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CANADIAN COMMERCIAL REORGANIZATION

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This publication is designed to help practitioners manage or avoid bankruptcy by keeping up to date on legislative and judicial changes. Updated regularly, with the Companies' Creditors Arrangement Act (CCAA) provisions and the parallel Bankruptcy and Insolvency Act (BIA) provisions for each stage of reorganization set out, this title helps practitioners understand both the BIA and the CCAA. Up-to-date information includes key decisions relevant to insolvency practice and substantial BIA and CCAA amendments now in force.

What's New in this Update:

This release features updates to chapters 2 (Statutory Requirements for Eligibility to Reorganize), 3 (The Application Process), 4 (Creation of a Reorganization Plan), 5 (Creditors' Voting Procedures), 6 (Court Approval and Supervision of a Reorganization Plan) and 7 (Receivership under the Bankruptcy and Insolvency Act).

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- **Creditors' Voting Procedures — Voting Procedures Under the Bankruptcy and Insolvency Act — Voting on Plans of Reorganization — Proof of Claim — Preferences or Settlement Disentitlement — Settlement Disentitlement** — The Ontario Superior Court of Justice reviewed a transaction under section 96 to determine whether there had been a transfer at undervalue, or in the alternative, whether the debtor had intended to defraud, defeat, or delay creditors. The debtor had provided the creditor with a secured guarantee and granted mortgages in favour of the creditor, which the creditor then claimed against the debtor. The Monitor argued that the debtor and creditor were not at arm's length, and thus the debtor's insolvency was sufficient to set aside the transaction under s. 96(1)(b)(ii)(a) of the *BIA*. In the alternative, the Monitor argued that the guarantee was given in order to defraud, defeat or delay creditors. The Court held that although the debtor and creditor had a long-standing business relationship, their relationship did not affect the normal economic incentives of the parties, and thus the parties were at arm's length. The only "badge of fraud" present in this case was that the transaction was carried out under the threat of legal proceedings. However, the Court noted that this "badge" on its own carries little weight, and it is often consistent with a bona fide transaction. As such, the motion was dismissed: *Urbancorp Toronto Management Inc. (Re)* (2018), 2018 ONSC 2965), 2018 CarswellOnt 7672.

- **Creation of a Reorganization Plan — Proposals Under the Bankruptcy and Insolvency Act — Contents of the Proposal** — The Ontario Superior Court of Justice held that a proposal was not invalidated by a formal defect. The bankrupt corporation had four corporate shareholders, the four corporate shareholders also being the only unsecured creditors. All of the shareholders appointed the sole principles of three of the shareholder corporations as inspectors of the corporation's bankruptcy estate. The inspectors unanimously approved a proposal, which they then directed the trustee to file with the Official Receiver. The proposal was subsequently approved by three of the four creditors representing more than two-thirds in value. The fourth, non-inspector shareholder opposed the new proposal and submitted to the court that the filing of the proposal had not been authorized by the corporation because no shareholders or directors meeting had been called and no resolution had been passed to authorize the filing. The trustee submitted that the motion for approval should proceed pursuant to s. 187(9) because any technical defects in bringing the proposal to the court had not caused substantial injustice. The court found that there was adequate evidence that the corporation wished the proposal to be implemented,

noting that the proposal was before the court with the authority and approval of three of four of the directors, officers and shareholders of the corporation. Although the technical requirement of a directors' resolution had not been met, in substance it was directors of the corporation who had directed the trustee to act: *1552906 Ontario Ltd. (Re)* (2018), 2018 ONSC 1731, 2018 CarswellOnt 5437.

- **Statutory Requirements for Eligibility to Reorganize — Jurisdiction of Courts Under the Bankruptcy and Insolvency Act** — The Ontario Court of Appeal confirmed that settlement privilege should apply to *CCAA* and *BIA* proposals. While settlement privilege will not apply in every case, the motion judge below erred in stating that settlement privilege should not apply to *CCAA* and *BIA* proposals. Exceptions to settlement privilege exist where there is a sufficiently strong competing public interest: *Emery Silfurtun Inc. (Re)* (2018), 2018 ONCA 485, 2018 CarswellOnt 8369.

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