibid*).
[555] Ellis, Fairbairn & McKendry, *ibid* ch 1 at 4 ("[e]ntering into a *potential* conflict of interest is a breach whether or not the conflict is operative; once such a conflict becomes operative to jeopardize the beneficiary or his property, the fiduciary breach would then give rise to the remedies available in law… to wait until damage or prejudice actually occurs is to prejudice the beneficiary's right to utmost loyalty and avoidance of conflict" *ibid*).
[556] Ellis, Fairbairn & McKendry, *supra* note 513 ch 1 at 19 ("[e]ven more problematic is the degree to which those who unquestionably act in a fiduciary capacity—corporate officers, directors and employees; joint venturers and partners; agents; trustees; lawyers, medical practitioners and accountants; elected officials; real estate and insurance brokers and agents; family members; and priests; to name but a few—are rarely even aware that they owe an extremely high degree of utmost good faith, loyalty and fidelity to those who have placed a fiduciary trust in them" *ibid*).
[557] *Hodgkinson*, *supra* note 518 ("whether the advisers be accountants, stockbrokers, bankers, or investment counsellors" *ibid*).
[558] *Ibid*.
[559] Ellis, Fairbairn & McKendry, *supra* note 513 ch 8 at 18.4–18.5, citing *Elderkin v Merril Lynch Royal Securities Ltd* (1977), 80 DLR (3d) 313 (NSCA), *Burke v Cory* (1959), 19 DLR (2d) 252 (Ont CA) at 258–59, *Burns v Kelly Peters & Associates Ltd* (1987), 16 BCLR (2d) 1 (CA).

events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor."[560]

(i) Fiduciary Duty of Receivers

Another example of such an occupation, within the context of insolvency law, is that of the receiver.[561] Privately appointed receivers act as agents of their appointees, (most often a secured creditor), to whom they owe a fiduciary duty,[562] though they "may be regarded as acting in an independent capacity in much the same way as a court-appointed receiver when enforcing the security interest."[563] As opposed to a privately appointed receiver,[564] "[a] court-appointed receiver is an officer of the court and acts in a fiduciary capacity in relation to all parties who have an interest in the assets under receivership."[565] The court-appointed receiver, like the CCAA monitor, may also encounter challenges in carrying out its duty to the parties, whose interests typically conflict.[566] Interestingly, the receiver's fiduciary obligation and impartiality are malleable,[567] such that "despite a fiduciary duty owed universally to all parties to a receivership, the court-appointed receiver will not be hampered in the carrying out of his responsibilities under his appointment."[568]

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[560] *Hodgkinson*, *supra* note 518.
[561] Ellis, Fairbairn & McKendry, *supra* note 513 ch 11 at 1 ("[a]lmost without exception, the law will find these individuals to owe a fiduciary duty" *ibid*).
[562] Wood, "Bankruptcy", *supra* note 8 at 507 ("[t]he privately appointed receiver's duties were owed primarily to the secured creditor who appointed the receiver, although the receiver also owed a more limited duty to the debtor and to persons holding lower-ranking interests in the assets to act in good faith and to obtain the best price reasonably obtainable" *ibid*, citing *Ostrander*, *supra* note 319, *Downsview Nominees Ltd v First City Corp Ltd*, [1993] AC 295.
[563] Wood, "Bankruptcy", *supra* note 8 at 498 – 99, citing *Peat Marwick Ltd v Consumers' Gas Co* (1980), 29 OR (2d) 336 (CA)..
[564] Court-appointed receivers have a broader fiduciary obligation than their privately-appointed counterparts; See e.g., *ibid* ch 11 at 2; Wood, "Bankruptcy", *supra* note 8 at 494–95, 507.
[565] Wood, *ibid* at 507, citing *Re Newdigate*, *supra* note 319, *Ostrander*, *supra* note 319; See also Ellis, Fairbairn & McKendry, *supra* note 513 ch 11 at 2.1, citing *Parsons v Sovereign Bank of Canada*, [1913] AC 160 (PC), *Delzotto v International Chemalloy Corp* (1977), 14 OR (2d) 72 (HC).
[566] Ellis, Fairbairn & McKendry, *supra* note 513 ch 11 at 1 ("[a]s might be expected in the throes of a receivership or a bankruptcy, respective interests of the interested parties conflict in the extreme" *ibid*).
[567] This is because the receiver exercises control over the debtor's assets, displacing directors' control; See BIA, *supra* note 241, s 246(1); See also Wood, "Bankruptcy", *supra* note 8 at 500, 508.
[568] Ellis, Fairbairn & McKendry, *supra* note 513 ch 11 at 2.1–2.2, citing *R v World Masters Sport Foundation*, [1986] 12 CPR (3d) 205 (Ont SC) at 208–09.

In this respect, the receiver and the monitor share common ground,[569] yet it is unclear exactly what this means in the face of conflicting parties, obligations, and what is supposed to be a strict standard in fiduciary doctrine. A different approach has been taken by courts in interpreting the fiduciary duties of directors and officers when faced with diverging interests.

(ii) Fiduciary Duty of Directors & Officers

Directors and officers of Canadian companies are under fiduciary obligations, to be carried out "with a view to the best interests of the corporation."[570] Much like the receiver and monitor, the duty is not owed to any party in particular, but rather to the collective that is the "corporation".[571] As Neumueller puts it, "[t]he objective of the fiduciary duty is to deter directors [and officers] from putting their own interests before those of the corporation… [they are] obliged by their fiduciary duty to act in good faith."[572] Referring to the *Canada Business Corporations Act*, (CBCA), the Supreme Court of Canada summarized the essential components of the duty in *Peoples Department Stores Inc (Trustee of) v Wise*:[573]

> The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally.[574]

The various groups and individuals that make up a corporation do not always share similar interests, particularly when it faces insolvency. In this respect, directors and officers are expected

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[569] See *Aquadis, supra* note 437 at para 73; *Essar, supra* note 306 at para 117; *Urbancorp, supra* note 443 at para 22.
[570] See e.g., *Canada Business Corporations Act*, RSC, 1985 c C-44, s 122(1)(a) [CBCA]; *Business Corporations Act*, RSO 1990, c B.16, s 134(1)(a) [OBCA].
[571] Carina Neumueller. "A Canadian Solution: Recent Developments in the Law of Directors' Duties in the Context of Financially Distressed Corporations" (2005) 14 Dal J Leg Stud 90 at 92.
[572] *Ibid*.
[573] 2004 SCC 68 [*Peoples*].
[574] *Ibid* at para 35 (note the various elements of fiduciary doctrine mentioned by the Court, i.e., honesty, good faith, avoiding conflict, selflessness, and loyalty).

to always maintain their duty to the corporation.[575] The Supreme Court of Canada has specifically noted that when the interests of the stakeholders making up the corporation clash, "[w]here the conflict involves the interests of the corporation, it falls to the directors [and officers] of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen."[576] So long as directors and officers have treated stakeholders fairly, acted in good faith, and considered all relevant factors, they have upheld their fiduciary obligation to the corporation.[577] This analysis provides an interesting parallel to the monitor's fiduciary duty, given the similarities in balancing multiple conflicting interests. If directors and officers are acting for a broader purpose, vis-à-vis the best interests of the corporation over those of individual stakeholders, perhaps the monitor's fiduciary duty can be better understood by framing it in similar terms.

The problem with this is that monitors owe their fiduciary duty to *all stakeholders*, and not to the best interests of—albeit a legal "person"[578]—an inanimate entity. The group of creditors and stakeholders that hold claims in an insolvency situation are often referred to as the collective. Perhaps the monitor's duty to this collective is not so different from the fiduciary duty of directors and officers. Can a monitor's duty then be more clearly defined if it is said to be in the interests of a collective of stakeholders? Does this allow it to consider but not necessarily act in the best interests of individual stakeholders? I will return to this comparison in my reform proposal, as it

[575] *Ibid* at paras 43, 46 ("[t]he various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty… [t]he interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" *ibid* at para 43).
[576] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69. at para 81 [*1976 Debentureholders*].
[577] *Ibid* at para 82 ("[d]irectors [and officers] may find themselves in a situation where it is impossible to please all stakeholders" *ibid* at para 83).
[578] CBCA, *supra* note 570, s 15(1); OBCA, *supra* note 570, s 15.

may provide an effective alternative for perceiving the duty despite the differences between the two.

(iii) Fiduciary Duty of the Monitor

Like the court-appointed receiver, the monitor's impartiality is not definite. Rather, it may "drop its cloak of neutrality,"[579] if that is required in order to pursue CCAA objectives.[580] While the monitor was considered a fiduciary even before the role was codified in the 1997 CCAA amendments,[581] there are some cases that question whether this is an automatic attribute.[582] In the seminal case on a monitor's fiduciary duty, *Winalta*,[583] the Alberta Court of Queen's Bench stated that monitors owe a fiduciary duty to all stakeholders,[584] which duty acts as a bulwark for public confidence in the Canadian insolvency system.[585] This follows the line of cases that consider the monitor a fiduciary from the outset.[586] Yet the Ontario Court of Appeal in *Ivaco* and then in *Essar* held that a monitor only becomes a fiduciary if it is assigned a particular responsibility that requires the imposition of fiduciary obligations.[587] This echoes the analysis in *Lac Minerals*[588] and *Galambos*,[589] whereby not *all* of a—in that case a *per se*—fiduciary's responsibilities to beneficiaries are fiduciary in nature,[590] and claims for breach of fiduciary duty must be founded on those responsibilities which impose fiduciary obligations.[591] In other words, fiduciaries carry

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[579] *Urbancorp*, *supra* note 443 at para 22.
[580] *Aquadis*, *supra* note 437 at para 73; *Essar*, *supra* note 306 at para 117.
[581] See 1997 Act, *supra* note 322; See e.g., *Siscoe, supra* note 336 at 9.
[582] See *Essar*, *supra* note 306; *Ivaco, supra* note 470.
[583] *Supra* note 10.
[584] *Ibid* at para 67.
[585] *Ibid* at para 73.
[586] See e.g., *Nelson*, *supra* note 315 at para 35; *Winalta*, *supra* note 10 at para 67; *Re 843504*, *supra* note 423 at para 19 [*Re 843504*]; *Siscoe*, *supra* note 336 at 9.
[587] *Essar, supra* note 306 at para 119, citing *Ivaco*, *supra* note 470at paras 49–53; *Re 1231640, supra* note 473 at para 51.
[588] *Supra* note 518.
[589] *Supra* note 532 at paras 36–37, citing *Lac Minerals*, *ibid*.
[590] *Galambos*, *ibid* at para 36.
[591] *Ibid* at para 37, citing *Lac Minerals*, *supra* note 518 at 647.

out duties that attract fiduciary standards of behaviour, along with other, more banal responsibilities. Yet this distinction only applies if it is first determined that a monitor is a fiduciary. The above cases suggest that this is not necessarily always so.

One important question to ask is whether court-appointed officers are inherent or *per se* fiduciaries. Previously, we observed that courts have consistently stated that court-appointed receivers "must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking."[592] Indeed, it seems to be a given that court-appointed receivers bear fiduciary obligations in each case.[593] While receivers carry out slightly different functions,[594] and derive their powers mainly from a court order,[595] their similarities with and judicial comparisons to the monitor make it difficult to understand why receivers are presumed fiduciaries and monitors' fiduciary status appears questionable. After all, there is an ongoing debate over whether the CCAA monitor is essentially acting as a receiver in the increasing use of the CCAA to effect sales.[596] There is another comparable fiduciary often confronted in the CCAA process—specifically in cross-border proceedings—and that is Chapter 11's Unsecured Creditors' Committee (UCC).[597]

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[592] *Panamericana de Bienesy Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181.
[593] *Canadian Imperial Bank of Commerce v Isobord Enterprises Inc*, 2002 MBCA 103 ("[i]t is trite to say that the receiver is an officer of the court and as a fiduciary acts for all parties"" *ibid* at para 17, citing *Fotti v 777 Management Inc*, [1981] 5 WWR 48 (Man QB) at 54).
[594] See Wood, "Bankruptcy", *supra* note 8 at 497.
[595] *Ibid* (monitors powers stem from both statute and court orders; see CCAA, *supra* note 2 ss 23(1)(a)–(k)); See BIA, *supra* note 241, ss 46(2), 47(2), 47.1(2) (powers of receivers).
[596] See e.g. *Urbancorp*, *supra* note 443 at para 22; See also Alfonso Nocilla, "Reorganizations, Sales, and the Changing Face of Restructuring in Canada: Quantitative Outcomes of 2012 and 2013 CCAA Proceedings" (2019) 42:2 Dal LJ 371 at 376 [Nocilla, "Reorganizations"]; Morin & Mojtahedi, *supra* note 398; Grant & Jeffries, *supra* note 361.
[597] Rachelle F Moncur & Rowena White, "The Hazards of Dual-Filed Reorganization Proceedings in Canada and the United States" (2011) 7:5 Pratt's J of Bankruptcy L 398 at 402.

(iv) Fiduciary Duty of the UCC

In Chapter 11, there is a requirement that an UCC be appointed in most cases.[598] The UCC owes a fiduciary duty, limited to its constituent members,[599] and not to the debtor or overall bankruptcy estate.[600] The membership of the UCC is determined by the U.S. Bankruptcy Trustee,[601] typically consists of the seven largest claims against the debtor,[602] and may shift because creditors are able to bow out at any time.[603] The UCC is given authority "both to promote and to protect the interests of its unsecured creditor constituency."[604] With this authority, the UCC is imbued with fiduciary obligations to its members, "defined by undivided loyalty and impartial service to all creditors represented… [and] bound not only to serving its co-creditors, but also to safeguarding the bankruptcy process."[605] The members of an UCC each owe fiduciary obligations to the committee's constituents.[606] These obligations are typically only owed to other members of a creditor's class.[607] Much like the monitor's duty, even the *appearance* of a breach of fiduciary

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[598] Code, *supra* note 112, s 1102(a)(1); See also Moncur & White, *ibid* ("[w]hile not mandatory in every case, a UCC is generally appointed in large Chapter 11 proceedings to act as an advocate of the debtor's prepetition unsecured creditors" Moncur & White, *ibid* at 401).
[599] *Re Johns-Manville Corp*, 23 BR 919 at 925 (Bankr SDNY, 1983) [*Johns-Manville*].
[600] See e.g., *Re SPM Manufacturing Corp*, 984 F 2d 1305 (USCA 1st Cir 1993); *Re Bohack Corp*, 607 F (2d) 258 (2nd Cir, 1979) [*Re Bohack*].
[601] Code, *supra* note 112, s 1102(a)(1).
[602] *Ibid*, s 1102(b)(1); See also Kenneth N Klee & K John Shaffer, "Creditors' Committees under Chapter 11 of the Bankruptcy Code" (1993) 44:4 SCL Rev 995 at 1006–09 ("the courts and U.S. Trustees routinely adjust the size of creditors' committees" *ibid* at 1006).
[603] Code, *ibid*, ss 1102(a)(2), 1102(a)(4). See also Michelle M Harner & Jamie Marincic, "Committee Capture - An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations" (2011) 64:3 Vand L Rev 747 at 754 ("turnover of committee membership can cause instability and potentially expose the committee to further manipulation by other creditors" *ibid*); See also Jason Harris, "Enhancing the Role of Creditors' Committees in Corporate Rescue Laws", in J Sarra, ed, *Annual Review of Insolvency Law, 2011* (Toronto: Carswell, 2011) [Retrieved from WestlawNext Canada].
[604] Klee & Shaffer, *supra* note 602 at 1000; Code, *supra* note 112, s 1103(c).
[605] Mark D Gensburg, "Rogue Committees Or Rogue Judges: The Limits of a Bankruptcy Judge's Authority to Disband Chapter 11 Committees" (2019) 35:2 Emory Bankr Dev J 601 at 609, citing *In re Fas Mart Convenience Stores, Inc*, 265 BR 427 at 432 (Bankr ED Va 2001) [*Fas Mart*]; *Westmoreland Human Opportunities, Inc v Walsh*, 327 BR 561 at 573 (WD Pa 2005).
[606] Klee & Shaffer, *supra* note 602 at 1053, citing *In re Map Int'l, Inc*, 105 BR 5 at 6 (Bankr ED Pa 1989), *In re National Equip & Mold Corp*, 33 BR 574 (Bankr ND Ohio 1983).
[607] Klee & Shaffer, *ibid* at 1054 (see *ibid*, at n 237 for cases); See also *Re Adelphia Communications Corp*, 544 F (3d) 420 (2nd Cir 2008).

duty constitutes a breach,[608] requiring the court to remove the breaching party from the committee.[609] This does not apply to the inherent conflict most stakeholders have with each other in the event of an insolvency.[610] Also like the monitor, the UCC has to balance conflicting interests, as unsecured creditors can and do often hold divergent positions.[611] Unlike the monitor and court-appointed receiver, the UCC is not an officer of the court,[612] but the UCC's representative role, vis-à-vis its diverse creditor constituency, attracts the high standards imposed by fiduciary law.[613]

The UCC is intended to act as a watchdog for its members,[614] investigating the debtor,[615] and providing a counterbalance to the debtor and secured creditors.[616] This role often requires it to, like the monitor in the CCAA process, provide oversight of the debtor, keeping it in check.[617] To this end, the UCC actively advocates for its members' best interests,[618] unconstrained by the impartiality that a monitor is expected to maintain. It can also deal with the debtor in a non-adversarial way, negotiating as "an ally for the debtor in its negotiations with secured creditors and potential postpetition lenders or purchasers."[619] The UCC's role thus helps to protect the interests of unsecured creditors, through the traditional adversarial role of a party to adjudication.

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[608] Regarding the appearance of bias in the monitor's role, see especially *Nelson*, *supra* note 315 at para 37, citing *Winalta*, *supra* note 10 at para 82.

[609] Gensburg, *supra* note 605 at 615, citing *Fas Mart*, *supra* note 605, *In re Venturelink Holdings, Inc*, 299 BR 420 at 423 (Bankr ND Tex 2003).

[610] Klee & Shaffer, *supra* note 602 at 1012–13 ("[a]rguably, in many cases every unsecured creditor has a potential conflict of interest with the debtor and other persons asserting claims… such a potential conflict cannot be sufficient to bar a creditor from membership on an official creditors' committee, or there would be no such committees in many cases" *ibid*).

[611] Harris, *supra* note 603, citing *Re Bohack*, *supra* note 600 at 262.

[612] Wasserman et al, *supra* note 378 at 177.

[613] Jeffries, "Unsecured", *supra* note 376; *Fas Mart*, *supra* note 605 at 432; *Johns-Manville*, *supra* note 599 at 925.

[614] Harner & Marincic, *supra* note 603 at 761–62, citing *In re AKF Foods, Inc*, 36 BR 288 at 289–90 (Bankr EDNY 1984).

[615] Code, *supra* note 112, s 1103(c)(2); Harris, *supra* note 603, citing *Re Wilson Foods Corp*, 31 BR 272 (Bankr WD Okla 1983).

[616] Wasserman et al, *supra* note 378 at 174.

[617] Harris, *supra* note 603, citing *Re Penn-Dixie Industries, Inc*, 9 BR 941 at 944 (Bankr SDNY 1981), *Re Advisory Committee of Major Funding Corp*, 109 F (3d) 219 (USCA 5th Cir 1997).

[618] Wasserman et al, *supra* note 378 at 172–73, citing Marta G Andrews, "The Chapter 11 Creditors Committee: Statutory Watchdog?" (1985) 2 Bank Dev J 247 at 269–70.

[619] Harner & Marincic, *supra* note 603 at 765.

While it must, like the monitor, balance competing duties,[620] the fact that it advocates for and holds allegiance to a particular 'team' allows the UCC to better define its intended role.[621] Nevertheless, the UCC model is not without its imperfections.

The multiple and divergent unsecured creditor interests that are represented by an UCC typically work within "a democratic process of discussion, voting, and compromise… [which] is significantly susceptible to disagreement and delay."[622] Whether because not all members agree on a particular action, or by virtue of changes in membership, the UCC is vulnerable to internal dissent and delay.[623] Further, given its defined interests, (i.e. to a particular group of creditors), the UCC model is vulnerable to self-interested use, which "can skew the court's and outside parties' perspectives."[624] These negatives can be further compounded by virtue of their cost, vis-à-vis the professional fees such committees incur.[625] This can be especially harmful to secured creditors "because, often, committee professionals are paid out of the cash collateral of a secured creditor."[626] Given the trickle down effects of claims, harm to such creditors typically impacts all creditors.[627] Finally, conflicts of interest can still occur, and "[w]hen a committee breaches its fiduciary duties, it creates an opportunity for the financial abuse of the debtor-in-possession and negatively impacts the return to creditors."[628]

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[620] Wasserman et al, *supra* note 378 at 171–72, 176, citing *Johns-Manville*, *supra* note 599 at 925.
[621] The UCC's mandate is to vie for the *best outcome for unsecured creditors*, which goal is narrower and easier to define/defend than vying for the *best interests of all involved parties* (i.e., the monitor's duty).
[622] Wasserman et al, *supra* note 378 at 177; See also Klee & Shaffer, *supra* note 602 at 1058.
[623] *Ibid*; Harner & Marincic, *supra* note 603 at 763 ("[t]hese creditors may hold interests, however, that are adverse to the debtor or other members of the committee" *ibid*).
[624] Harner & Marincic, *ibid* at 766.
[625] Gensburg, *supra* note 605 at 612–13.
[626] *Ibid* at 616, citing *In re Las Torres Dev, LLC*, 413 BR 687 at 699 (Bankr SD Tex 2009).
[627] *Ibid* at 617.
[628] *Ibid* at 602.

In light of the above synthesis of UCCs, it seems that, in some respects, their defined loyalties may afford them a more tenable role as fiduciaries. However, in many ways, they may also offer a more focused view of the conflicts of interest faced by insolvency fiduciaries generally.

(v) Conclusions Regarding Fiduciary Duties

The above sections considered the fiduciary duties of different types of professionals, such as receivers, directors and officers, the monitor, and finally UCCs. Several conclusions can be drawn from this discussion. Court-appointed receivers owe fiduciary obligations to all interested parties, and are accordingly expected to remain impartial. Importantly, however, a receiver's impartiality, and thus its fiduciary duties, are not to unreasonably impinge on its ability to carry out its responsibilities.[629] Directors and officers likewise owe fiduciary duties that are to be fulfilled in the best interests of the corporation. While a corporation is comprised of a variety of divergent interests, directors are considered to be in compliance with their fiduciary obligations so long as they have considered and balanced all relevant factors and acted in good faith.[630] Directors and officers are impartial, insofar as their fiduciary obligations require them to selflessly work towards the objects of the corporation.[631] The monitor is supposed to be impartial, but like the court-appointed receiver, its impartiality should not prevent it from carrying out its responsibilities.[632] Likewise, recent cases have raised the question of whether the monitor is *prima facie* a fiduciary, or whether such obligations only apply when the monitor is assigned certain responsibilities by the court.[633]

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[629] See text accompanying note 629.
[630] *Peoples*, *supra* note 573 at paras 43, 46; *1976 Debentureholders*, *supra* note 576 at paras 82–83.
[631] *Peoples*, *ibid* at para 35.
[632] See text accompanying notes 568–69.
[633] See text accompanying notes 579–82.

Finally, the UCC is composed of fiduciaries, with each member owing a fiduciary duty to all other members.[634] It owes its allegiance to its constituents, and thus may be considered impartial insofar as it is advocating for the interests of its members. Of the four fiduciaries discussed, it is the only one that actively advocates on behalf of a defined portion of actors, whereas receivers, directors and officers, and monitors each work for the interests of a broader collective. Examining these fiduciaries comparatively provides a better understanding of the different ways fiduciary obligations are understood in the corporate law and corporate insolvency contexts. With these examples in mind, I now turn the focus back on the monitor, and highlight solutions for addressing its conflicting roles.

PART III – IMPROVING THE MONITOR: SUGGESTED SOLUTIONS

Former Ontario Supreme Court Justice James Farley famously proposed the bifurcation of the monitor's role.[635] He contended that "insolvency/restructuring culture changes overtime — and sometimes very quickly."[636] In his view, the cumulative effect of these changes, particularly CCAA amendments, is that "heavier and heavier burdens have been thrown on the role of the court appointed officers," especially the monitor.[637] The result is that it is increasingly difficult to "truly be objective and neutral" as a monitor in CCAA cases.[638] Mr. Farley pointed to the shared history between many of the typical players in the CCAA to highlight monitors acting so as to secure future work as a potential conflict.[639]

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[634] See text accompanying notes 599, 606.
[635] Hon James Farley, QC, "Musings (a.k.a. Ravings) About the Present Culture of Restructurings" (2010) 22 Comm Insol R 57 at 59–60.
[636] *Ibid* at 58.
[637] *Ibid* at 59.
[638] *Ibid*.
[639] *Ibid*; See also McLean & Bowra, *supra* note 373; Sarra, "Ethics", *supra* note 323 at 184.

He proposed that the role of the monitor be divided into two: "one role… as an advisor to the applicant debtor and to provide appropriate financial and other information[,]… [and] a different entity to be the advisor to the court directly and therefore indirectly to all interested parties."[640] The latter court advisor role would encompass the traditional watchdog role of the monitor, reporting on the debtor and ensuring protection of "smaller or unorganized stakeholders."[641] The debtor's advisor would be appointed in the initial order, as with the current framework,[642] "with its authority and duties being to continue indefinitely to advise the debtor applicant and provide financial and other information but only temporarily in respect of other aspects relating to the role of the monitor" as currently understood.[643] Mr. Farley's rationale for his proposed changes echoes Topolniski J's statement in *Winalta* that the CCAA and its monitor act as safeguards for public faith in the insolvency system.[644] For Mr. Farley, the need to "keep pace with the inevitable evolution" of the insolvency system is necessary to maintain that same safeguard.[645] Accordingly, he recommended proactive changes in the face of increasing difficulty avoiding conflicts of interest in the monitor's role.

Recently, Vern DaRe and Alfonso Nocilla re-examined Mr. Farley's proposal to bifurcate the monitor's role.[646] Briefly, they propose amendments to the CCAA aimed at mitigating conflicts of interest at the outset: "Parliament should consider amending the *CCAA* to provide courts with the express authority to bifurcate the monitor's role when a real or apparent conflict arises."[647] DaRe and Nocilla are concerned with the growing number of duties and responsibilities imposed

[640] Farley, *ibid* at 59.
[641] *Ibid* at 59–60.
[642] CCAA, *supra* note 2, s 11.7(1).
[643] Farley, *supra* note 635 at 60 (Farley notes that the temporary duties continue until 'Monitor B' is appointed, at which point it will assume the watchdog/reporting role).
[644] *Supra* note 10 at para 82.
[645] Farley, *supra* note 635 at 60.
[646] *Supra* note 338.
[647] *Ibid* [emphasis in original].

on the monitor. Courts increasingly rely on the monitor's advice and expertise "when exercising their discretion to make novel orders that extend the Act's ambit."[648] The monitor functions as an extension of the CCAA court's supervisory role.[649] As restructurings grow in complexity—especially the growing tendency for CCAA cases to be creditor-driven—the monitor may find itself overburdened with responsibilities.[650] Moreover, with such growing complexity, courts may directly, or indirectly through the monitor, become more active, thus stepping beyond their supervisory role.[651] While DaRe and Nocilla recognize that "the overwhelming evidence from the case law is that monitors are highly ethical and skilled professionals," their concern is that increasing duties create endless potential for conflicts of interest.[652] This is important, given that courts have stated that even the *perception* of bias is sufficient to prevent the monitor from carrying out its impartial role.[653]

DaRe and Nocilla's bifurcation proposal follows Farley's vision of a separate debtor-advisor and court-advisor appointment.[654] They add that bifurcation is not a necessary practice in all cases, suggesting that judges be provided with "a set of factors… to consider in determining whether it would be appropriate to split the monitor's role, appoint some other officer or even empower a creditor's committee," depending on the circumstances.[655] DaRe and Nocilla provide a flexible framework for judges to use when a monitor's role is stretched thin by the complexity

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[648] *Ibid* at 230.
[649] See *Callidus*, *supra* note 4 at paras 46–48, 51–52 (court's supervisory role and monitor as extension thereof) [*Callidus*]; See also Jones, *supra* note 312.
[650] DaRe & Nocilla, *supra* note 338 at 241.
[651] *Ibid* at 249–50, citing Jones, *supra* note 312 ("[w]hen the court becomes active as an advocate for some particular outcome, the function being performed quickly becomes an administrative or executive function, rather than being an adjudicative or judicial function" Jones, *ibid*).
[652] DaRe & Nocilla, *ibid* at 244.
[653] *Ibid* at 246; See *Nelson*, *supra* note 315 at paras 32, 37; *Winalta*, *supra* note 10 at para 82.
[654] DaRe & Nocilla, *ibid* at 248, citing Farley, *supra* note 635 at 59.
[655] DaRe & Nocilla, *ibid*.

of a restructuring, or otherwise encounters a potential conflict of interest.[656] This flexibility, which reflects a CCAA judge's discretionary power, opens the door for increased use of alternative means of assisting the monitor in discharging its expanded duties.[657]

Chapter Two of this thesis discussed one such means of easing pressure off the monitor: the Chief Restructuring Officer (CRO), which may be appointed to provide insolvency-specific expertise and leadership to the debtor firm.[658] Like the monitor, the CRO is a court-appointed officer, and is subject to some of the same concerns facing the monitor, such as bias and an unsettled fiduciary duty.[659] Creditors' committees are another suggested means of taking pressure off the monitor. These committees function similarly to the UCC in Chapter 11, in that they represent their respective creditor constituencies.[660] The CCAA does not address committees, leaving the formation of such to the judge's discretion, primarily under section 11.[661] Committees may be useful in especially complex restructurings, where better organization of creditor groups can streamline negotiations and planning.[662] They are especially useful in cross-border

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[656] See e.g., Chartered Professional Accountants Alberta, "2020 CPA Alberta Conduct Case Summaries" (January 2021) at 15 (individual trustee of the monitor charged with professional misconduct for failing to properly communicate with creditors and not cooperating with investigation of a complaint by said creditors).

[657] See e.g., *Aquadis*, supra note 437 at paras 61, 82 (extending monitor's role to allow it to sue third parties on behalf of the debtor); See e.g., *Re 843504*, *supra* note 423 at para 4 (court empowered monitor to run debtor's operations); *Mine Jeffrey*, *supra* note 423 at para 39 (monitor empowered to run debtor mining operation); See also DaRe & Nocilla, *supra* note 338 at 237–38 (for a discussion on *Aquadis*).

[658] Janis Sarra, "Rescue", *supra* note 4 at 350.

[659] *Ibid* at 353–54; Sarra, "Creditor Rights", *supra* note 8 at 147.

[660] Robert J Chadwick & Derek R Bulas, "Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World", in J Sarra, ed, *Annual Review of Insolvency Law, 2011* (Toronto: Carswell, 2012) [Retrieved from WestlawNext Canada]; See e.g., *Re Calpine*, *supra* note 309 at para 11; *Stelco*, *supra* note 113.

[661] CCAA, *supra* note 2, ss 11 (general power of the court), 11.52(1)(c) (used to secure payment of committee expenses); See also Chadwick & Bulas, *ibid*; Harris, *supra* note 603; Honourable Madam Justice B E Romaine, "Overview of the current status of unsecured creditors' committees in Canada," online:<http://www.iiiglobal.org> at para 5 ("[t]here are no statutory provisions under the CCAA or the BIA for the appointment of creditors' committees or representative counsel in an insolvency[,]… [h]owever, it has become relatively common in the last ten years for the Courts in Canada to use their discretionary power to recognize and accept submissions from ad hoc committees" *ibid*).

[662] Jeffries, "Unsecured", *supra* note 376 ("while the monitor does play an important part in facilitating negotiations and the formulation of a plan of compromise and arrangement, it does not act as the principal negotiating party…

restructurings, where they provide a venue for better representation of Canadian unsecured creditor groups.[663] The main argument against committees in Canada is that the existence of the monitor renders their role largely unnecessary except in rare cases.[664] However, unlike the UCC in Chapter 11, Canadian *ad hoc* committees are generally thought to not have fiduciary duties "to similarly situated creditors,"[665] and because they "are largely self-formed and unsupervised by the Court except on a high level, issues of governance can arise that have the potential of impeding, rather than aiding, efficient and responsive negotiation."[666] It is no surprise then that committees are not a common practice in CCAA cases, with the preferred alternative usually being the appointment of representative counsel.[667]

A court has jurisdiction to make a representation order upon consideration of a number of factors concerning the effect of such an order on the parties.[668] In *Canwest Publishing*, the court went so far as to say: "[d]esirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee… [but] [i]t would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel."[669] One of the more contentious aspects of representative counsel is funding.[670] Nevertheless, such costs may be a worthwhile trade-off, given their invaluable assistance with

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Canadian creditors have begun to look more and more to the use of committees as a way to take advantage of the benefits of collective action and joint representation" *ibid*).

663 Wasserman et al, *supra* note 378 at 167–68 (these authors advocate for a super monitor role to address this); Romaine, *supra* note 661 at para 11; Jeffries, "Unsecured", *supra* note 376; Chadwick & Bulas, *supra* note 660.

664 Jeffries, "Unsecured", *supra* note 376 ("[t]he existence of a neutral third-party fiduciary in the *CCAA* process in the form of the monitor, however, means that creditors' committees have a much more confined and self-interested role to play in *CCAA*" *ibid*); Romaine, *supra* note 661 at paras 11, 19.

665 Romaine, *ibid* at para 13.

666 *Ibid* at para 15.

667 Jeffries, "Unsecured", *supra* note 376.

668 CCAA, *supra* note 2, s 11; See *Canwest*, *supra* note 309 at paras 20–21; See also Chadwick & Bulas, *supra* note 660, citing *Nortel Networks Corp (Re)* (2009), 53 CBR (5th) 196 (Ont Sup Ct) [Commercial List]).

669 *Ibid* at para 24.

670 Allan Nackan & George Benchetrit, "Representation Orders in Insolvency Cases: Current and Future Practice" 7:4 IIC Art (WestlawNext Canada).

negotiating and strategizing, along with improving communication channels between counsels' clients and the monitor.[671] Information asymmetry is one of the more prevalent difficulties encountered in Chapter 11, given the absence of a neutral fiduciary like the monitor.

One American Fourth Circuit justice proposes a new fiduciary for Chapter 11 that resembles the CCAA monitor.[672] Justice Harner justifies the need for a "protector" of the bankruptcy estate on the basis of the debtor and creditors' "self-interest and influence by outside pressures."[673] Borrowing inspiration from Canada's insolvency system, among others, Justice Harner envisions "a third-party neutral appointed by the court… [a] case facilitator [who] would, among other things, work with the DIP to gather information and explore restructuring alternatives; provide information to the debtor's stakeholders; act as a facilitator for negotiations among the debtor and its stakeholders; and report all relevant information to the bankruptcy court and U.S. trustee."[674] Much like the monitor then, Harner's case facilitator is a watchdog, information intermediary, and facilitator of negotiations.[675]

Unlike the monitor, the case facilitator "would not independently assess or make recommendations to the bankruptcy court regarding the parties' positions or the debtor's reorganization options."[676] The rationale is that being "asked to perform both judgemental and facilitative functions" is more likely to result in actual or perceived conflicts.[677] The case facilitator is limited to helping the parties identify the best plan, by first ensuring they have access to

[671] *Ibid*.
[672] Michelle M Harner, "The Search for an Unbiased Fiduciary in Corporate Reorganizations" (2011) 86:2 Notre Dame L Rev 469.
[673] *Ibid* at 474, 476–77, 493 ("[t]he potential vulnerability of DIPs [debtor in possession] and creditors' committees raises the question of who is or should be protecting the bankruptcy estate" *ibid* at 474).
[674] *Ibid* at 475.
[675] *Ibid* at 475, 511 ("[t]he primary goals of the case facilitator proposal are to correct information asymmetry and reduce conflict (and related costs) in Chapter 11 cases" *ibid* at 475).
[676] *Ibid* at 512.
[677] *Ibid* at 513 (Harner adds that this double role may still be useful in rare cases).

necessary information, and then by reviewing proposed plans.[678] The goal is to mitigate the effect of parties' self-serving actions, address the information asymmetry of Chapter 11 cases, and ultimately "[facilitate] more meaningful, objective and efficient dialogue among the parties."[679] The bottom line for Harner's proposal is to shift restructuring under Chapter 11 towards mediation and alternative dispute resolution, and away from overly adversarial litigation.[680] These laudable objectives are also in line with the CCAA's various objectives, such that Justice Harner's case facilitator provides some ready lessons for re-envisioning the CCAA monitor.

PART IV – PROPOSAL

The monitor has long been held to owe a fiduciary duty to all stakeholders in the CCAA process. At least some of the stakeholders in a typical CCAA proceeding will hold positions at odds with others. The monitor will also have pre-existing relationships, with the debtor and often many of the creditors as well. There may be especially heavy pressure to pursue a sale or liquidation, over a restructuring. The monitor may be working on a restructuring plan, while actively soliciting sales. It will ultimately recommend to the court the option which it finds most viable. This decision will necessarily benefit some stakeholders to the detriment of others. How can such an outcome be reconciled with the monitor's duty to act in the best interests of each stakeholder?

Two authors summarize the tension in Canadian insolvency law: "[a] fundamental principle in Canada with respect to the appointment of a monitor and/or receiver is the balancing of efficiency and cost-saving with the desire and requirement to ensure an insolvency officer is

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[678] *Ibid* at 512.
[679] *Ibid* at 499.
[680] *Ibid* at 508.

free of conflict, can act independently and is not subject to undue influence."[681] The fiduciary aspect of the monitor's role requires careful attention. It provides the strongest protection against conflict of interest by holding the monitor to the highest standard. When coupled with its general and specific duties of good faith,[682] along with the rules of professional conduct for insolvency professionals,[683] it is expected that monitors will be careful, neutral, and independent. However, "[f]iduciaries can and do act in multiple capacities and they are not necessarily fiduciaries in each capacity, or indeed a fiduciary for all purposes."[684] This malleability, referred to by various courts,[685] leaves a hole in the armour of a court-appointed officer whose role as neutral watchdog symbolizes protection of public confidence in the insolvency system.[686]

While committees and representative counsel may ease the pressure on the monitor, improving the flow of communication and negotiations, they do nothing to address the monitor's independence. The monitor carries a "duty to ensure that no creditor has an advantage over another."[687] Even skillfully organized stakeholders may still be favoured over others, particularly if they are able to present a united front. Bifurcation of the role is one feasible solution, because it provides a means of neatly divvying up contentious tasks, providing all stakeholders with its intended watchdog functions, without detracting from the need to have an advisor for the debtor. Yet the bifurcation proposal suggests one role owing duties—and thus loyalties—to the debtor,

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[681] Dietrich & Prince, *supra* note 400.
[682] CCAA, *supra* note 2, ss 18.6, 25.
[683] CAIRP, *supra* note 487.
[684] Harris, *supra* note 603.
[685] *Urbancorp*, *supra* note 443 at paras 18, 22; *Essar*, *supra* note 306 at para 119, citing *Ivaco, supra* note 470 at paras 49–53; *Re 1231640 Ontario Inc*, *supra* note 473 at para 51.
[686] *Nelson*, *supra* note 315 at para 37, citing *Winalta*, *supra* note 10 at para 82.
[687] *Winalta*, *supra* note 10 at para 77 ("[a] recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank of Canada* (1994), 29 C.B.R. (3d) 1 at 8 (N.B.C.A.); *Re Laidlaw Inc.* (2002), 34 C.B.R. (4th) 72 at para. 2 (Ont. S.C.J.); *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 at para. 20 (B.C.S.C.); and *Re 843504 Alberta Ltd.*, 2003 ABQB 1015 at para. 19, 351 A.R. 223)" *ibid*).

and another to the court and stakeholders. This does not entirely address the potential for bias, and the weak safeguards on independence.

I propose the imposition of a new duty on the monitor to the CCAA *process* itself, which duty would consist of the following undertakings: (1) to consider and balance all stakeholder interests; and (2) to produce the best possible result in line with the CCAA's objectives. These requirements echo the court's statement in *Urbancorp*,[688] to the effect that the monitor's neutrality is not required if it prevents the monitor from pursuing CCAA goals.[689] Recall that the Ontario Court of Appeal in *Essar* also recognized that the monitor will be at odds with stakeholders because of its investigation of the debtor's finances,[690] and will step outside neutrality to take positions only when they accord with a restructuring purpose.[691] The Supreme Court of Canada has summarized the CCAA's objectives as follows:

> [41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).
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> [42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21).[692]

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[688] *Supra* note 443.
[689] *Ibid* at paras 18, 22.
[690] *Supra* note 306 at para 117.
[691] *Ibid* at para 119.
[692] *Callidus, supra* note 4.

There are likely to be many varying interests in any given CCAA case. As observed above, the CCAA's flexibility permits pursuit of a range of options. At one end of the spectrum lies a traditional restructuring, while at the other a liquidation of the debtor's business assets.[693] There are many potential permutations in between these two different outcomes.[694] All stakeholder interests, i.e. desired outcomes, can be plotted along this spectrum. A duty owed to the process, pursuant to the CCAA objectives, allows the monitor to chart the course of a CCAA case according to a position on that spectrum. Once the monitor's recommended course of action has been approved by the court and requisite stakeholders, the monitor can then pursue this chosen course *in the best interests of all stakeholders*. The duty to the process operates as a duty owed to the court; it provides an additional layer of protection, and codifies the monitor's allegiance to the CCAA's objectives. In other words, the best interests of the stakeholders as a collective are the baseline for decision-making at two levels: (1) the process of considering and deciding on a plan, and (2) the implementation of the plan. The CCAA is fundamentally about making compromises. A plan will necessarily benefit some parties more than others. So long as that plan is reached after a careful balancing of the various stakeholder interests, adhering to CCAA objectives, the process will bear the necessary hallmarks of fairness and transparency. Once a viable plan is fairly selected, the "best interests of the collective" will be defined by how best to balance claims with the chosen course of action.

[693] See *Century Services*, *supra* note 3 at para 15; *Callidus*, *supra* note 4 at paras 40 ("[u]ltimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval… when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus" *ibid* at para 46); *Essar*, *supra* note 306 at para 103.

[694] See McLaren, *supra* note 4 ch 1 at para 1.3350, ch 2 at paras 2.100–4.2357.6; Wood, "Bankruptcy", *supra* note 4 at 311–14 ("[t]he restructuring process might also involve a dual track in which both liquidation and restructuring are put forward as possibilities, with the ultimate choice depending on the best offer that is obtained" Wood, *ibid* at 313–14).

It remains open to CCAA judges to consider parties' requests for representation orders, and recognition of unofficial committees. Though such decisions are highly context-specific, the complexities of a given case may make such orders necessary. These are both ways to also provide stakeholders with the ability to present an organized front, which additionally may make the monitor's task easier. This is especially true in cases involving super monitors and cross-border proceedings, because: "like other fiduciaries, monitors cannot reasonably take on too many duties to different parties whose interests may be, or may become, adverse."[695] Stakeholders in a CCAA case typically play an adversarial role,[696] each advocating for their own view of a just outcome.[697] Encouraging this adversarial role allows the parties to drive the process, which prevents the court or its monitor from stepping beyond supervision and adjudication, into administration.[698] The court's role as referee remains "to ensure that it is a fair and reasonable process."[699] This can be bolstered by the monitor's role so long as its focus is on balancing competing interests and safeguarding the fairness of the process.[700] This can be achieved by the duty owed to the process.

The cornerstone of the CCAA regime is its integrity; the monitor is a natural reflection of the need to protect that integrity, acting as guardian of the process.[701] Courts and monitors each

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[695] DaRe & Nocilla, *supra* note 338 at 244, citing *Galambos*, *supra* note 532 at para 31.
[696] DaRe & Nocilla, *ibid* at 249 ("it is important to emphasize that the Canadian common law system is fundamentally adversarial, not administrative" *ibid*).
[697] *Ibid* at 248, citing Mokal, "Fairness", *supra* note 117.
[698] DaRe & Nocilla, *supra* note 338 at 255, n 8 (the fear is that "as courts increasingly rely on monitors to drive these restructurings forward, the court may be seen as taking on a different role than simply that of an impartial referee" *ibid* at 249); See also Jones, *supra* note 312 ("[w]hen the court becomes active as an advocate for some particular outcome, the function being performed quickly becomes an administrative or executive function, rather than being an adjudicative or judicial function" *ibid*).
[699] Jones, *supra* note 312; See especially *Re Stelco*, *supra* note 497 ("[w]hat the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process… the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts" *ibid* at para 44).
[700] See e.g. *Laurentian University of Sudbury (Re)*, 2021 ONSC 3272 [*Laurentian*] ("in order to enhance the prospects of a viable plan of compromise or arrangement, it is often necessary to take into account the potential compromises that will have to be made by all stakeholder groups" *ibid* at para 45).
[701] See *Nelson*, *supra* note 315 at para 37, citing *Winalta*, *supra* note 10 at para 82: "[i] In order to safeguard against that risk [of undermining the public's faith], a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest" *Winalta*, *ibid*).

have duties to uphold public confidence in the regime. The CAIRP Rules of Professional Conduct, to which monitors are subject, state as their first principle: "[m]embers conduct themselves at all times in a manner that maintains the good reputation of the profession and serves the public interest."[702] The Ontario Superior Court of Justice in *Olympia & York Developments Ltd v Royal Trust Co*[703] summarized the court's role as follows:

> [fairness] is the quintessential expression of the court's equitable jurisdiction -- although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity -- and "reasonableness" is what lends objectivity to the process… What is "fair and reasonable", then, must be assessed in the context of the impact of the plan on the creditors and the various classes of creditors, in the context of their response to the plan, and with a view to the purpose of the <u>CCAA</u>.[704]

The court in *Olympia* stresses the role of the court as arbiter of fairness in the CCAA process. Recall that "the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge."[705] The judge supervises negotiations, often through the monitor, while also supervising the monitor itself.[706] On the other hand, "[t]he monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose."[707] It is ultimately the court's role to supervise, and also oversee the balancing of the multiple objectives of the CCAA regime and the interests of each particular case.[708] The duty to the process, under the CCAA's objectives, allows the court to better instruct and manage the monitor, while also clarifying its status as fiduciary.

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[702] CAIRP, *supra* note 487.
[703] (1993), 12 OR (3d) 500 (Gen Div) [*Olympia*].
[704] *Ibid* at 12–13 [emphasis in original].
[705] *Callidus*, *supra* note 4 at para 46.
[706] *Ibid* at paras 51–52.
[707] *Essar*, *supra* note 306 at para 109.
[708] *Ibid* at para 103 (the court here notes that "[i]t is against this background that the role of the monitor must be considered," *ibid* at para 104); See also *Re Stokes*, *supra* note 320 at para 14.

The Ontario Court of Appeal stated that "a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach."[709] Under my proposal, the monitor would be a *prima facie* fiduciary per its duty to the process, best understood as a duty to the court. This follows the understanding of the monitor's fiduciary duty prior to *Essar*, and affords parties with remedies for breach of fiduciary duty at equity. Moreover, while not every action undertaken by the monitor carries the obligations of a fiduciary,[710] the essence of the role *vis-à-vis* its reporting and advisory functions suggests that the analysis in *Essar* should not be taken to say the monitor is not a fiduciary by default. It would be rare for the monitor to not disseminate information, report on the debtor's finances, or provide an opinion on a particular course of action, all of which directly affect stakeholders' interests.[711] This is illustrated by explaining how my proposal addresses the issue of the monitor resolving competing demands of each stakeholder. In essence, the imposition of the duty to the process, beholden to the CCAA objectives, allows the monitor to select an action, (i.e., giving its advice to the debtor or recommendation to the court), most in line with a CCAA objective. So long as the monitor safeguards the fairness of the process—in pursuit of CCAA objectives—the focus extends beyond individual stakeholders.[712] If any stakeholder is dissatisfied, it will be up to a court to determine whether there has been any unfairness, whether a CCAA objective was pursued, and finally whether the stakeholder was fairly and reasonably considered. Applying the mechanics of fiduciary obligations to the monitor helps to better understand the proposal.

[709] *Ibid* at para 109.
[710] See *Galambos*, *supra* note 532 at para 36, citing *Lac Minerals*, *supra* note 518.
[711] Recall the guiding principles of fiduciary doctrine: undertaking to act in the best interests of the stakeholders, who are vulnerable to the monitor's decision-making, because their legal interests can be negatively affected by the monitor's "exercise of its discretion or control"; See *Elder Advocates*, *supra* note 513 at para 36.
[712] See Janis Sarra, "Brueghel's Brush: A Portrait of the CCAA" (2020-2021) 64 CBLJ 72 at 79–80 (Sarra refers to *Aquadis*, *supra* note 437 at para 73 to say that "[t]he judgment illustrates the close alignment of the monitor's duties with the fairness principle" Sarra, *ibid* at 80).

Fiduciary law provides the basic indicia for determining whether a fiduciary duty is owed by one party to another. The CCAA court heavily relies upon the monitor,[713] such that the monitor's opinions and recommendations almost invariably affect the outcome of a restructuring.[714] This is the second element of an *ad hoc* fiduciary duty, i.e., that "the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them."[715] It is hard to argue that the weight of the monitor's reports does not connote discretionary power over the stakeholders.[716] The first element is the "undertaking of responsibility to act in the best interests of a beneficiary,"[717] which is a staple of the monitor's role.[718] This is, however, the part of the fiduciary analysis which is unsettled with respect to the monitor.[719] The Supreme Court of Canada in *Galambos* stated that: "[r]elevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices."[720] Accordingly, there is a strong case for an implied undertaking, given the high standards imposed on insolvency professionals by CAIRP, the monitor's status as a court-appointed officer, its role as protector of the public faith in the CCAA regime, and its similarity to the BIA receiver.[721] The Supreme Court of Canada in *Hodgkinson* also stressed that "where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise

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[713] See e.g., *Laurentian*, *supra* note 700 at para 46, citing *Nortel Network Corp (Re)*, 2018 ONSC 6257 (Commercial List) at para 27; *Aralez Pharmaceuticals Inc (Re)*, 2018 ONSC 6980 (Commercial List). at para 36; *Aveos Fleet Performance Inc*, 2012 QCCS 4074 at para 50(f).
[714] Wasserman et al, *supra* note 378 at 170.
[715] *Elder Advocates*, *supra* note 513 at para 33.
[716] See e.g., *Consumers Packaging*, *supra* note 335 at para 2.
[717] *Elder Advocates*, *supra* note 513 at para 30, citing *Galambos*, *supra* note 532 at paras 66, 71, 77–78; *Hodgkinson*, *supra* note 518 at 409–10.
[718] See e.g., *Laidlaw*, *supra* note 381 at paras 2–3; *Siscoe*, *supra* note 336 at para 28; *United Auto*, *supra* note 321 at para 20; *Hickman*, *supra* note 392 at para 33; Sarra, "Ethics", *supra* note 323 at 177.
[719] *Essar*, supra note 306 at para 119; *Ivaco*, *supra* note 470 at para 49–53; *Re 1231640*, *supra* note 473 at para 51; Sarra, "Ethics", *supra* note 323 at 180; Wasserman et al, *supra* note 378 at 170.
[720] *Supra*, note 532 at para 79.
[721] *Nelson*, *supra* note 315 at para 37, citing *Winalta*, *supra* note 10 at para 82; See text accompanying note 586.

to a fiduciary duty on the part of the advisor."[722] The final element is "that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary."[723] As with the second element, the monitor's influence over the CCAA process most likely satisfies the need for its discretion to affect stakeholders' interests.

A duty to the process clarifies that the monitor is a fiduciary from the moment of its appointment.[724] This cements the monitor's role as guardian of public confidence in the CCAA,[725] by subjecting it to the high standards of fiduciary obligations. Importantly, the duty to the process also helps to alleviate the tension inherent where a fiduciary owes duties to two conflicting parties.[726] The monitor's duty to the process can be understood as "instructions" from the client to ensure a fair determination of which outcome to pursue,[727] beholden to the high standard of a fiduciary to avoid conflict of interest. Like the duty of directors and officers under Canadian corporate law, the monitor's duty to the process is about fairly balancing the interests of the stakeholder collective to reach the best outcome under CCAA objectives. Put another way, it could be said that the duty is owed to the court and held in the best interests of the CCAA's objectives, in the context of the particular case at hand.

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[722] *Supra* note 518.
[723] *Elder Advocates*, *supra* note 513 at para 34, citing *Frame*, *supra* note 526 at 142.
[724] Note that this is different from the duty to ensure that the restructuring plan is fair and reasonable, because this duty is aimed at the *process* that leads up to the plan and not the *substance* of the plan itself, though both remain equally important issues.
[725] *Winalta*, *supra* note 10 at para 73; See also Wasserman et al, *supra* note 378 at 171.
[726] Ellis, Fairbairn & McKendry, *supra* note 513 ("[w]hile it is clear, for instance, that there is no rule of exclusivity on the part of some fiduciaries (business agents, for example), *any* scenario whereby the fiduciary owes a duty to two or more "beneficiaries" whose interests conflict will be seen as repugnant" *ibid* at 1-7).
[727] *Ibid* ("[u]pon a premise of full disclosure, fiduciary fidelity further manifests itself in a duty to adhere to the specific instructions of the client. A departure from those instructions… will also constitute a breach of fiduciary duty" *ibid* at 1-6).

PART V – CONCLUSION

The monitor is both a symbol and a champion of the CCAA process. It acts as an extension of the court's supervisory capacity, serves a quasi-mediator function, disseminates key information, and is crucial to the approval and implementation of a restructuring plan. Scholars and courts have commented on the nature of the monitor's neutrality since the monitor's inception. This discussion has culminated in questions over whether the monitor is, or can be, truly a fiduciary. This Chapter has explored the fundamentals of fiduciary law in Canada, and has compared the Canadian and U.S. approaches to this area. This analysis demonstrates the complexity of fiduciary law and fiduciary relationships in Canada. In the context of CCAA restructuring, it is clear that the monitor cannot possibly satisfy the individual whims of each stakeholder. What the monitor can do, however, is seek to resolve the various competing claims of different stakeholders through the CCAA process, and in a manner that is fair and reasonable to all stakeholders.

Anchoring the monitor's role in a duty owed to the CCAA process itself, rather than to any particular stakeholder, will help to clarify the monitor's role as an impartial court-appointed officer with multiple, overarching duties. Equity provides an avenue for the pursuit of traditional remedies for breach of fiduciary duty. This duty ensures that the monitor is independent but unrestrained by independence so that it can assist the court and the stakeholders in fairly formulating a plan in accordance with the objectives of the CCAA. My proposal seeks to follow the trend in the CCAA of codifying judicial practices,[728] and to firmly entrench the duty most vital to the monitor's independence within the legislation. This will promote greater certainty in the legislative scheme, thus assisting the monitor in its role as bulwark for public confidence in the Canadian insolvency

[728] *Callidus, supra* note 4 at paras 67, 86, 91.

system.[729] The following Chapter addresses the implementation of the proposed duties, suggests language for codification, summarizes the project, and addresses arguments against the proposal.

[729] *Winalta*, *supra* note 10 at para 73.

CHAPTER FOUR

Introduction

The preceding Chapters laid the groundwork for understanding insolvency law, centering on the CCAA,[730] and one of the most integral aspects of the CCAA: the monitor. This Chapter provides a conclusion to this study of the monitor and its fiduciary duty. Part I begins with a synthesis of the preceding three Chapters. Part II provides a breakdown of how the proposal should be implemented, including suggested language for codification. Part III addresses weaknesses of and anticipated arguments against the proposal. Part IV concludes with summary remarks about the impact of this project on the literature.

PART I – TYING IT ALL TOGETHER

Chapter One concluded that the CCAA consists of a series of objectives, all of which must be balanced and prioritized according to the circumstances of each particular case.[731] This has encouraged a flexible process in which parties can attempt to sort through the treacherous waters of insolvency. This is also why the role of the CCAA court is supervisory in nature.[732] In this way, the CCAA recognizes that insolvency law is not one size fits all,[733] and leaves it to the players and the supervising judge to determine the best path to success. Chapter One demonstrated that in many ways the balancing of objectives within the CCAA is reflected in attempts by stakeholders to lobby in legislatures and especially courts,[734] using their particular flavour of insolvency theory or CCAA objective to gain more influence or protection in the process. The most prominent of

[730] *Supra* note 2.
[731] *Century Services*, *supra* note 3 at paras 40, 46; *Essar*, *supra* note 306 at para 103; *Callidus*, *supra* note 4 at para 46; Sarra, "Creditor Rights", *supra* note 8 at 54.
[732] *Century Services*, *supra* note 3 at paras 47 – 48; *Essar*, *supra* note 306 at para 125; Jones, *supra* note 312.
[733] Schwartz, *supra* note 150 at 1850 ("[i]n the world of bankruptcy, one size cannot fit all" *ibid*).
[734] Torrie, *supra* note 283 at 166 (on the judiciary as the principal venue for changes to insolvency law in Canada).

these groups, historically, has been secured creditors.[735] This understanding informs the present project in two ways.

First, because it is courts that have enumerated the multiple objectives of the CCAA,[736] which the legislative text lacks. This finds a ready parallel in the monitor, itself a product of judicial ingenuity, subsequently codified after almost a decade of its successful deployment by judges.[737] Second, because the monitor plays a crucial role in the ultimate decisions which resolve a CCAA case. This means the monitor's assessment of a plan, and subsequent opinion and advice as provided to the court and the debtor, necessarily accounts for the CCAA's objectives. The current project argues that the monitor should have a duty to safeguard the fairness of the CCAA process, beholden to the multiple CCAA objectives. In other words, this project contends that the next step in the evolution of the CCAA and its monitor is to put into legislation what judges have been saying for decades.[738] This is especially relevant because while insolvency legislation is the chosen response to the collective action problem, it shifts some responsibility for avoiding that problem to the supervising judge and its appointed officer. The concern today is that the monitor is pulled in different directions by the different elements of the collective, to the point of actual or perceived conflict of interest.

Chapter Two retraced the monitor's history, from inception to its current iteration. The complexity of restructurings compelled the courts to create an extension of its supervisory authority in the monitor.[739] Chapter Two outlined how the balancing of the CCAA's multiple

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[735] Torrie, *ibid* at 168.
[736] See e.g., *Callidus, supra* note 4 at para 46; Sarra, "Creditor Rights", *supra* note 8 at 54.
[737] *Northland Properties*, *supra* note 320 (first use of the term "monitor"); 1997 Act, *supra* note 322 (codification of the role).
[738] See e.g., *Nelson*, *supra* note 315 at para 35; *Winalta*, *supra* note 10 at para 67; *Re 843504*, *supra* note 423 at para 19; *Siscoe*, *supra* note 336 at 9.
[739] *Callidus*, *supra* note 4, at paras 47–48, 51–52; Mann & Narfason, *supra* note 328 at 133.

objectives arises in every aspect of the monitor's role. It is both the eyes and ears of the court, and the symbol of fairness in the CCAA process. To take on the role of impartial officer in the midst of numerous, divergent interests is difficult at best. The pressures and stakes of a CCAA proceeding weigh on the monitor's role, as it must consider all options and ultimately give its advice and opinion thereon.

Chapter Two exposed the main concerns in the monitor's role: its malleable neutrality and unclear status as fiduciary. A review of the jurisprudence, reveals a significant gap in the understanding of the source of the monitor's independence and its safeguards. This is especially so given that its strongest source of independence, its status as fiduciary, has not been conclusively defined or even determined to be a necessary component of the role. Chapter Two is especially important to the current project because its examination of the caselaw reveals that, besides three statements by the Ontario Court of Appeal,[740] CCAA courts across Canada have treated the monitor as a fiduciary, owing fiduciary duties to all stakeholders. Likewise, Chapter Two served to highlight the many instances in which a monitor may encounter actual or perceived conflicts of interest. These included: a pre-existing relationship between the monitor and debtor, the monitor's responsibility to guide the debtor through a restructuring, the practice of pursuing a restructuring while simultaneously soliciting sales, persuasion of the monitor by strong stakeholders, its malleable neutrality, and its indeterminately defined fiduciary duty. Whereas Chapter Two explained the role and the gaps therein, Chapter Three focused on its unclear fiduciary duty as the most promising solution to concerns over the role.

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[740] *Essar, supra* note 306 at para 119, citing *Ivaco, supra* note 470 at paras 49–53; *Re 1231640, supra* note 473 at para 51.

Chapter Three presented an overview of Canadian fiduciary doctrine. Then it examined a variety of fiduciaries in the corporate and insolvency law contexts, before applying these observations to the monitor. Whereas Chapter Two outlined the instances of conflict of interest in the monitor's role, Chapter Three argued these conflicts are precisely why it is important to cement the role of the monitor in a way that recognizes its independence. A fiduciary duty is defined by the high standards of good faith, loyalty, reliability, and trustworthiness.[741] Legislative recognition that the monitor is a fiduciary and a guarantor of fairness in the CCAA holds the monitor to the highest possible standard in every case, communicating through codified language the importance of independence for the role. After all, the monitor fulfills a role whose purpose is to protect public confidence in the CCAA scheme.[742]

Such confidence also comes from greater certainty in the legislative scheme. Chapter Three demonstrates the need for certainty with regards to the monitor's fiduciary duty. The means of providing that certainty lies in this dissertation's proposal for codification. By making the monitor a fiduciary by default, tasked with balancing the CCAA's multiple objectives with the best interests of the stakeholder collective, each case can produce an outcome that is in keeping with the spirit of the legislation. While the ultimate authority is always the court, Chapter Three clarified that the proposed fiduciary duty (set out below) serves to make a court's job easier. That is, codification allows a judge to more easily configure and then supervise the monitor, ensuring fair treatment of both individual stakeholders and the collective as a whole.

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[741] Ellis, Fairbairn & McKendry, *supra* note 513 ch 1 at 2, citing *CanAero*, *supra* note 521 at 607; See also Ellis, Fairbairn & McKendry, *ibid* ch 1 at 5.
[742] *Nelson*, *supra* note 315 at para 37, citing *Winalta*, *supra* note 10 at para 82.

PART II – IMPLEMENTATION OF PROPOSAL

The CCAA has historically evolved incrementally as a result of judicial decisions.[743] Its inception as a skeletal legislative scheme encouraged judges to exercise their discretion, both inherent and that afforded them by section 11 of the CCAA, to develop the law in accordance with changes in business and restructuring practice.[744] This approach has functioned thus far because the flexibility of the legislation and the broad discretionary powers of CCAA judges encourage creative solutions even in especially complex cases.[745] One of the main areas lacking a clear statement on the law is the monitor's duty or duties, particularly its fiduciary obligations.[746] As observed in Chapters Two and Three, this position has never been as unclear as it is now.[747] Accordingly, it would fall short of the purpose of a proposal aimed at providing clarity and consistency to suggest its implementation through the courts.

The proposed duty to the process should be codified in the CCAA. In Chapter Three, I drew a comparison with the corporate law fiduciary duty of directors and officers, which is found in every corporate law statute in Canada. My proposed duty to the process would be similarly codified, and would be worded as follows:

> The monitor, in exercising its powers and discharging its duties, shall
>
> (a) act as a fiduciary, in the interest of safeguarding the fairness of the process by pursuing the most reasonable outcome according to the objectives of this Act, in the best interest of the stakeholder collective; and
>
> (b) in the event of a conflict of interest on the part of the monitor, the court will consider whether the monitor's actions were undertaken in pursuit of a valid CCAA objective,

[743] *Century Services*, *supra* note 3 at para 58; *Dylex*, *supra* note 11 at para 10.
[744] Jones, *supra* note 312; *Century Services*, *supra* note 3 at para 48.
[745] Jones, *ibid*.
[746] Sarra, "Ethics", *supra* note 323 at 180; See also Standing Senate Committee Report, *supra* note 22 at 5, 184–85 ("and for trustees, monitors and other insolvency practitioners, who also require comprehensive guidelines about their rights and responsibilities" *ibid* at 5).
[747] *Essar*, *supra* note 306 at para 119, citing *Ivaco*, *supra* note 470 at paras 49–53; *Re 1231640*, *supra* note 473 at para 51.

> failing which such actions constitute a breach of the duty in (a), giving rise to the traditional equitable remedies afforded by fiduciary law to individual stakeholders.

The codification of this duty accords with one of the fundamental purposes of the monitor: to act as a safeguard of public confidence in the Canadian insolvency law system. By being able to point to the legislation, the monitor's fiduciary duty and its independence are thereby grounded as essential elements of the CCAA process. Moreover, an unintended but positive effect of this codification would be to incorporate by reference the CCAA's objectives, which currently reside in judicial pronouncements and academic texts and not in the legislation.[748]

PART III – ADDRESSING WEAKNESSES

(i) Being Proactive

One question that is likely to be raised in light of this proposal is whether changes to the monitor's role are even necessary at this time. After all, there have only been two cases of reprimand or removal historically,[749] and monitors are typically found to be ethical, effective, and professional.[750] The simple answer to this question is that it is best to be proactive. Concerns about the credibility of monitors endanger public confidence in the insolvency system.[751] Much has been written about the problems faced by monitors, particularly as concerns their receiver-like role in the increasing use of the CCAA to effect sales.[752] When coupled with the unclear status of their neutrality and fiduciary duty, there arises a need to provide a clear basis on which to base their impartiality and role as champion of the CCAA's objectives.

[748] See especially *Century Services*, *supra* note 3 at para 40; *Callidus*, *supra* note 4 at para 48.
[749] *Nelson*, *supra* note 315; *Winalta*, *supra* note 10.
[750] DaRe & Nocilla, *supra* note 338 at 244.
[751] Sarra, "Oscillating", *supra* note 250; *Winalta*, *supra* note 10 at para 82; Industry Canada, "Fresh Start", *supra* note 225 at 6 ("[e]quitable treatment of stakeholders and transparent processes also help to protect the integrity of the insolvency regime" *ibid*).
[752] See e.g., Nocilla, "Reorganizations", *supra* note 596 at 376; Morin & Mojtahedi, *supra* note 398; Grant & Jeffries, *supra* note 361.

The current framework combines the requirement in the CCAA that the monitor act in good faith in performing its duties,[753] with the CAIRP rules of conduct for insolvency professionals.[754] Good faith is imposed on all parties, and does not answer questions of monitor independence. The CAIRP rules stipulate that at a minimum, acceptable conduct consists of: acting in a manner that serves the public interest, avoiding actual or perceived conflict of interest, and remaining "free of any influence… which impairs their professional judgement or objectivity."[755] Although helpful, these rules summarize what is already expected of monitors in the caselaw, and do nothing to ground or clarify a standard of independence. The proposal necessarily incorporates these minimum standards, and provides an indelible statement on monitor independence.

(ii) Alternative Approaches

In Chapter Three, I highlighted some of the suggested means of taking pressure off the monitor or changing its role to address inherent and potential conflicts. These included bifurcation of the monitor's role,[756] appointment of a CRO,[757] appointment of creditor committees,[758] representation orders,[759] as well as American commentary on what an insolvency fiduciary should look like.[760] In light of such well-argued proposals, the current proposal needs to state why it provides a more favourable response. The short answer is that a codified duty to the process, in the best interests of the stakeholder collective, is the only suggestion thus far that directly addresses the status of the monitor as fiduciary. By so doing, this proposal also goes to the heart of the monitor's independence. As observed in Chapter Three, fiduciary obligations carry the highest

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753 CCAA, *supra* note 2, s 25.
754 CAIRP, *supra* note 487.
755 *Ibid*.
756 Farley, *supra* note 635; DaRe & Nocilla, *supra* note 338 at 226 [emphasis in original].
757 See Sarra, "Rescue", *supra* note 4 at 350.
758 Chadwick & Bulas, *supra* note 660.
759 *Ibid*.
760 Harner, *supra* note 672.

standards imposed by the law, and require nothing short of utmost good faith and diligence.[761] While bifurcation of the role may ease the workload of the monitor in certain instances, and provide better optics vis-à-vis separate advisory responsibilities, either or both of these new roles may or may not be a fiduciary under current caselaw. In other words, separating the roles may just lead to two separate potentials for conflicts of interest, as opposed to one, while still lacking a firmly grounded basis for independence.

As for the many other means of providing organization and voice for stakeholders, (i.e., committees and representation orders), the same question of independence remains. Better means of communication and information sharing do not, on their own, decrease the risk of influence on the monitor. If anything, they may increase such a risk, by providing avenues through which concerted efforts to influence the monitor can be exercised.

These proposals are not to be discarded. They still raise important points, and offer ways to address gaps in a very complex process. Bifurcation and the various means of organizing creditors are to be considered as *supplementary* to this proposal. The core of the monitor's role is to be its fiduciary duty as codified. From this starting point, it is open to the courts to adopt such strategies depending on the circumstances of each particular case.

(iii) Likelihood of Implementation

In the law and economics literature, a Pareto Efficiency describes an efficient change as one which leaves at least one party better while not causing detriment to any others.[762] Another

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[761] *Galambos*, *supra* note 532 at para 66; Ellis, Fairbairn & McKendry, *supra* note 513 ch 1 at 2, citing *CanAero*, *supra* note 521 at 607; See also Ellis, Fairbairn & McKendry, *ibid* ch 1 at 5.

[762] See e.g., James Chen, *Pareto Improvement* (April 2019), online: Investopedia <https://www.investopedia.com/terms/p/paretoimprovement.asp> (explanation of Pareto Efficiency); See also Jim Chappelow, *Pareto Efficiency* (September 2019), online: Investopedia <https://www.investopedia.com/terms/p/pareto-efficiency.asp> (discussing an extension of Pareto Efficiency, whereby efficiency occurs when the benefits of a change outweigh the harms); See also Jackson, *supra* note 15 ("…

way to state this, and one more pertinent to the CCAA, is that "[u]nfairness resides where only some face these risks, [i.e., of uncertainty,] while others actually benefit from the situation."[763] One important question raised by any proposal for change is whether it is efficient or fair in this manner. Chapter One highlighted the historic superior position of strong creditors, particularly secured creditors, in the CCAA process.[764] Accordingly, another way to ask the above question is to ask whether this proposal so disturbs the status quo that it might encounter insurmountable obstacles, such as lack of political will or strong lobbying efforts, against its implementation.[765]

This proposal is primarily about fairness, and one of its principal guardians in the CCAA: the monitor. Better protection and understanding of the monitor's independence provide greater assurance of fairness in the CCAA process.[766] This is especially helpful for unsecured creditors, because they can point to a duty that requires their interests to be taken into account and balanced alongside the CCAA's objectives. Secured creditors are still going to be the most powerful players. This is because of the nature of their credit arrangement, which this proposal does not alter. The goal of the proposal is to curb influence on the monitor, by establishing its impartiality, balanced with the need to pursue valid CCAA objectives, through codification. Accordingly, weaker parties are better protected, and the strongest parties have not had their positions tarnished. In this regard, the proposal is both fair and efficient because it does not single any one party or group out.

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a net benefit: the secured creditor would be no worse off than before and the unsecured creditors could be made better off" *ibid* at 870).

[763] Sarra, "Oscillating", *supra* note 250.

[764] Torrie, *supra* note 283 at 166; Sarra, "Oscillating", *ibid*; Nocilla, "History", *supra* note 372 at 100; Nocilla, "Reorganizations", *supra* note 596 at 379.

[765] See e.g., Thomas G W Telfer, "Canadian Insolvency Law Reform and "Our Bankrupt Legislative Process"", in Janis Sarra and Barbara Romaine, eds, *Annual Review of Insolvency Law 2010* (Toronto: Carswell, 2010) [Retrieved from WestlawNext Canada] [Telfer, "Reform"] ("[t]he law is not "value neutral", generated by invisible forces. Rather, interest groups play a significant part in bankruptcy reform" *ibid*); Jacob S Ziegel, "The Modernization of Canada's Bankruptcy Law in a Comparative Context" (1998) 33:1 Tex Intl LJ 1 [Ziegel, "Modernization"] ("[m]odem bankruptcy legislation is quintessentially an adversarial process because it is concerned with cutting up a rapidly diminishing pie and determining who gets what, where, and when. It is not value neutral" *ibid* at 23–24).

[766] Sarra, "Oscillating", *supra* note 250 ("the role of monitor is integral to the current system" *ibid*).

(iv) Judicial Response

One of the central supports for this proposal is that it is merely following the flow of CCAA evolutionary history: codifying the practices of judges.[767] As discussed in Chapters Two and Three, there is a long line of cases that consider the monitor a fiduciary.[768] Similarly, the duty to the process reflects judicial statement that a monitor is first and foremost beholden to the CCAA process, its objectives and purposes, and by meeting this qualification it can take a position that would otherwise seem biased.[769] The proposal conceptualizes this fiduciary duty, as expressed in judgments over time. One might ask how judges have historically responded to similar codification. The most recent example of this lies in section 18.6, the CCAA duty of good faith, enacted in 2019.[770] This provision has not met with resistance by the judiciary,[771] despite commentary by academics that its usefulness and meaning are unclear.[772] It should be noted that one of the main issues with section 18.6 is that "good faith" is not defined in the CCAA.[773] The current project's proposal does not face a similar issue because its principal goal is to add certainty to the regime as a whole by defining the monitor's fiduciary status. This raises the question of whether this certainty is misdirected, given that courts already act as guardians of the fairness of the CCAA process.

In other words, does not a CCAA judge already consider whether a plan is in pursuit of a valid CCAA objective? It is important to note that the proposal does not fetter the court's

[767] See e.g., *Callidus*, *supra* note 4 at paras 67, 86, 91.
[768] See text accompanying note 586.
[769] See e.g., *Aquadis*, *supra* note 437 at para 73; *Essar, supra* note 306 at para 119; *Urbancorp*, *supra* note 443 at para 22.
[770] See text accompanying note 491.
[771] See e.g., *Laurentian*, *supra* note 700 at paras 70–72; *Callidus*, *supra* note 4 at para 50; *12178711 Canada Inc v Wilks Brothers, LLC*, 2020 ABCA 430 at para 66.
[772] See e.g., Girgis, "Generalized Duty", *supra* note 491; John Salmas & Mark Freake, "The 2019 CCAA Amendments: Origins, Trends and Practical Implications" 9:6 IIC Art (WestlawNext Canada).
[773] Girgis, *ibid* at 118; Salmas & Freake, *ibid*.

discretion. The proposal clarifies the monitor's role by cementing its independence, and adherence to fairness and the CCAA's objectives. As accounting and insolvency experts, monitors' reports are afforded significant respect by CCAA courts.[774] The integrity of a monitor's decision-making is protected by the imposition of fiduciary obligations, which is similar to the respect of the business judgment of directors and officers by courts in Canadian corporate law.[775] As the eyes and ears of the court, the monitor is an extension of the court's supervisory authority.[776] All of a monitor's other duties are already codified in section 23,[777] except the most important one: its fiduciary duty. By codifying its fiduciary obligations, the monitor's reports to the court and guidance to the debtor are qualified by these high standards. This more clearly defines the relationship between CCAA courts and monitors, and makes for better understanding of the aims of the role.

PART IV – CONCLUSION

In these four Chapters, I have analysed the role of the monitor and its broader significance to Canadian insolvency law. A review of the cases and commentary since the first use of the term "monitor" in CCAA proceedings reveals the success of this creature of judicial creativity. Nevertheless, a pragmatic approach to this rapidly evolving area of the law reveals a tendency towards complexity and conflicts of interest. In order to provide a response to concerns over credibility and transparency in the CCAA process, it is proposed that the legislation proactively recognize the monitor as a fiduciary. This proposal firmly entrenches the role of the monitor as bulwark of public confidence in the CCAA regime, and additionally provides codified recognition

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[774] Kent et al, supra note 249 at 17; Ben-Ishai & Lubben, supra note 365 at 605; See e.g., *Consumers Packaging*, *supra* note 335 at para 2.
[775] *1976 Debentureholders*, *supra* note 576 at paras 40, 99; *Peoples*, *supra* note 573 at paras 64–65.
[776] *Callidus*, *supra* note 4 at paras 51–52.
[777] CCAA, *supra* note 2. It should be noted that the 2009 codification of the monitor's duties in section 23 was largely in keeping with judicial practices; See DaRe & Nocilla, *supra* note 338 at 237.

of the role of the CCAA's multiple objectives within the decision-making process. This change does not require a major legislative reform, nor does it change the relative positions of parties to the CCAA process. What it does is provide a means for assessing whether a CCAA case has been conducted in accordance with the objectives of the legislation, appropriately balanced, and whether the monitor's actions were undertaken in pursuit thereof.

This introduces some objectivity into the necessary deviations from absolute neutrality that monitors will naturally encounter. With multiple, divergent interests at stake, a monitor's ultimate analysis will result in recommendation of a plan that is necessarily undesirable to some parties, in relative terms. In order to ensure that the negotiating and decision-making that led to such opinions and recommendations is free of bias, stakeholders will be able to point to a duty that requires the monitor to fairly balance CCAA objectives in rendering its advice to the court. By proactively addressing the perception or actual occurrence of bias in the monitor's role, this proposal seeks to reinforce the essential elements of the Canadian restructuring regime, best articulated by the Honorable James Farley:

> We should recall that our restructuring regime is based upon the collective action of a supermajority of creditors exercised in a fair and reasonable way in an exercise of corporate democracy — not in a dictatorship of special interests.[778]

[778] *Supra* note 635 at 59.

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