

Canadian Structured Finance Newsletter

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DBRS COMMENTS ON AMENDMENTS TO THE BANKRUPTCY AND INSOLVENCY ACT

On August 19, 2009, an Order in Council fixing September 18, 2009, as the date that certain amendments to a number of insolvency-related statutes will come into force was published in the *Canada Gazette*. This marks the final step in a legislative reform process that has seen numerous delays and has involved the passage of two bills, the second amending the first, in different sessions of Parliament.

One aspect of the reform package of particular interest from a structured finance point of view is the amended section 65.11 of the *Bankruptcy and Insolvency Act* (BIA), which states that a debtor, other than an individual, may “disclaim or resiliate any agreement” to which it is a party as of the date of the bankruptcy. This effectively allows the debtor to terminate and walk away from an agreement. Any disclaimer or resiliation must be approved by the bankruptcy trustee or the court. If an agreement is disclaimed or resiliated, other parties to the agreement are deemed to have a claim for damages as unsecured creditors; however, they may also make application to the court for an order to nullify the disclaimer or resiliation. On September 18, 2009, similar amendments will also come into force under the *Companies’ Creditors Arrangement Act* (CCAA).

While these amendments may have been intended to simply codify in legislation certain rights available to debtors at common law, concern has been raised by a number of industry participants that these amendments have created broader rights for debtors, thereby introducing uncertainty with respect to the bankruptcy remoteness of certain lease securitization structures that have been used in Canada.

In light of these concerns, DBRS has begun to discuss the implications of these amendments with the sponsors of structured finance transactions that may potentially be affected by the changes. While no rating action is being taken at this time, DBRS’s legal criteria requires that structured finance transactions be bankruptcy remote. As a result, transaction sponsors may need to develop mechanisms or execute appropriate revisions to transaction documentation to mitigate the impact of these amendments. DBRS will continue to monitor this development and comment on its applicability and potential impact on rated structured finance transactions.

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