SALES OR PLANS: A COMPARATIVE ACCOUNT OF THE "NEW" CORPORATE REORGANIZATION

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&

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&

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Abstract.

In this article, Professors Stephanie Ben-Ishai and Stephen Lubben explore the recent surge in popularity of "quick-sales," essentially the pre-reorganization plan sale of an insolvent debtor's assets. In their examination of quick sales, the authors use the recent examples of Lehman Brothers and Chrysler to illustrate the popularity and relevance of the pre-plan sales. The authors then move on to a more detailed discussion of the quick sales process in both Canada and the United States, isolating the differences and similarities between both countries, and weighing the costs and benefits of each approach. Ultimately, the authors argue that questions of speed and certainty mark the biggest difference between the two jurisdictions, as the American approach offers greater flexibility, which is apt to facilitate quicker asset sales. However, Ben-Ishai and Lubben assert that the Canadian approach also provides significant benefits, particularly in the realm of employee protection and the ability of the monitor to act as an independent check on quick sales proceedings. Accordingly, the authors conclude that, while the American approach is

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advantageous in situations with exceptional time constraints, the Canadian approach under the Companies Creditors' Arrangement Act (CCAA) is more beneficial for a typical corporate reorganization, insofar as the role of the monitor and other limitations of the CCAA will prevent overuse of the quick sales process.

I. INTRODUCTION

Recently, two historically central North American firms – Chrysler and General Motors – entered reorganization proceedings to address their persistent financial and operational troubles.[3] Both debtors were provided with sizeable governmental financing from both Canada and the U.S.,[4] and both cases involved a swift sale of the "good" parts of the debtors' assets, while what remained was left behind for liquidation.

Somewhat surprisingly, given both of the debtors' considerable presence in Canada, as well as the Canadian government's extensive involvement in the cases, neither GM nor Chrysler ever filed a Companies' Creditors Arrangement Act ("CCAA") proceeding in Canada.[5] There was not even an attempt to have the U.S. proceedings "recognized" in Canada. As far as Canadian creditors were concerned, GM and Chrysler were not really bankrupt.[6] Yet their assets – including those located in Canada – have been sold to new owners.

Indeed, while the tendency in the international literature is to focus on the polar extremes of the U.S. corporate bankruptcy process – long, traditional reorganization cases as were often seen in the 1980s or extremely quick "pre-packs," a term which has developed a wealth of meanings – the reality is that many large Chapter 11 cases now

[3] *Ind. State Police Pension Trust v. Chrysler LLC* (*In re Chrysler LLC*), 576F.3d 108 (2d Cir.), vacated as moot, 2009 WL 2844364 (Dec 14, 2009)) [*Ind. State Police Pension*]; *In re General Motors Corp*,, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).
[4] In the case of Canada, financial assistance came from both the federal and provincial (Ontario) governments.
[5] *Companies Creditors' Arrangement Act*, R.S., 1985, c. C-36 [CCAA].
[6] With the possible exception that larger creditors doing business in the United States may have been subject to the U.S. Bankruptcy Court's jurisdiction. *See* 11 U.S.C. § 362.

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involve asset sales.[7] In such cases, the bulk of the debtor's assets are sold in the early days of the case and the remainder of the case is focused on deciding how to allocate the proceeds. Thus, despite some overheated commentary to the contrary, the Chrysler and GM cases were not all that remarkable.

We use this article to explore the question of why such an asset sale was not also pursued in Canada for these debtors. And more generally we examine the tools provided in the United States and Canada to sell in lieu of a more traditional reorganization process.

As we show, both the United States and Canada have well-established case law that supports the "pre-plan" sale of a debtor's assets. The key difference between the jurisdictions thus turns not on the basic procedures, but rather the broader context of those procedures. Although not without some controversy and conflict among decisions, in the United States it is generally possible to sell a debtor's assets distinct from any obligations or liabilities associated with those assets.[8] Indeed, the only obligations that survive such a sale are those that the buyer willing accepts and those that must survive to comport with the U.S. Constitution's requirements of due process.

As we describe in greater detail below, in Canada the debtor has less ability to "cleanse" assets through the sale process. Particularly with regard to employee claims, a pre-plan sale under the CCAA is not apt to be quite as "free and clear" as it American counterpart.

The jurisdictions also differ on the point at which the reorganization procedures – and the sale process – can be invoked. Canada, like most other jurisdictions, has an insolvency prerequisite for commencing proceeding, whereas Chapter 11 does not. And the Canadian sale process is tied to the oversight of cases by the monitor: without the monitor's consent, it is unlikely that a Canadian court would approve a pre-plan asset

[7] *See, e.g.*, Douglas G. Baird & Robert K. Rasmussen, "The End of Bankruptcy" (2002) 55 Stan. L. Rev. 751 ; Stephen J. Lubben, "The 'New and Improved' Chapter 11" (2005) 93 Ky. L.J. 839.
[8] 11 U.S.C. § 363(f).

sale.[9] In the United States, on the other hand, there is no such position. Accordingly, a debtor can seek almost immediate approval of a sale upon filing. Finally, there remains some doubt and conflicting case law in Canada about the use of the CCAA in circumstances that amount to liquidation, particularly following an asset sale. In the U.S., it is quite clear that Chapter 11 can be used for liquidation.[10]

We submit that these latter factors are the more likely explanations for the failure to use the CCAA in the automotive cases. While authors have often noted specific differences between the U.S. and Canadian asset sale process – such as the use of competitive bids – we argue that it is the questions of speed and certainty that marks the biggest difference between the two jurisdictions, as the CCAA is more than sufficiently flexible to account for simple procedural differences. In the case of GM and Chrysler, where the governments valued speed above all else, these issues came to the fore.

This paper thus begins with a summary of the relevant law in the United States, followed by an analysis of the Canadian law in Part III. In Part III of the paper we engage in the true comparative work, noting both the similarities and differences of the two systems and their approaches to pre-plan asset sales. In short, we find that the U.S. approach is more flexible, and is thus apt to facilitate much quicker asset sales.

In part IV of the paper we draw our analysis to a close by considering the relative merits of the two approaches. The speed and flexibility of the U.S. process is commendable in very large cases like Lehman Brothers or General Motors, where the complexity of the business warrants a swift response. The process is buttressed by the sophistication of the bankruptcy courts and the major creditor constituencies in these cases. Plainly this flexibility would be less desirable in jurisdictions without the latter

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[9] *See* Jacob Ziegel, *The BIA and CCAA Interface*, in CANADIAN BANKRUPTCY & INSOLVENCY LAW, Stephanie Ben-Ishai & Anthony Dugan eds.(Toronto: Lexis, 2007) at 326-7.
[10] Stephen J. Lubben, "Business Liquidation" (2007) 81 Am. Bankr. L.J. 65.

two features – another note of caution for those who would spread Chapter 11 (or the CCAA) across the globe.[11]

On the other hand, the virtually unbridled use of 363 sales in the United States is not without its critics.[12] In particular, one of us has previously questioned if the current form of Chapter 11 cases benefits creditors – other than the secured creditors who are typically demanding the quick sale.[13] The CCAA avoids some of these concerns by protecting employees and interjecting the monitor as an independent voice in the proceedings; free from the pressure the debtor may face from its senior lenders.

In short, while we see the advantages of the Chapter 11 approach in exceptional times – like those of the past 18 months – for a more typical corporate reorganization, the apparent limitations of the CCAA are not necessarily indicative of inefficiencies or points that should be changed. Instead, it is arguable that the monitor and other apparent "limitations" of the CCAA will prevent the overuse of the bankruptcy by secured lenders who simply seek to foreclose on their collateral.

II. ASSET SALES BEFORE PLANS – THE US APPROACH

In the United States, there are two ways for a corporate debtor to sell its assets. First, the debtor can propose the sale as part of a traditional reorganization plan.[14] Alternatively, the debtor can sell its assets and then propose a liquidation plan that distributes the sale proceeds to creditors.[15] In the past ten to fifteen years, secured lenders have used the latter provision, plus the control inherent in being a secured lender,

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[11] Stephen J. Lubben, "Financial Distress in Emerging Markets" in *Emerging Markets: Performance, Analysis And Innovation*, Greg N. Gregoriou ed. (Chapman-Hall /Taylor and Francis, 2009).
[12] Jay Lawrence Westbrook, "The Control of Wealth in Bankruptcy" (2005) 82 Tex. L. Rev. 795.
[13] *See*, Lubben, "New and Improved,*" supra* note 7 at 841-42.
[14] 11 U.S.C. §1123(b)(4).
[15] John J. Hurley, "Chapter 11 Alternative: Section 363 Sale of all of the Debtor's Assets Outside a Plan of Reorganization" (1984) 58 Am. Bankr. L.J. 233 at24-41 (Noting more than twenty years ago, that "it has become generally accepted that section 363(b) empowers a trustee or debtor in possession to sell all of the property of the debtor outside a plan of reorganization.").

particularly control over the debtor's cash,[16] to take charge of Chapter 11 cases.[17] Among the well-known debtors that have used 363 sales in their cases are TWA, Vlasic Foods, Polaroid, Bethlehem Steel, and, most recently, Lehman Brothers.[18]

The preference for 363 sales is driven by the speed of the process, which allows lenders to exit before the debtor resolves all of its bankruptcy issues, and the ability under section 363 to sell assets "free and clear" of most claims. Indeed, with the possible exception of future tort claimants who could not know that they have claims, courts have ruled that section 363(f) provides a tool for providing very "clean" title to the debtor's assets.[19] As such, quick sales have become an increasingly popular outcome in large Chapter 11s,[20] with approximately two-thirds of all large bankruptcy proceedings involving a sale of the firm as opposed to the more traditional reorganization plan.[21]

A sale *quo* sale does little to change a creditor's recovery against the debtor, and thus a pre-plan sale is formally not subject to any of the rules associated with confirmation of a plan.[22] Instead, creditors are provided with a variety of tools to protect against the threat of a "lowball" sale, including the ability to submit competing bids and credit bids, in the case of secured creditors.[23]

In particular, if a debtor in possession elects to sell its assets in a section 363 sale, the process typically involves identifying an initial bidder, frequently called a "stalking

[16] Douglas G. Baird & Robert K. Rasmussen, "Private Debt and the Missing Lever of Corporate Governance" (2006) 154 U. Pa. L. Rev. 1209 at1229.
[17] Douglas G. Baird & Robert K. Rasmussen, "Chapter 11 at Twilight" (2003) 56 Stan. L. Rev. 673 at 674 . *See also* Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2331 n.2 (2008).
[18] *Cf.* Lynn M. LoPucki & Joseph W. Doherty, "Bankruptcy Fire Sales" (2007) 106 Mich. L. Rev. 1.
[19] *In re Trans World Airlines, Inc*., 322 F.3d 283 (3d Cir. 2003); *In re General Motors Corp,,* 2009 Bankr. LEXIS 1687 (Bankr. S.D.N.Y. July 5, 2009).
[20] Kenneth Ayotte and David A. Skeel Jr., "Bankruptcy or Bailouts" (2009) U of Penn, Inst for Law & Econ Research Paper No. 09-11 at 8, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1362639&rec=1&srcabs=1443613> ["Bankruptcy or Bailouts"].
[21] Kenneth Ayotte and Edward Morrison, "Creditor Control and Conflict in Chapter 11" (2009) J. Leg. Anal. (forthcoming), online: <http://ssrn.com/abstract=1081661>.
[22] See *In re Trans World Airlines, Inc.,* 2001 Bankr. LEXIS 980, 2001 WL 1820326, *11 (Bankr. D. Del. Apr. 2, 2001).
[23] 11 U.S.C. §363(k). *See* Bruce A. Markell, "Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations" (1991) 44 Stan. L. Rev. 69, 121-22.

horse," and approval of bidding procedures.[24] These bidding procedures provide structure for the solicitation of competing bids, followed by an auction if any competing bids materialize.[25] Bidding procedures can also include expense reimbursement and "break up" or break fees for a stalking horse bidder that does not ultimately win the debtor's assets.[26] Once the sale is complete, the debtor either proceeds to formulate a Chapter 11 liquidating plan or converts the case to Chapter 7, where a trustee will conduct the liquidation.

Nonetheless, aware of the risk that the terms of a sale might constrict a future plan and creditors' ability to vote on that plan, courts have developed rules that prevent imposition of a reorganization plan through the sale process.[27] This is the so-called rule against "*sub rosa*" plans – that is, plans disguised as sales. While the rule is applicable across the United States, the content of the rule varies by judicial circuit. [28] In the Second Circuit, which includes the Southern District of New York (*i.e.* Manhattan), the rule only seems to preclude sale provisions that explicitly dictate terms of a future plan or the initial distribution of the sale consideration.[29]

The automotive cases followed this basic structure. As Judge Gonzalez noted in Chrysler, "[t]he sale transaction…is similar to that presented in other cases in which exigent circumstances warrant an expeditious sale of assets prior to confirmation of a

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[24] See *In re O'Brien Environmental Energy, Inc.,* 181 F.3d 527, 530 (3rd Cir. 1999).
[25] See C.R. Bowles & John Egan, "The Sale of the Century or a Fraud on Creditors?: The Fiduciary Duty of Trustees and Debtors in Possession Relating to the 'Sale' of a Debtor's Assets in Bankruptcy" (1998) 28 U. Mem. L. Rev. 781 at 805-36.
[26]*In re Reliant Energy Channel View LP*, No. 09-2074, 2010 BL 8858 (3d Cir.Jan. 15, 2010); Bruce A. Markell, "The Case Against Breakup Fees in Bankruptcy" (1992) 66 Am. Bankr. L.J. 349 at 359. It should be noted that s.363 provides no textual basis for the approval of bidding procedures or break-up fees, but rather these tools have been developed by American bankruptcy courts as part of the exercise of their powers to approvenon-ordinary course asset sales.
[27] Jason Brege, "An Efficiency Model of Section 363(b) Sales" (2006) 92 Va. L. Rev. 1639 at 1650.
[28] James J. White, "Death and Resurrection of Secured Credit" (2004) 12 Am. Bankr. Inst. L. Rev. 139, 161-63.
[29] *Contrarian Funds, LLC v. Westpoint Stevens, Inc.* (In re Westpoint Stevens, Inc.), 333 B.R. 30 (S.D.N.Y. 2005).

plan. The fact that the U.S. government is the primary source of funding does not alter the analysis under bankruptcy law."[30]

As noted, the desirability of this turn in American corporate bankruptcy cases is the subject of a good deal of debate.[31] There are concerns about the propriety of turning the bankruptcy court and Chapter 11 into a glorified foreclosure process, particularly if the cost of that process is not born by secured lenders. Moreover, some recent studies suggest that secured lenders may be driven to embrace quick sales for reasons that have nothing to do with maximizing asset values.[32] Further, this debate has often been clouded by skepticism over the strong empirical claims that Baird and Rassmussen, the first academics to fully describe the growth of 363 sales, made in connection with their analysis of the issue.[33] Nevertheless, as a descriptive matter, it is beyond debate that GM and Chrysler's sales represent little more than the very public tip of a much larger trend.[34]

III. ASSET SALES BEFORE PLANS – THE CANADIAN APPROACH

In Canada, two courses of action for an insolvent corporate debtor include reorganization under the *Companies' Creditors Arrangement Act*[35] (CCAA) or reorganization under the *Bankruptcy and Insolvency Act*[36] (BIA). The CCAA is the main piece of legislation governing the restructuring of large corporations,[37] and is preferred in reorganizations where a court is dealing with matters that are novel or complex.

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[30] *In re Chrysler LLC*, 405 B.R. 84, 87 (Bankr. S.D.N.Y. 2009), *aff'd,* 2009 WL 2382766 (2nd Cir. Aug 05, 2009).
[31] See Westbrook, *supra* note 13.
[32] Sarah P. Woo, "Simultaneous Distress of Residential Developers and Their Secured Lenders: An Analysis of Bankruptcy and Bank Regulation" (5 August 2009), online: <http://ssrn.com/abstract=1440859>.
[33] Lynn M. LoPucki, "The Nature of the Bankrupt Firm: A Response to Baird and Rasmussen's The End of Bankruptcy" (2003) 56 STAN. L. REV. 645 at 653. In particular, Baird and Rasmussen have argued that "businesses in Chapter 11 have little going- concern value and sales are usually the best way to preserve whatever value exists." Douglas G. Baird & Robert K. Rasmussen, "Boyd's Legacy and Blackstone's Ghost" (1999) Sup. Ct. Rev. 393 at 402–6.
[34] Lubben, Stephen J., No Big Deal: The GM and Chrysler Cases in Context (September 3, 2009). Seton Hall Public Law Research. Available at SSRN: http://ssrn.com/abstract=1467862.
[35] CCAA, *supra* note 5.
[36] *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3, [BIA].
[37] Although the CCAA was rarely used during the early twentieth century, during the recession years in the 1980s, it was "radically transformed from a largely dormant Act to a dynamic and judicially driven restructuring vehicle, albeit one without firm rules." See Jacob Ziegel, "Bill C-55 and Canada's Insolvency Law Reform Process" (2006) 43 Can. Bus. L.J. 76 at 81.

As part of a reorganization, a "pre-plan" sale of a debtor's assets is an increasingly common practice in Canada under the CCAA. This is particularly the case where time is of the essence because the debtor will soon be unable to meet its operating expenses.[38]

Although the CCAA has been likened to Chapter 11 of United States Bankruptcy Code,[39] there are nevertheless important differences between the two statutes.[40] For example, the CCAA lacks the detailed statutory framework for quick sales included in the U.S. Bankruptcy Code.[41] This difference continues to persist even with the recently enacted amendments, designed to provide a codification of practices and laws that have developed over the past few decades[42] and lend more structure to the CCAA, which has been characterized by, and sometimes criticized for, its flexibility.[43] Amongst the recent amendments is the new Section 36 of the CCAA, which dictates the rules for asset sales and the disposition of assets. The new provision lays out the specific factors to be considered in deciding whether the court should grant authorization for the sale and transfer of the debtor's assets.[44] However, these amendments do not delineate a detailed framework through which to conduct the sales process; rather, they merely outline

[38] Sheryl Seigel, "Distinctions with a Difference: Comparison of Restructurings Under the CCAA with Chapter 11 Law and Practice" Lang Michener LLP, online: <http://www.langmichener.ca/index.cfm?fuseaction=content.contentDetail&ID=9916&tID=244>, [Seigel].

[39] Toronto attorney Terrence Dolan once noted that the CCAA is "like a Chapter 11 proceeding, with no rules." See Sean Dargan, "The Emergence of Mechanisms for Cross-Border Insolvencies in Canadian Law" (2001-2002) 17 Conn. J. Int'l L. 107 at 111, where the author also notes that the CCAA has been characterized as a "Canadian answer to Chapter 11 of the United States Bankruptcy Code." *Ibid* at 112.

[40] See, Lynn M. LoPucki and George G. Triantis, "A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies" (1994) 35 Harv. Int'l L. J. 267 at 286, where the authors note that, "[t]hough Canada shares a common language and heritage with the United States, it has rejected many legal doctrines thought to be fundamental to the operation of the U.S. system of bankruptcy reorganization, such as cram down, the debtor in possession, and the debtor's option to assume or reject executory contracts."

[41] Seigel, *supra* note 38. In this sense, the better comparison might be with the receivership process used in the United States before the New Deal to reorganize insolvent railroads. See, generally, Stephen J. Lubben, "Railroad Receiverships and Modern Bankruptcy Theory" (2004) 89 Cornell L. Rev. 1420.

[42] Andrew J.F. Kent et al., "Canadian Business Restructuring Law: When Should a Court Say 'No?'" (2008) 24 Banking and Finance L. Rev. 1 at 2 [Kent].

[43] See Yaad Rotem, "Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada" (2008) 3 Va. L. & Bus. Rev. 126 at 140, where the author notes that "the CCAA has been acknowledged as a flexible restructuring tool that is administered by highly involved bankruptcy judges."

[44] See Stephanie Ben-Ishai, *Bankruptcy Reforms: 2008* (Toronto: Thomson Carswell, 2008) at 59.

relevant considerations for the court to weigh in approving the sale; further, this list is not exhaustive.[45]

In this section we examine the practice of quick sales in Canada as compared to the United States and isolate the differences and similarities in how the Canadian system approaches pre-plan sales. The recently completed Canadian bankruptcy law reform process will undoubtedly influence the current law and practice around pre-plan sales in Canada. However, as we discuss in greater detail below, the changes will likely only further entrench the existing differences between the two jurisdictions and potentially unwind the increasing influence that the American approach has had on the Canadian system. This not necessarily a negative outcome. In fact, the Canadian approach to quick sales may provide just the model that commentators critiquing the American approach in Lehman and Chrysler may be searching for.

A. Sales Procedures and Protection for Purchasers under the CCAA

The most significant difference between the Canadian and American approaches to quick sales is that the United States has a more established quick sales process under s.363 of the U.S. Bankruptcy Code. Although, like their American counterparts, Canadian courts do approve pre-plan sales and "make orders conveying title to the purchased assets free and clear of liens and encumbrances,"[46] the same structured sales procedures typically used in a Chapter 11 proceeding are not as common in Canada.[47] Rather, in the past, without any express provisions dealing with asset sales in the CCAA, Canadian courts relied on their powers to impose terms and conditions under a stay order[48] and their inherent jurisdiction under the CCAA to approve asset sales. However, the new s.36 has since been added to the CCAA in order to provide some guidance on how to approach asset sales in Canada.

[45] *Ibid.*
[46] Seigel, *supra* note 38.
[47] *Ibid*.
[48] Under s.11 of the CCAA. See CCAA, *supra* note 5 at s.11.

As noted in Part II, under Chapter 11, the quick sales process often proceeds as follows: the debtor corporation "identifies a 'stalking horse' or initial bidder, usually after a marketing process of some kind, and enters into a definitive agreement to purchase the company's assets with the understanding that the agreement will be shopped around to other prospective purchasers, who will be solicited to top its deal."[49] A U.S. bankruptcy court—specialized in dealing with such matters[50]— is then asked to approve this stalking horse bid, the auction date and bidding procedures, which set the rules of the auction. The bidding procedures will generally include built-in protections for the stalking horse, including minimum bidding increments, an approved form of purchase agreement for competing bids, standard bidder qualifications, a "break fee"[51] to be paid to the stalking horse if it is outbid, and some form of expense reimbursement for the stalking horse if outbid.[52]

Historically, the Canadian quick sales process has not had these same procedures and protections. Rather, a Canadian quick sale transaction may proceed as follows under the CCAA:

(i) submission of non-binding letters of intent or expressions of interest;
(ii) due diligence;
(iii) submission of binding agreements and deposits;
(iv) negotiations by the debtor or monitor with one or more interested parties (which parties are requested to put in their highest and best offers);
(v) the selection of the preferred purchaser;

[49] Pam Huff, "Court-Supervised Mergers and Acquisitions Opportunities for Knowledgeable Buyers in Distressed Markets" (16 October 2007) Blake, Cassels & Graydon LLP, online: < http://www.blakes.com/english/view_disc.asp?ID=1813>, [Huff].
[50] Unlike in Canada, where there are no specialized federal bankruptcy courts developing their own body of law.
[51] Or "break up" fee, as it is typically termed in the United States. American Bankruptcy Courts are "generally prepared to approve break fees in the range of one per cent to three per cent of the purchase price, although this practice is not without controversy." See Huff, *supra* note 49. However, others insist that break fees are necessary to protect the stalking horse and to ensure an attractive initial bid, as opposed to a discounted offer, which would set the baseline too low for a meaningful auction process. See also, *Calpine Corp. v. O'Brien Env't Energy, Inc.* (*In re O'Brien Env't Energy,Inc.*), 181 F.3d 527 (3d Cir. 1999).
[52] Huff notes that that bidding incentives, such as overbid protections, are "reasonably required by the stalking horse to compensate for its costs and the arguable disadvantage of coming forward to establish the transparent baseline for the auction process." *Ibid.*

(vi) an application to the court for approval of the proposed purchase agreement (which agreement is often sealed and not made part of the public record); and

(vii) and court approval of the purchase transaction, without any auction or ability of a third party bidder to make a higher or better offer.[53]

Leading Canadian insolvency practitioner, Sheryl Seigel, notes that, unlike the American process under s.363, "[s]talking horse bids, break-up fees and other bid protections, detailed bidding and sale procedures ... and auctions are not the norm"[54] in Canada. Absent these procedures, particularly those geared towards protecting an initial bidder, it could be more difficult for Canadian debtors to benefit from the quick sales process, as they might have more difficulty attracting a favourable starting offer. Subsequently, this could make it more challenging to find other bidders that are willing to top that initial offer in a significant way.

Compounding the issues surrounding the lack of bid protection provided for under the CCAA, is the fact that, in Canada, purchase agreements recommended to the court for approval are often not made public.[55] As such, prospective bidders are "rarely given the opportunity to submit a higher or better offer once a successful bidder has been recommended to the court."[56] Canadian practitioners often complain that under the Canadian system, there is less likely to be a competitive bidding process, in which competing bids drive the price of the business up and the debtor receives the maximum value for their corporation.[57] Accordingly, there is a perception that this lack of protection for bidders and lack of transparency in the bidding process results in quick

[53]Seigel, *supra* note 38. The author also notes that "Canadian courts are reluctant to override a transaction recommended by the debtor and monitor, if the sales process followed is found to have fairness and integrity."
[54] *Ibid*.
[55] *Ibid.*
[56] *Ibid.*
[57] Thereby maximizing the benefit for their creditors. Of course, it is arguable that the existence of competing bidders is more theoretical than real in the United States. See LoPucki & Doherty, *supra* note 18.

sales process that is far less efficient and generates fewer desirable offers, when compared to the American regime under Chapter 11.

B. The Role of the Monitor

A notable feature distinguishing the governance and reorganization process under the CCAA from Chapter 11 is the requirement under the CCAA to appoint a monitor.[58] Essentially, in CCAA cases a monitor is appointed as an officer of the court, in order to observe and report back to the court on the activities of the debtor.[59] The recent amendments to the CCAA seek to further codify the role of the monitor.

The mandatory appointment of a monitor is a relatively new requirement. Before 1997, the CCAA did not require the appointment of a monitor. However, in the years prior, a practice developed of having the court appoint an accounting firm to perform an officially sanctioned role in the CCAA proceedings.[60] Today, the accounting firms assigned as monitors have more often than not have served as the firm's auditor prior to the proceeding.[61] Although the strategy of appointing the corporation's auditor as monitor, instead of an unrelated party, has been somewhat controversial in Canada, there are advantages to this practice. Specifically, "the auditor knows the corporation inside and out, has already established working relationships with management, and is cheaper to employ than another accounting firm. The auditor can also utilize his knowledge of the firm to formulate a restructuring."[62] As discussed in greater detail below, this practice will change with the limits on who can serve as a monitor under the new amendments to the CCAA.

The purpose of the monitor is to act as a watchdog to observe the conduct of management and the operation of the business while a plan was being formulated.[63] In order to fulfill this "watchdog" requirement, monitors are typically given "express access

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[58] *Ibid*. at 13.
[59] Seigel, *supra* note 38.
[60] Kent, *supra* note 42.
[61] Rotem, *supra* note 43 at 42.
[62] *Ibid*. at 149.
[63] Kent, *supra* note 42.

to the debtor's books, records and property...."[64] In the context of this watchdog role, "the frequency of reporting to the bankruptcy judge and to the parties participating in the proceeding is quite high. Bankruptcy judges regard the monitor as their 'eyes and ears' in dealing with the debtor firm."[65] However, in the majority of cases, the monitor's role and influence extends beyond that of watchdog.[66] Indeed, while monitors can be appointed by the court, they can also be "hired by the debtor and in substance often act as an advisor to the debtor, albeit with special responsibilities."[67] Making the monitor's role even more difficult to define is the fact it is simply not set in stone. Rather, as Yaad Rotem asserts "Canada has allowed its bankruptcy judges to decide on a case-by-case basis what precise role the court-appointed official should fulfill."[68]

The monitor's role can even be extended to include supervising or actively participating in a sale process.[69] Andrew Kent notes that, "in their reports monitors now routinely go beyond simply providing information. They will express views and make recommendations to the court concerning matters before the court,"[70] including pre-plan sales. Indeed, Rotem states that monitors "examine restructuring proposals, purchasing offers from third parties,' suggested sales of assets, appraisals of the firm, cash-flow projections made by the firm, and generally, any approach taken to dispose of the corporation's assets."[71]

In fact, the monitor's influence is particularly important in finalizing a quick sale under the CCAA. As quick sales are commercial transactions implemented "during the

[64] *Ibid*. at 14.
[65] Rotem, *supra* note 43 at 144-5.
[66] *Ibid*.
[67] Kent, *supra* note 42 at 15.
[68] Rotem, *supra* note 43 at 141. While the author stresses that the role of the monitor can be difficult to pin down, Rotem also notes that a monitor is *not* intended to manage the corporation on a daily basis. *Ibid*. at 142. In the United States, a similar phenomenon has developed with regard to "examiners," who by statute are appointed to investigate the debtor. Recent bankruptcy court decisions have instead used examiners to review fee applications and generally act as an all-purpose "neutral" in the case.
[69] Seigel, *supra* note 38.
[70] Kent, *supra* note 42 at 16.
[71] Rotem, *supra* note 43 at 145.

course of CCAA proceedings before a plan is filed,"[72] court approval is typically substituted for creditor approval. Kent writes that:

> On application for approval of these transactions, invariably the monitor will file a report and make recommendations as to whether the proposed transaction should be approved by the court. Almost, as invariably, the court will defer to the monitor's views. Accordingly, *in substance these transactions are really subject to monitor approval*. As a result the monitor's judgment has replaced the judgment of the court or the creditors.[73]

Furthermore, monitors can use this substantial power to control a transaction. Kent asserts that monitors "can use the threat of withholding their approval to negotiate with the debtor."[74] Indeed, debtors know that "it will be difficult to obtain court approval for a major transaction without have the monitor's approval. So *the monitors can and do constructively influence the debtor's conduct*."[75] Kent goes so far as to state that it can "be the reality that the real negotiations in the proceedings take place in secret between the monitor and the management for the debtor."[76] Accordingly, 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.

In contrast, there is no court-appointed monitor in Chapter 11 restructurings. As such, under Chapter 11, there is one less "hoop to jump through" in arranging a pre-plan sale, something that can be very important in situations where time is of the essence (as is typically the case when an insolvent debtor is seeking a quick sale).

This Canadian hoop may become more formal and difficult for a debtor corporation to go through in the coming years. The 2009 amendments to the CCAA provided clarification on the role of the monitor that will take away some of the current flexibility available to both debtor corporations and the courts in defining the role. Specifically,

[72] Kent, *supra* note 42 at 17.
[73] *Ibid*., emphasis added..
[74] *Ibid*.
[75] *Ibid*., emphasis added.
[76] *Ibid*.

under the amendments, section 11.7 establishes that the court must appoint a monitor in CCAA proceedings, and that this person must be a trustee within the meaning of subsection 2(1) of the BIA.[77] Further, section 11.7(2) states that, except with express permission from the court, no trustee can be appointed as a monitor if they have during the preceding two years been a director, officer or employee of the company, or related to the company in any way, even as an auditor or legal counsel.[78] Additionally, subsection 11.7(3) states that the court may replace the monitor following an application from a creditor, if it considers that course of action appropriate.[79] Finally, all CCAA proceedings will be subject to the oversight of the Office of the Superintendent in Bankruptcy and the Monitor will be subject to the licensing and professional responsibility requirements that all licensed trustees are subject to in Canada.[80]

C. The Influence of the American Quick Sale Process on Recent Canadian Proceedings

As discussed to this point, the quick sales process under s.363 tends to have more formalized bidding and sales procedures and greater transparency than a traditional Canadian sales process.[81] In addition, the monitor adds an additional layer of non-judicial and non-creditor involvement, which does not exist in the United States. However, the role of the monitor has been quite flexible and changed with evolving CCAA practise. Both of these features may explain how, in some recent CCAA filings, the CCAA sales process has been influenced by the s.363 sale process.[82]

In particular, as a Canadian practitioner who regularly handles such files, Pam Huff, notes, there has "been recent examples in Canadian insolvency proceedings where a stalking horse style process has been used from the outset or adopted later on in the

[77] CCAA, *supra* note 5 at s.11(7).
[78] *Ibid*. at s.11.7(2)
[79] *Ibid.* at s.11.7(3)
[80] *Ibid.*
[81] Seigel, *supra* note 38.
[82] Huff, *supra* note 49.

process."[83] However, Huff stresses that with "no statutory provisions to establish a stalking horse process at the beginning, there have been some purchasers and prospective purchasers who have complained that the process changed or migrated toward an auction, with the court entertaining the participation of late bidders."[84] This is problematic because, if the rules are not clearly laid out at the beginning of the process, "the purchaser that thought it had the winning bid may not have negotiated protections, such as a break fee or expense reimbursement, which are typical in the U.S."[85]

Consequently, in only adopting certain elements of the American approach to quick sales, such as the stalking horse process, while not adopting other elements of the Chapter 11 regime—for example, break fees or other overbid protections—it is unclear whether the Canadian quick sales process truly benefits. That is to say, simply borrowing bits and pieces from the s.363 process, and trying to fit them into the far-less regimented Canadian model, could result in confusion for both debtors and prospective purchasers. As such, it is worth examining Canadian cases in which elements of the s.363 process have been applied and analyzing the impact on the quick sales process under the CCAA.

A major criticism of Canadian policy and research on the CCAA is the lack of comprehensive empirical databases similar to those long established in the United States. Comprehensive data currently does not exist on completed CCAA proceedings. However, there are a number of notable studies including an analysis of recent cases under the CCAA,[86] conducted by Keith Pritchard. Pritchard studied a total of 79 cases under the CCAA, taking place between September of 1997 and August of 2002. In his commentary, he reveals that of the "29 successful filings, (a) three were identified as being both a pre-pack and a sale (10.3%), (b) seven were identified as being sale only (24.0%), (c) six were identified as a pre-pack only (20.6%), (d) 11 were identified as neither a sale nor a pre-pack, and (e) no information was reported for two of the cases."[87]

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[83] *Ibid*.
[84] *Ibid*.
[85] *Ibid*.
[86] See, for example, Keith Pritchard, "Analysis of Recent Cases Under the Companies' Creditors Arrangement Act" (2004) 40 Can. Bus. L. J. 116.
[87] *Ibid*. at 121.

Although these numbers indicate that both sales and pre-packs may be slightly less popular in Canada than in the United States, Pritchard nevertheless notes that "sales and pre-packs represent a significant proportion of the successful cases."[88] We analyze the two most notable of such cases and the cases that have followed them below.

i. Canadian Red Cross Society

One aspect of the 1998 CCAA proceedings in *Canadian Red Cross Society*[89] dealt with a motion on the part of the Canadian Red Cross Society (Red Cross) for the approval and sale of its blood supply assets and operations as part of an insolvency proceeding under the CCAA.[90] The insolvency proceeding arose as a result of approximately $8 million in tort claims asserted against the Red Cross by those who suffered harm as a result of a "blood contamination problem that ... haunted the Canadian blood system since at least the early 1980's."[91]

The Court approved the sale of substantially all of the Red Cross' assets before any restructuring plan was ever put to creditors. The Red Cross obtained CCAA protection and shortly thereafter obtained court approval of the sale and transfer of all of its blood supply assets and operations to two government agencies.[92] However, it is worth noting that the Court stressed the social utility of the assets owned and controlled by the Red Cross, and the social utility of their transfer. Specifically, in his decision, Justice Blair stated that the assets:

> [O]wned and controlled by the Red Cross are important to the continued viability of the blood supply operations and to the seamless transfer of those operations in the interests of the public health and safety. They also have value. In fact, they are the source of the principal value in the Red Cross's

[88] *Ibid*.
[89] *Canadian Red Cross Society* (1998), 1998 CanLII 14907 (Ont. S.C.) [*Red Cross*].
[90] *Ibid*. at para. 3.
[91] *Ibid*. at para. 2.
[92] Linc Rogers, "CCAA Liquidations and Employment Issues" in Technical Issues, Part II: Competing Perspectives on Liquidating CCAA Proceedings, Building Bridges: Discussing Labour Issues in Restructuring Proceedings" (Toronto: Ontario Bar Association, 2009), online: <http://www.blakes.com/english/publications/RI/pdf/Paper138.pdf> at 3 [Rogers].

> assets which might be available to satisfy the claims of creditors. Their sale was therefore seen by those involved in attempting to structure a resolution to all of these ... social and personal problems ...[93]

Accordingly, the Court's emphasis on the social importance of approving this pre-plan sale indicates that Canadian courts may be more willing to approve a quick sale when there is some greater benefit to be obtained, on top of simply repaying creditors. This is consistent with CCAA case law in general.

With respect to financial considerations, Justice Blair noted that the central question for determination "whether the proposed Purchase Price for the Red Cross' blood supply assets ... [was] fair and reasonable in the circumstances and a price that is close to the maximum as is reasonably likely to be obtained for such assets ."[94] He noted that as long as the answer to that question is "yes" than there is little quarrel as to the appropriateness of a pre-plan sale.[95] Specifically, he stressed that it does not matter to creditors and claimants "whether the source of their recovery is a pool of cash or a pool real/personal/intangible assets. Indeed, it may well be advantageous to have the assets crystallized into a cash fund...."[96] As such, in his decision Justice Blair laid out some of the factors for consideration when approving a pre-plan sale, and the rationale for such a decision.[97]

In *Fracmaster (Re)*,[98] Fracmaster Ltd. – an Alberta corporation involved in restructuring under the CCAA – asked the court to approve the sale of substantially all its assets to UTI Energy Corp. A syndicate of Fracmaster's creditors supported this

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[93] *Red Cross*, *supra* note 89 at para. 7.
[94] *Ibid*. at para. 16.
[95] *Ibid.*
[96] *Ibid.*
[97] The Court's decision in *Canadian Red Cross Society* was followed in *Playdium Entertainment Corp. (Re)*, [2001] O.J. No. 4252 at para. 11, [*Playdium*] and *Fracmaster (Re*), [1999] A.J. No. 566 at para. 29, [*Fracmaster*]. It was also explained in *PSINet Ltd. (Re)*, [2001] O.J. No. 3829 at para. 5, [*PSINet*]. Additionally, this decision was mentioned in 27 other cases, including *Skydome Corp. (Re)*, [1999] O.J. No. 1261 at para. 6; *Royal Bank of Canada v. Fracmaster Ltd.*, [1999] A.J. No. 675 at para. 16; *T. Eaton Co. (Re)*, [1999] O.J. No. 4847 at para. 4; *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 771 at para. 173; *Redekop Properties Inc*. *(Re)*, [2001] B.C.J. 3090 at para. 75; *843504 Alberta Ltd. (Re)*, [2003] A.J. No. 1549 at para. 15.
[98] *Fracmaster*, *supra* note 97.

application, but presented to the court the alternative plan of lifting the current stay on proceedings and appointing the monitor as receiver and manager of Fracmaster.[99] Basically, although the syndicate supported the sale to UTI (it was contractually obliged to), it wanted the stay lifted and a receiver appointed so that it could proceed to enforce its security even if the court declined to approve the UTI sale under the CCAA.[100]

While the UTI sale would have been beneficial to secured creditors, it would have offered nothing in the way of compensation for unsecured creditors. To that end, several parties objected to both Fracmaster and the syndicate's applications. Specifically, two such parties, Mr. Balm and the Janus Corporation "applied to continue the stay, adjourn the other applications, appoint an interim receiver and have the court direct the calling of meetings for consideration of its proposal by the secured creditors, the unsecured creditors and the shareholders."[101] In addition, another corporation called Calfrac Ltd. applied to purchase Fracmaster; their proposal made some small provisions for unsecured creditors.[102]

In considering the applications at hand, the court was emphatic in its support of *Canadian Red Cross*, with Paperny J. stating at para. 29:

> I accept and support the broad statement made by Blair J. in Red Cross (at 10):
>
>> I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section11; and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in the legislation so as to give effect to the objects of the CCAA,

[99] *Ibid*. at para. 1.
[100] *Ibid*. at para. 9.
[101] *Ibid*. at para. 1.
[102] *Ibid*.

> including the survival program of a debtor until it can present a plan.'

This statement must be read in light of the following wording (at 10):

> *It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon*.[103]

However, despite this endorsement of the court's ability to authorize quick sales, Paperny J. was less enthusiastic about the proposed transactions in this case. Noting that there was "no value in Fracmaster greater than the amount owed to secured creditors,"[104] Justice Paperny questioned the ability of the Balm/Janus and Calfrac proposals to actually make provisions for unsecured creditors and shareholders. Specifically, Justice Paperny said that both proposals were, on their face, only "marginally better for the unsecured creditors and, possibly, for the shareholders."[105]

Further, the Balm/Janus proposal contemplated a delay, which the court ruled was significant in the circumstances.[106] Underscoring the substantial losses already faced by Fracmaster's creditors, the court noted that the "Balm/Janus proposal [put] the Syndicate ... at risk to lose even more."[107] In contrast, the "unsecured creditors and the shareholders face[d] no such risk if there is delay – they [had] only the possibility of recovering some amount greater than zero."[108] As such, the court did not approve the Balm/Janus application.

Similarly, the court asserted that the Calfrac proposal was "no more a plan than ... the UTI proposal. Although it slightly better[ed] UTI's pricing structure, it fail[ed] to contemplate practical procedures, including a provision for consultations

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[103] *Ibid*. at para. 29.
[104] *Ibid*. at para. 32.
[105] *Ibid*.
[106] *Ibid*. at para. 35.
[107] *Ibid*.
[108] *Ibid*.

with the stakeholders or a method of determining claims."[109] Accordingly, Calfrac's application was also rejected.

As for the main proposal in question – the UTI sale – Parnerny J. stated,

> It may well be that the UTI proposal is a commercially provident deal. The fact that it is not in the form of a plan is not in and of itself fatal in *CCAA* proceedings. However, the proposed transaction does not create a pool of cash in which unsecured creditors or shareholders can ultimately participate for their general benefit. It does not provide for the opportunity to consult with those stakeholders because it does not contemplate their receipt of any benefit. The court does not have the comfort of an independent opinion as to the fairness of the transaction or the process leading up to it. It has only a limited opportunity to evaluate the proposal. However reasonable the proposal may be, its purpose is to facilitate a sale for the benefit of the Syndicate. That can be accomplished in a different fashion without distorting the spirit of the *CCAA*. These concerns, cumulatively, lead me to no other conclusion than this proposed sale ought not to be approved under the *CCAA*."[110]

Finally, the court approved the secured creditors' application to have the stay lifted and granted the request to have a monitor appointed as receiver and manager of the property and assets of Fracmaster.[111] Paperny declined only to direct the monitor to approve the UTI proposal, claiming that such an action would "fetter" the discretion of the monitor.[112]

The *Fracmaster* opinion stands in contrast to cases like *Chrysler* in the United States, where the debtor's assets were sold in a pre-plan sale that only benefited secured lenders and those unsecured creditors deemed sufficiently

[109] *Ibid*. at para. 37.
[110] *Ibid*. at para. 40.
[111] *Ibid*. at para. 43.
[112] *Ibid*. at para. 44.

important for ongoing operations.[113] It also directly addresses the key controversy in the United States: namely, whether a s.363 sale should be used to solely benefit a secured lender, or whether the lender should be related to its state-law collection rights. And while the Canadian caselaw is somewhat less developed that its U.S. counterpart, if Fracmaster correctly defines the outer bounds of pre-plan asset sales it shows that sales in Canada, unlike the United States, are not a complete substitute for traditional reorganization. Rather, the use of a quick sale appears limited to those instances where the benefits will be shared throughout the debtor's capital structure. However, as is highlighted in the next case we consider, where benefits are shared by a range of the debtor's stakeholders, a single creditor of the debtor will not be able to veto the sale.

PSINet Ltd. (Re)[114] involved a joint hearing between the U.S. Bankruptcy Court and Ontario's Superior Court of Justice. The hearing concerned the proposed sale of PSINet's assets in Canada to Telus Corp. The assets in question were owned in part by the Canadian applicants under the CCAA filing, and in part by their U.S. parent company.[115] The only objection to the sale came from Royal Bank, which, with respect to equipment leases, wished to be paid out in full the balance of payments under such financing arrangements. In response, PSINet proposed that the sale be "approved with the proviso vis-à-vis the Royal Bank that an amount of money for the full claim be set aside with ... PricewaterhouseCoopers Inc., the monitor in these proceedings, pending a further determination of entitlement."[116]

In its analysis, the Ontario Court held that the Bank would not be "prejudiced or otherwise disadvantaged by the arrangements proposed by the PSINet companies. To the contrary in this real time litigation situation, there would be material prejudice ... to the other stakeholders if the Telus transaction were not proceeded with."[117] In approving the sale, Justice Farley used *Canadian Red Cross* as support for his decision, stating that

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[113] *Ind. State Police Pension*, *supra* note 3.
[114] *PSINet*, *supra* note 97.
[115] *Ibid*. at para. 1.
[116] *Ibid*. at para. 2.
[117] *Ibid*. at para. 3.

Canadian Red Cross is evidence that "the court has jurisdiction to approve a sale where circumstances dictate ... prior to a CCAA plan being submitted."[118]

ii. Re Consumer Packaging Inc.

Another recent CCAA case where asset sales played a large role was *Re Consumer Packaging Inc*.[119] *Consumer Packaging* was another instance where the sale of substantially all the debtor's assets was approved by the court, under the CCAA, before creditors voted on a plan. In this case, Consumers Packaging Inc. ("Consumers") had filed for protection under the CCAA in May, 2000; KPMG was appointed monitor under section 11.7 of the CCAA. In June, Justice Farley authorized Consumers "through an Independent Restructuring Committee and its Chief Restructuring Officer to fix a date upon which interested third parties were to submit firm, fully financed offers to purchase all or any part of Consumer's business."[120] After, the Restructuring Committee, its Chief Officer, and the monitor agreed on a preferred bid, and the sale approval motion was heard on August 31.[121]

In approving the sale, Justice Farley noted "as a fact that Consumers was 'quite sick' and 'financially fragile...'"[122] He also stressed that the lenders who were supporting Consumers were threatening to withdraw if they were not paid out immediately.[123] In so doing, Justice Farley underscored the usefulness of a pre-plan sale in cases where the situation of the debtor is quite desperate and a timely solution is needed in the place of the more traditional, yet lengthy restructuring.

Justice Farley's sale approval order was appealed by an unsuccessful bidder, at which time the Court of Appeal stressed the validity of CCAA sales as a legitimate purpose of the statute.[124] The Court of Appeal for Ontario noted that the bid approved by Justice Farley "was the result of a fair and open process developed by Consumers and its

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[118] *Ibid*. at para. 5.
[119] *Consumers Packaging Inc. (Re)* (2001), 2001 CanLII 6708, 27 C.B.R. (4th) 197 (C.A.).
[120] *Ibid*. at para. 2.
[121] *Ibid*.
[122] *Ibid*.
[123] *Ibid.*
[124] *Ibid.*

professional advisors....”[125] The Court added that the successful bid provided more cash to creditors, had the least completing risk,[126] was not conditional on financing, was likely to close in a reasonable period of time, and would result in the continuation of Consumers’ business and the retention of many of their employees. [127] Of the unsuccessful bidder, the court asserted that it was “the unanimous view of the Monitor, Consumers’ Independent Restructuring Committee and Consumer’s Chief Restructuring Officer that Adargh’s [unsuccessful] proposals were not viable and would, if pursued, result in the liquidation of Consumers, resulting in lower return to creditors, loss of jobs and cessation of business operations.”[128] Here, the Court of Appeal outlined several key factors in pursuing a successful quick sale: the approval of the monitor, the approval of other key stakeholders, a fair bidding process, and a successful bid that maximizes creditor’s returns and maintains the efficiency of the sales process.

Also of note in this decision was the Court of Appeal’s general reluctance to grant leave to appeal in such situations. The Court noted that the “authorities are clear that, due to the nature of CCAA proceedings, leave to appeal from orders made in the course of such proceedings should be granted sparingly .... Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to stakeholders as a whole, and would hence be contrary to the spirit and objectives of the CCAA.”[129] The Court stressed that this was the case with Consumers, as there was a “real and substantial risk that granting leave to appeal ... [would] result in significant prejudice to Consumers and its stakeholders, in light of significant time and financial constraints ....”[130] Accordingly, it appears that for an appeal on a quick sale to be successful, the appellant would need to demonstrate that the proposed sale is clearly against the interests of the debtor corporation and its creditors, and that greater harm would result from the sale than from preventing it.

[125] *Ibid*. at para. 3.
[126] That is, risk of not closing the sale.
[127] *Ibid*.
[128] *Ibid*. at para. 4.
[129] *Ibid.* at para. 5.
[130] *Ibid.*

This is a significant burden of proof for an appellant to meet,[131] and represents a kind of judicial protection for insolvency sales like that found in the United States' s.363(m).[132]

The recent case of *Nortel Networks Corp. (Re)* [133] involved a cross-border insolvency; Nortel, the applicants, were involved in insolvency proceedings in four countries. In Canada, Nortel had been granted CCAA protection and proposed to maximize the value of the corporation through a quick sale.[134] This proposal was approved by the monitor. In June 2009, Justice Morawetz approved the Asset Sale Agreement between Nortel, as the sellers, and Nokia Siemens, as the buyers. Justice Morawetz also approved and accepted Nortel's motion for approval of a "stalking horse" bidding process, utilizing such bidder protections as break-up fees and expense reimbursement.[135] Under this sale agreement, the purchaser was to assume both assets and liabilities. Moreover, this process involved no formal plan for compromise with creditors.

In approving Nortel's application, the court discussed their main submissions – namely that "CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or 'the whole economic community.'"[136] Further, the "purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both

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[131] *Re Consumer's Packaging Inc.* has been mentioned in 6 subsequent cases. This decision received "neutral" treatment in *Nortel Networks Corp. (Re),* [2009] O.J. No. 3169 at para. 33, [*Nortel*]; *Railpower Technologies Corp. (Arrangement relatif à)*, [2009] Q.J. No. 6511 at para. 105, [*Railpower*]; *Papiers Gaspésia Inc. (Arrangement relatif à)*, [2004] J.Q. No. 11951 at para. 73; and *843504 Alberta Ltd. (Re)*, [2003] A.J. No. 3169 at para. 25, [*Alberta*]. The decision in *Re Consumer's Packaging Inc*. was distinguished in *Air Canada (Re)*, [2003] O.J. 2976 at para. 25, [*Air Canada*], and it was affirmed in *Country Style Food Services Inc. (Re)*, [2002] O.J. 1377 at para. 15, [*Country Style Food*].

[132] 11 U.S.C. §363(m) ("The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.").

[133] *Nortel*, *supra* note 131.

[134] Specifically, Nortel argued that a quick sale was the best way to preserve jobs and company value. *Ibid*.

[135] *Ibid*. at para 1-2.

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

secured and unsecured) and the employees."[137] In so doing, the court cited *Re Consumers Packaging Inc*. as authority for that statement.

In *Railpower Technologies Corp.*,[138] Railpower –a corporation that had already filed under the CCAA – brought a motion requesting authorization to sell substantially all of its assets to RJ Corman Railroad Group, a Kentucky-based limited liability company.[139] While Railpower's most important creditor, the Ontario Teacher's Pension Plan Board, supported the motion, Progress Rail Services Corporation ("Progress") contested the sale.[140]

Specifically, Progress alleged that "the bidding process through which RJ Corman's bid was accepted was defective and prejudiced its rights .... [and] the offer that was finally accepted by Railpower's board of directors [was] less favourable to the creditors and other stakeholders in Railpower than would otherwise have been possible."[141] Accordingly, in its contestation Progress filed a new bid, and requested that the court refuse to ratify the sale of Railpower's assets to Corman, declare null and void any agreement between Corman and Railpower, and re-open the bidding process in order to allow Progress to bid on Railpower's assets. [142]

Despite Progress' motion contesting Railpower's sale to Corman, Justice Alary held that the sales process which Progress objected to was fair and the monitor had acted reasonably in accepting Corman's bid.[143] The court stressed that the bidding process "included identifying and approaching qualified strategic partners or investors, making a data room available and signing Confidentiality Agreements. [In doing so,] Railpower ... and the Monitor asked for bids, requested details and additional information and kept the

[137] *Ibid*.
[138] *Railpower*, supra note 131.
[139] *Ibid*. at para. 3.
[140] *Ibid* at para. 4-5.
[141] *Ibid*. at para. 5.
[142] *Ibid*. at para. 8.
[143] *Ibid*. at para. 89.

Board of directors informed."[144] Further, the monitor and Railpower awarded equal chances to all potential investors to make their offers.[145]

Citing *Re Consumers Packaging Inc.*, the court noted that there are authorities to the effect that courts have jurisdiction to authorize a sale of assets in CCAA proceedings in appropriate circumstances.[146] Citing Janis Sarra, the court noted that

> The CCAA has a broad remedial purpose and is aimed at avoiding the social and economic consequences of a termination of business operation and at allowing the corporation to carry out business, causing the least possible harm to employers and the communities in which it operates .... According to the Monitor, a transaction with RJ Corman will allow Railpower's business to continue, as a going concern, although in a different form and under a new corporate identity.[147]

Lastly, the court also stressed that, in authorizing the sale of assets under CCAA proceedings, substantial deference should be given to the monitor's recommendation "where the later has acted reasonably."[148]

In *843504 Alberta Ltd. (Re)*,[149] Edgestone Capital Mezzanine Fund II Ltd. ("Edgestone") – a creditor of 843504, better known as Skyreach– and the monitor of Skyreach sought an extension of the stay of proceedings granted under an Initial Order pursuant to the CCAA.[150] Through this extension, Edgestone and the monitor intended to "establish a process for soliciting offers to purchase assets."[151] With the exception of GE

[144] *Ibid*. at para. 90.
[145] *Ibid*. at para. 91.
[146] *Ibid*. at para. 105.
[147] *Ibid.*
[148] *Ibid*. at para. 93.
[149] *Alberta*, *supra* note 131.
[150] *Ibid*. at para. 1.
[151] *Ibid*. at para. 9.

Commercial Distribution Finance Canada Inc. (GE), Skyreach's other creditors opposed this extension of the stay. [152]

In this case, several parties used *Re Consumer Packing Inc*. to argue in favour of the "sale of Skyreach's assets, either hard assets or shares, well before a plan is developed and presented to the creditors."[153] Specifically, the "Monitor, EdgeStone and GE urge[d] that this process w[ould] maximize recoveries for the stakeholders, contending that the marketplace can best determine value of the debtor's assets," relying on *Re Consumers Packaging Inc.* as authority.[154]

However, while Justice Topolniski did agree to extend the stay of proceedings,[155] she did not endorse a pre-plan sale of Skyreach's assets. Rather, she asserted:

> I accept that the need for flexibility in CCAA proceedings may, in the appropriate circumstances, warrant a sale of a significant portion of a debtors assets or undertaking before a plan of arrangement is put to the creditors ... Obviously, each case must be assessed on its own unique facts, but in this case *there is no evidence that it is either necessary or in the stakeholders' best interests*. Accordingly, at this stage the proposed process is unacceptable.[156]

In her decision, Justice Topolniski distinguished the case at hand from *Re Consumers Packaging*, stating that, in *Consumers*, "the court approved a going concern sale before the plan of arrangement was presented because the sale would preserve the business, albeit under new ownership, and because of uncertainty over whether the debtor could continue operations given its financiers' demands." However, in Skyreach's situation, Justice Topolniski felt that this was not the case and held that a pre-plan asset sale would not be beneficial.[157]

[152] *Ibid*. at para. 1 and para. 17.
[153] *Ibid.* at para. 24.
[154] *Ibid*. at para. 25.
[155] *Ibid*. at para. 33.
[156] *Ibid*. at para. 29.
[157] *Ibid*. at para. 33.

D. Reforms to the CCAA: Codification of the Quick Sale Approval Process

To a certain extent the 2009 reforms to the CCAA codify and give greater certainty to the sale process under the CCAA and the role of the monitor. Together with the case law that demonstrates a clear American influence on the Canadian CCAA quick sale process, one might predict the increasing popularity of this approach. However, the reforms remain uncertain in their application, do not introduce specific features for the process (such as break fees), and introduce greater obligations relating to employees, which will likely mean that we will not see a significant departure from the current process. That is, the Canadian quick sale process will continue to be driven by the courts' concern with whether the sale is necessary and in a broad range of stakeholders' best interests. The monitor will continue to be the guiding force for the court in making such a determination. There will continue to be a greater measure of unpredictability in whether a quick sale will be approved as compared to the American process.

The new section 36 of the CCAA provides that a debtor company may not sell or dispose of its assets outside of the ordinary course of business during the administrative period in a CCAA restructuring without court approval and on notice to secured creditors who are likely to be affected by the proposed sale or disposition. The court is required to consider specific enumerated factors in reaching a decision on the sale or disposition:

- Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- Whether the trustee or monitor approved the process leading to the proposed sale or disposition;
- Whether the trustee or the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- The extent to which the creditors were consulted;
- The effects of the proposed sale or disposition on the creditors and other interested parties; and
- Whether the consideration to be received for the assets is reasonable and fair, taking

into account their market value.[158]

In addition to these factors, if the proposed sale or disposition is to a person who is related to the company, the court may only grant authorization if it is satisfied that

- Good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- The consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.[159]

Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained. Further, the court may authorize the sale of assets free and clear.[160] As will be discussed in greater detail below, "free and clear" in the Canadian context has a different meaning than in the United States and functionally means subject to certain employee and crown claims.

As a "rationale" for these reforms, Industry Canada indicates that the "reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."[161] In particular, the factors included in the reforms are intended to provide the courts with legislative guidance and to provide direction for the debtor company. Industry Canada indicates that the amendments should improve consistency of judicial decisions.[162] In addition, Industry Canada notes that the amendment that provides that a court may order that the property be sold to the purchaser free and clear of charges, liens and restrictions will increase the value of the property

[158] CCAA, *supra* note 5 at s.36(3).
[159] *Ibid*. at s.36(4).
[160] *Ibid*. at s.36(6).
[161]. Industry Canada, "Corporate and Insolvency Law Policy – CCAA: Sale of Assets" (23 January 2009), online: <http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00828.html>.
[162] *Ibid*.

thereby creating greater wealth for the estate while also increasing the likelihood that property will be returned to productive use quickly.[163]

While the clear articulation of factors relating to the monitor's role in this process and the court's approval process, in addition to the explicit indication that assets can be sold free and clear appear to create a more transparent and bidder friendly process, it will still remain a judicially driven process that relies on the monitor's judgment and a significant degree of judicial discretion. In addition, a final restriction on the approval process for quick sales in a CCAA will continue to differentiate it from the American process. A court can only grant authorization for a quick sale of assets if it is satisfied that the company can and will make payments to its employees and former employees, immediately after court approval of the proposal, of amounts equal to the amounts that they would be qualified to receive under paragraph 136(1)(d*)* of the BIA if the employer became bankrupt on the date of the filing of the notice of intention, or proposal if no notice of intention was filed, as well as wages, salaries, commissions or compensation for services rendered after that date and before the court approval of the proposal, together with, in the case of travelling salesmen, disbursements properly incurred by those salesmen in and about the bankrupt's business during the same period.[164]

IV. THE COSTS AND BENEFITS OF FLEXIBILITY

As parts II and III have shown, both the United States and Canada share a common belief that it is permissible to sell a debtor's assets as part of a reorganization procedure. But upon closer inspection, it is clear that the U.S. approach to assets is substantially broader – encompassing both a broader range of cases and selling assets free from a broader range of claims. In this section of the paper we examine the costs and benefits of this extra flexibility. We ultimately conclude that while sec. 363 in its fullest form is more beneficial for once in a lifetime cases like Lehman Brothers, for the broader

[163] *Ibid*.
[164] BIA, *supra* note 36 at s.36(7).

run of cases the more confined Canadian approach to asset sales provides better safeguards against potential abuses of the reorganization process.

A. *The costs of pre-plan sales*

In its purest form, a pre-plan sale of a debtor's assets would represent nothing more than a change of form, converting hard assets into cash for distribution to creditors. Such a sale could never be objectionable.

But reality is often somewhat different. Valuation of a corporation and its prospects is an inherently uncertain endeavor.[165] In most cases it will never be known what the present value of the debtor really is and thus comparison to the proposed sale proceeds becomes a rather speculative endeavor. Secured creditors can be expected to engage in excessively pessimistic valuations and unsecured creditors and shareholders will tilt the opposite direction, leaving the judge to divine the true value.

This creates the risk of manipulation of the bankruptcy process, a risk that we argue is more extreme in the United States because courts will now allow a 363 sale to replace a plan in almost every cases. For example, it remains conceivable that would-be objectors to a "lowball" sec. 363 might be satisfied by side payments from either the purchaser or the debtor. If the senior lender is paid in full, it has no reason to object to such an arrangement that might lead to a quicker realization of its recovery. If these side payments are funded by reduced value going into the estate, the problem is a significant threat to the bankruptcy process and the basic premise of creditor equality.

The actual occurrence of such collusion is hard to detect. While many commentators alleged such a deal took place in the automotive cases – in particular with regard to the payments made to the unions – it is not at clear that these arguments were not just reflections of the overheated political rhetoric surrounding these cases and many of the claims seemed to amount, at heart, to an argument that the government should prefer

[165] Sabin Willett, "Gheewalla and the Director's Dilemma" (2009) 64 Bus. Law. 1087 at 1096.

investors over unions.[166] Given that the union was making significant labor concessions to the buyers of the automotive assets, a plausible argument can be made that the value the unions received was on account of their deal with the purchaser and not as a result of their parallel status as unsecured creditors of the debtors.

In addition, even without strategic behavior among parties, there remains the question of whether it is appropriate to conduct a reorganization proceeding for the sole benefit of a secured creditor. This is especially acute in the United States, where the broad reach of sec. 363(f) means that the costs of some asset sales – including those in the two recent automotive cases – are borne by tort and other involuntary creditors. Specifically, since section 363(f) allows for the sale of assets free of these liabilities, the sale represents a transfer of value from these involuntary creditors to the debtor and, most often, its senior creditors.[167]

More broadly, there are important policy considerations embedded in the decisions to allow a corporate reorganization scheme to transform into a kind of supercharged foreclosure mechanism, particularly if secured lenders are able to avoid incurring costs that they would normally absorb in a state or provincial debt collection action.

B. *The benefits of pre-plan sales.*

The most obvious instance where pre-plan sales provide real benefits is a case where the debtor has going concern value but is unlikely to survive long enough to complete a formal reorganization process. Lehman Brothers may offer an example of this, where the court was presented with testimony that a failure to sell Lehman's key

[166] Ann Woolner, "Chrysler Mows Down Debtholders' Claims in Courts" (5 June 2009), online: <http://www.bloomberg.com/apps/news?pid=20601039&refer=columnist_woolner&sid=aN_5hvV_xqHM>.

[167] More precisely, the cost of the 363 sale in this situation is the marginal difference between a sale and a formal reorganization plan. For example, if the sale achieves something that could not be achieved under a plan, it represents a cost.

assets would result in a worldwide financial panic, with obvious consequences for the value of Lehman.[168]

Using a sale also allows for the resolution of the debtor's financial distress to proceed even in the face of inter-creditor disputes about payment and priority. The debtor's assets can be disengaged from the claims resolution process, allowing the business to resume normal operations in a swift manner that does not depend on the pace of the bankruptcy process. Moreover, it may be that claims are resolved faster if dissenting creditors lose their ability to obstruct the debtor's reorganization.

All of this has to be tempered by the realization that secured lenders can create an emergency at will, simply by freezing the debtor's access to cash needed for daily operations. A secured creditors with liens on all of the debtors assets, including the debtor's operating cash, has the option to set a timetable for the bankruptcy case that will preclude any other option than a quick sale. The growth of secured financing – driven in part by the ability to sell "pieces" of a secured debt facility – means that more debtors will enter bankruptcy with a strong controlling creditors (or group of creditors) that may have the ability to trigger a sale.

C. *Balancing*

As previously discussed, the necessity of receiving the monitor's approval for an asset sale in Canada can impede the quick sales process; however, the key role played by the monitor can also be framed in more positive terms, as the monitor helps to provide an independent assessment in whether a quick sale is truly beneficial or not. Indeed, the recent amendments to the CCAA both emphasize and ensure the monitor's role as an independent advisor throughout the reorganization process. For example, section 11.7(2) states that, except with permission from the court, no trustee can be appointed as a monitor if they have during the preceding two years been a director, officer or employee

[168] Lehman Sale Transcript, p. 146 ("Any failure to consummate [the Barclay's sale] may potentially cause a major shock to the financial system"), and the remarks of Judge Peck, Transcript at 171 ("in unrebutted testimony [Mr. Ridings, Lehman's investment banker] indicated through proffer that the markets, in effect, would tank [if the sale was not approved].")

of the company, or related to the company in any way, even as an auditor or legal counsel.[169] This differs from the previous guidelines (or lack thereof) under the CCAA, under which the monitor was frequently someone who had acted in an auditing capacity for the company in question.

Moreover, under the recent amendments, the monitor must now be a trustee within the meaning of subsection 2(1) of the BIA.[170] As such, insolvency practitioners acting as monitors are now subject to additional oversight mechanisms from professional bodies such as the Canadian Association of Insolvency and Restructuring Professionals (CAIRP) as well as the Office of the Superintendent of Bankruptcy (OSB). Accordingly, CAIRP and the OSB are available to oversee the activities of the monitor and ensure that they are as an independent advisor during the restructuring and reorganization process. Similarly, the new subsection 11.7(3) of the CCAA allows the court to replace the monitor following an application from a creditor, if it considers that course of action appropriate.[171] Therefore, if the monitor is not acting independently throughout the process, the court is equipped with the ability to appoint a new monitor. It remains to be seen how effectively CAIRP, the OSB and the courts will play their new role in "overseeing the overseer."

In its newly cemented role as an independent advisor, the monitor has the potential to play an important role during the quick sales process, balancing the interests of the insolvent corporation with those of the creditors and other stakeholders. As Andy Kent notes, the monitor is "[o]ne possible counterweight to the powers given to the debtor under the Canadian system."[172] The monitor also presents a possible check against an overreaching secured creditor, especially in situations where the debtor is unable or unwilling to resist the creditor's demands.

[169] CCAA, *supra* note 5 at s.11.7(2)
[170] *Ibid.* at s.11(7).
[171] *Ibid.* at s.11.7(3)
[172] Kent, *supra* note 42 at 13.

Certainly, in acting as a "watchdog" throughout the CCAA process, the monitor has access to the debtor's books, records and property.[173] As such, the monitor is extremely well positioned to provide an objective analysis of whether a quick sale is truly the best course of action, or whether the debtor would be likely to receive better returns for creditors by pursuing a more traditional reorganization.

Similarly, the monitor is not only obliged to weigh whether the debtor would be better off pursuing a traditional reorganization; the monitor is also subject to a formal requirement that it advise the court if the declaring bankruptcy under the BIA would be a better option. In so doing, the monitor is able to balance the needs of the debtor with those of creditors, while also providing a check on the unbridled use of quick sales in Canada.

This perspective of the monitor—as an independent overseer, capable of balancing the interests of all parties—is consistent with the legislative goals of having a monitor in the first place. Indeed, during the 1997 round of legislative reform, the Bankruptcy and Insolvency Advisory Committee ("BIAC"), a task force appointed to study changes to the CCAA and BIA, stressed that the appointment of a monitor should be made mandatory, in order to provide "creditors in CCAA applications [with] the same protection of a *professional and impartial* 'watchdog.'"[174] Similarly, in *United Used Auto and Truck Parts Ltd. Re*, the court also stressed the balancing role that the monitor can play during the CCAA process. Here, the court asserted that the monitor has an "obligation to act independently and to consider the interest of petitioners and creditors."[175] Accordingly, although satisfying the monitor that a quick sale is truly the best course of action places a significant burden on a Canadian debtor, it is nevertheless possible to argue that this is useful, and even necessary, in balancing the debtor's interests with those of other parties.

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[173] *Ibid.* at 14.
[174] Report of the Task Force on the CCAA to the Bankruptcy and Insolvency Advisory Committee Working Group on Commercial Reorganizations, Bankruptcies and Receiverships, 1994 at 3, emphasis added (as quoted in Kent, *supra* note 42 at 14).
[175] *United Used Auto & Truck Parts Ltd., Re* (1999), [1999] B.C.J. No 2754 No. 409 at para. 20 [*United*].

Further, the somewhat reduced scope of quick sales in Canada, when compared to the United States can also be viewed in a positive light as it could allow for greater oversight during the process. As noted, quick sales are becoming increasingly popular in Canada; however, at present, pre-plan asset sales remain more popular in the United States.

Additionally, the reduced scope of quick sales in Canada could provide limits on agreed to sales. An added judicial check on the quick sales process in Canada is the additional requirements placed on sales to persons related to the distressed company. Specifically, under the new s.36(4), if a proposed sale is to a person related to the company, the court may only grant authorization if satisfied that "good faith efforts were made to sell …. the assets to persons who are not related to the company; and the consideration received to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale."[176]

Moreover, the added requirement under the CCAA that debtors pay the super-priority charge for any arrears on wages and pensions persists during a quick sale. As such, while Canadian debtors can theoretically dispose of their assets freely during pre-plan sale, in reality Canadian asset sales are never entirely "free and clear" of charges and obligations. Rather, with regard to employee claims, a quick sale under the CCAA cannot proceed unless the debtor meets the mandated requirements beforehand. Although in larger American Chapter 11 cases employees are typically paid in full through "first day" orders, the U.S. Bankruptcy Code at least provides the option to sell without paying employees – a policy decision that may represent a real cultural distinction between the two jurisdictions.[177]

Despite the benefits of the Canadian quick sales regime—with its greater emphasis on oversight and the balancing of key interests—there are still situations in which the more established American framework would be more efficient. For example, in the United

[176] CCAA, *supra* note 5 at s.36(4)(a) and (b).
[177]Under the U.S. Bankruptcy Code, employees have a priority claim for up to $10,000 in back wages, indexed for inflation (currently $10,950). 11 U.S.C. §507(a)(4). But this claim is a priority unsecured claim – meaning that it comes after secured creditors – and of fourth priority, putting it after the costs of administering the debtor's estate. Cf. 11 U.S.C. §507 (a)(2) (priority for administrative claims).

States, a distressed corporation would not need to prove that it is insolvent, prior to pursuing a pre-plan sale, as it would in Canada. Further, American quick sales are not subject to the oversight of the monitor, who plays a key role in the Canadian process. As such, American debtors are able to seek approval of a sale more quickly. Such factors are particularly important in situations when time is of the essence because the debtor will soon be unable to meet its operating expenses. As such, the American process is apt to be more efficient in such "emergency" situations – although there remains the problem of creditors manufacturing emergencies.

CONCLUSION

Pre-plan sales are becoming increasing popular in both Canada and the United States, with several high profile insolvencies ending in quick sales in recent years, such as Lehman Brothers, GM and Chrysler. Although the Canadian quick sales process under the CCAA has been likened to American regime under s.363 of Chapter 11, there are nevertheless key differences in the way both countries approach pre-plan sales.

Indeed, the CCAA lacks the detailed statutory framework included in the United States Bankruptcy Code. Although recent amendments to the CCAA provide somewhat more guidance as to factors that courts should weigh in considering whether to approve a pre-plan sale, they do not outline a specific process through which asset sales are supposed to occur.

Despite the lack of a clearly expressed quick sales process, the Canadian approach to pre-plan sales includes a number of checks in order to ensure that the process is fair and efficient. Particularly, Canadian courts are required to appoint a monitor during all CCAA proceedings. While the monitor can certainly be viewed as an impediment to an efficient asset sale—as, in practice, the debtor must secure the monitor's approval prior to any sale—the monitor has the potential to play a critical role in balancing the interests of both the debtor and creditors.

In essence, the questions of speed and certainly mark the biggest difference between quick sales under the CCAA and Chapter 11. The U.S. approach is more likely to facilitate quicker asset sales. The efficiency of the U.S. framework is necessary in large cases, where the complexity of the business and the extent of their distress warrant an expedient response. Alternatively, the Canadian quick sales process, though potentially less efficient than the American regime, the CCAA provides better protection for employee claims and utilizes the monitor as an independent advisor, in order to balance the needs of both the debtor and its creditors.

Ultimately, while there are undoubtedly benefits to both systems, during a more traditional reorganization, the checks and balances provided by the CCAA are beneficial, insofar as they prevent the overuse of quick sales and provide greater oversight for the sales process.