tect and enhance creditors' investments, including those of non-traditional creditors. France offers the best comparative model for recognition of workers' equitable investments in the firm. While other jurisdictions formally recognize the public interest in job preservation, they do not appear to make constructive use of workers' informational and organizational capital in decision making. The notion of community or other stakeholder participation is almost non-existent elsewhere, with the possible exception of the recognition of the decision rights of tort claimants in the United States. Only France has expressly embraced the idea of enterprise wealth maximization, although recent American case law indicates a slight potential for movement in this direction.

Finally, in assessing the debt collection jurisdictions, two observations can be made. First, while both the United Kingdom and Germany continue to maintain their creditor-oriented approach, they have both recognized the need to provide for some opportunity for the debtor corporation to try to work out a viable plan. The underlying policy rationale differs from rehabilitation regimes in that the objective is to further enhance creditors' interests by avoiding premature liquidations. The fixed claims of employees as creditors, their human capital investments, and the interests of constituent members of the community may also benefit to some extent from the avoidance of premature liquidation. The new EU Bankruptcy Regulation is likely to have an impact on these issues, because of the growing need for effective cross-border mechanisms to address a firm's financial distress. While close convergence is unlikely, states continue to try to find the optimal combination of liquidation and rehabilitation policy instruments that meet their particular, debtor-oriented or creditor-oriented normative insolvency law objectives.

10 Conclusion: Future Development of the Public Interest within the Enterprise Wealth Maximization Model

In Canada, legislative debates and judicial interpretation have suggested that there is an element of public interest in the outcome of restructuring proceedings. I have suggested that 'public interest' is a short form for the complex balancing of interests that the courts engage in when determining whether to sanction a plan of arrangement or compromise for an insolvent corporation. The enterprise wealth maximization model suggested in this book enables us to better understand the current trends in judicial thinking and provides a rationale for further development. The framework's key elements – recognizing the value of a workout regime; recognizing the investments of creditors, workers, and other stakeholders; according participation and decision rights; and the substantive goal of enterprise wealth maximization – can serve as policy objectives and instruments as the law develops.

The framework described in chapter 3 also provides a benchmark against which to measure concerns raised by debt collection, rehabilitation, and enterprise theorists. While these theoretical approaches conflict in some aspects of their analysis, their best elements can be utilized to develop the enterprise wealth maximization model. From debt collection theory, I have drawn on the need for an effective debt collection process; prevention of a race to realization; the need for consistency in and out of bankruptcy in how claims are valued; and the need to respect the hierarchy of credit in securities, corporate, personal property, and bankruptcy regimes. While the framework proposed endorses debt collection norms that insolvency law should be

indifferent as to whether liquidation or restructuring is the proper outcome in a particular case, it suggests that until all costs of the firm's financial distress are accounted for, and until investors with a current and future stake in the corporation are given an opportunity to participate in the assessment of options, there cannot be a full appreciation of which outcome is optimal.

From enterprise theory, the model advocated in this book draws upon the recognition of multiple inputs into the firm's generation of surplus value, including equity, debt, and human capital investments. It suggests according value to the current inputs that generate wealth for the corporation, and which are not now properly accounted for in valuing firms. In addition, there must be a more systematic means of determining the difference between externalities and costs that should properly form part of the restructuring decision. The model suggested here takes the enterprise theory one step further by proposing principles that could be utilized in formulating a measure of the value of these inputs, which might then give rise to decision and participation rights. Valuation of such claims does not interfere with the current priority of secured claims, and given the current hierarchy, whether the outcome is liquidation, restructuring, or some combination of both, the claims of creditors are preserved, with value accounted for more realistically. However, the model does provide a basis for establishing the proportional share of the upside value of the restructuring that should accrue to workers and other non-traditional creditors, and it suggests that this determination should form part of the court's consideration in its sanctioning of a plan.

From rehabilitation theory, the model draws on ideas about how to measure the community or public interest. While such interest may not involve capital claims on the corporation, the court's decision making may in some instances be enhanced by hearing the views of those elements of the community who have a direct nexus with the financially troubled corporation. A number of options, including participation rights in the insolvency proceeding, representation on restructuring committees, or input as amicus curiae have been put forward as means by which non-traditional stakeholders may be given a voice. Finally, both rehabilitation and enterprise theory assist in making the links between the interests of stakeholders implicated in the corporation's insolvency and restructuring and public interest concerns in protecting the environment and granting remedies against wrongful conduct. These issues are interwoven in the fabric of Canadian economic life.

Developing Notions of Enterprise Wealth Maximization

I have suggested that enterprise wealth maximization, rather than shareholder wealth maximization or creditor wealth maximization, should be made a substantive objective of insolvency law. Such a recasting of goals would promote a governance model that accounts for all the inputs into the corporation. Its distributive consequence would be to recognize value currently generated by particular stakeholders, not only in capital investments, but in the governance role of debt and the contributions of human capital and infrastructure. Wealth creation would be linked more directly to those who have the greatest incentive to generate value and to monitor decision makers in governance of a corporation. Enterprise wealth maximization as a normative objective would address the concerns of debt collection theorists that creating differing rights in and outside of bankruptcy will lead to forum shopping.

Inherent in the enterprise value maximization goal is a recasting of fiduciary obligation to take account of all interests in the firm. Earlier chapters suggested a governance model of enterprise wealth maximization with fiduciary obligation recast as 'best interests of the corporation, having regard to equity, debt and equitable investments.' Where the solvent corporation is concerned, this shift will likely engender considerable debate. On insolvency, however, Canadian courts have recently recognized that the directors' duty to a corporation as a whole extends to not prejudicing the interests of creditors in an insolvency context.[1] This is particularly the case where the corporation was insolvent at the point at which a particular transaction was entered into, or where the transaction itself resulted in the insolvency. This reconception of fiduciary duty on insolvency erodes the shareholder wealth maximization model of corporate law and provides support for a model in which other stakeholders' interests can legitimately be the subject of the directors' legal duties.

Judicial recognition of a shift in fiduciary obligation on insolvency is a relatively recent development in Canadian law. In *Peoples Department Stores Inc. v. Wise*, the Quebec Superior Court held that where a company is insolvent or near to insolvency, the directors' duties shift to a consideration of the interests of creditors when acting in the best interests of the corporation.[2] The court held that where a corporation is approaching insolvency, only the creditors have a meaningful stake in its assets, and the directors therefore had an obligation not to sacrifice creditors' interests when the financial situation of the corporation

was doubtful. The lower court's reasoning has been endorsed by several other courts.[3] As this book goes to press, the Quebec Court of Appeal, nine months after hearing the appeal, rendered its decision in *Peoples Department Stores v. Wise.*[4] The Court of Appeal allowed the appeal on a number of grounds. Most significant for the discussion in this book is the court's equation of the fiduciary duty of directors to the corporation with a duty owed solely to shareholders, equating best interests of the corporation as purely shareholder interests. The court held that, even on insolvency, the fiduciary obligation is still owed only to shareholders and that any extension of fiduciary obligation to creditors was a matter for legislative amendment. The decision appears to discount the fact that when the corporation is insolvent, shareholders' equity interests have little or no economic claim on the corporation's assets. Rather, it is the creditors that are entitled to a proportional share of the value of assets where the firm is bankrupt. Failing to recognize that directors and officers are to act in the best interests of the corporation, which in insolvency means having regard to the interests of all those with investments in the firm, including creditors and employees, unnecessarily narrows the existing statutory language. The court's analysis of the potential for duties to be owed to creditors on insolvency reflects a very civilian approach that is reluctant to import any specific obligations without express language regarding creditors. However, it appears to abandon this approach in finding that the fiduciary duty, which the statute expressly requires be rendered to the 'corporation,' is in fact owed to shareholders alone. The judgment appears contrary to recent decisions of Canadian courts in insolvency cases, as discussed in chapter 4. The judgment may also create enormous ex ante incentives for directors to act in a manner that depletes corporate assets and prejudices the interests of creditors and other stakeholders.[5] The court also narrowed considerably its view of the scope of the duty of care in the *CBCA*, ignoring much of the case law concerning this duty in the past two decades.[6] By importing notions of good faith, motivation, and reliance without requiring a basic due diligence standard before such defences are available, the judgment appears to largely disregard the statutory language. Leave to appeal is being sought to the Supreme Court of Canada, and hopefully, the Supreme Court will take the opportunity to provide some clear direction concerning this important issue.

By comparison with other jurisdictions, Canadian law lags behind in development of fiduciary obligation during insolvency.[7] Courts in the United Kingdom, Australia, and the United States have long recognized that directors must consider the interests of creditors when the corporation is insolvent, although there are differences in opinion as to when that obligation arises.[8] The slower development of these notions of fiduciary obligation in Canada may be explained in part by the availability of the oppression remedy under applicable corporate law statutes, which in some cases provides an alternative to recognition of creditor interests on insolvency. Oppression remedy provisions specify a 'statutory lifting of the corporate veil' where the conduct of directors is oppressive, unfairly prejudicial to, or unfairly disregards the interests of particular stakeholders.[9] The courts have recognized that creditors and trustees in bankruptcy can be proper persons to bring oppression claims.[10] The remedy, however, is available only in limited circumstances, and the courts will not allow debt actions to be routinely turned into oppression actions. Unfair prejudice encompasses the protection of the underlying expectation of the creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor. The earlier discussion of *Canadian Airlines* makes it clear that the courts will consider allegations of oppression in *CCAA* proceedings through the lens of multiple stakeholders, where the impugned conduct may be a function of the workout, not oppressive actions.

These shifts in fiduciary obligation and more textured understanding of oppression remedies are key to consideration of the framework set out in this book. Enterprise wealth maximization is limited as an objective if parties do not have enforceable remedies. To recognize an expanded fiduciary obligation will not result in an expansion of unaccountable decision making by corporate officers because deference will continue to be paid to statutory hierarchies of credit and to business judgments. However, the shift will ensure that in a *CCAA* or other restructuring application, corporate decision makers will have incentives to consider the interests of all those with investments in the corporation, including those who can make claims against those decision makers under the expanded fiduciary obligation or oppression remedies.

As discussed earlier, *Algoma Steel* represents a working model of an expanded notion of fiduciary duty in which directors and officers of the corporation have regard to equity, debt, and human capital invest-

ments. The restructuring and economic turnaround of the corporation would not have been possible without the protection afforded under the *CCAA*, and without the skilled intervention of the court. *Algoma Steel* represents a major breakthrough in the courts' recognition of workers' interests and in the acceptance by creditors of the role that workers and their bargaining agents can play in the development of effective plans of arrangement.

The experience of France's system of *redressement* illustrates that a clear articulation of multiple rehabilitation and debt collection goals, combined with structural intervention early in the firm's financial or economic distress, can lead to workout strategies that maximize enterprise value and reduce harms to various stakeholder groups. Developments in Canadian law in respect of creditor remedies are a move in this direction, but create delineation problems in terms of when fiduciary obligation shifts from shareholders to creditors. 'Best interests of the corporation' narrowly defined as shareholder wealth maximization and then equally narrowly shifted to secured creditor wealth maximization ignores the range of other interests and investments in the corporation at all stages of its economic life. While other international systems appear to lean too much towards rehabilitation or debt collection goals, causing either deferred liquidations or premature liquidation, the Canadian model offers potential for reconciliation of these tensions. Adoption of enterprise wealth maximization as a substantive goal permits a more comprehensive recognition of how wealth is generated in a firm and determination of who should benefit from its value. It also provides a means to create consistency in that goal in and outside of corporate insolvency.

The Public Interest in Encouraging Restructuring

Whether the normative goal of the insolvency regime is to facilitate debt collection, encourage rehabilitation, or some combination of the two, the public policy value of a workout regime has clearly been recognized. Canada's regime currently centres on debt collection, but the value of rehabilitative and enterprise wealth maximization goals is increasingly acknowledged. Developments in notions of the public interest reflect concern about the economic and social costs of firm failure. The shift has not been linear, however; rather, public policy has endorsed multiple goals for the insolvency law regime. The result has been successful restructuring of a number of insolvent corporations over the past decade and the preservation and enhancement of value for multiple stakeholders.

Where public interest is being argued, it is helpful to define the nature of that interest. It is equally important to quantify it where possible. While such information might not be readily available and there are costs associated with generating it, it is important that parties present their case to the court in economic terms. Evidence of the nature and value of the claim will assist the courts in determining the impact of its decisions and provide a clear basis on which negotiations for a workout should take place. In the absence of an economic valuation, 'public interest' becomes too nebulous and is easily dismissed, given the more compelling capital claims of traditional creditors within insolvency legislation.

For example, in the *Algoma Steel* case, evidence was presented of the impact of corporate failure on the community. In *Canadian Airlines*, the liquidation analysis extended beyond direct capital claims to establish the social and economic consequences of the corporation's failure for employees, consumers, and local communities. In *Red Cross*, the court was faced with competing public interest claims: the direct claims of tort claimants relating to the serious harm to their health, the public interest in having a blood delivery system that the Canadian public could have confidence in, the public interest in retaining employees skilled in collection and delivery of blood projects, and the public interest in the continued humanitarian work of Red Cross. The court was assisted by having the value of those diverse claims placed before it, as well as information on how the workout would affect the various interests within the larger scheme of the economic and health care system. While ultimately the debtor corporation must devise a survival strategy acceptable to creditors, public policy recognition of the value of workouts creates the space and the forum for resolution of more specific claims. Public policy recognition of the value of workouts is situated in and complements a much larger scheme of economic and social activity and the corporate, securities, bankruptcy, and other public laws that regulate the corporation's activities.

In recent years, environmental liability at the point of insolvency has become a key governance issue. This liability poses important challenges for the restructuring regime. Where restructuring efforts fail, environmental protection and clean-up costs are frequently borne by environmental authorities and, ultimately, by taxpayers. Often at the point of a *CCAA* proceeding, the outstanding environmental is-

sues that the corporation has been deferring for years come to the fore, and in many cases, particularly in the resource sector, there are millions of dollars in remediation liabilities. While there is a problem of inadequate enforcement of environmental standards when the corporation is solvent, which should be addressed much earlier in the firm's life cycle, environmental liability and remediation continues to be an immediate challenge in insolvency. One difficulty is determining who will bear responsibility for clean-up costs under environmental protection legislation. Liability runs with the land, and creditors, managers, and other stakeholders must necessarily consider the risks of environmental liability in considering whether or not to restructure. Environmental protection legislation has been strengthened considerably, imposing personal and corporate liability for environmental harm. However, environmental liability or tort claims arising out of environmental harm may be such that they impair the ability of the debtor corporation to pay its debts, thus precipitating insolvency or bankruptcy. Uncertainties about the extent of liability may hinder a corporation's ability to obtain further financing for restructuring, as the value of the security is uncertain.[11] Decisions about converting debt to equity in a restructuring or exercising enhanced oversight are shaped by the environmental liability that creditors may be acquiring, particularly if there is the possibility of being named a 'person responsible' for the source of the contaminant. Environmental liability is also an important consideration in the court's determination of whether to approve a plan. Since these costs are often unknown at the point at which a debtor corporation is in *CCAA* proceedings, this can pose a barrier to successful resolution of the insolvency.

Environmental issues are directly linked to the public policy objective of encouraging workouts where possible. If the corporation is liquidated, secured creditors have first call on almost all the value of the corporation's remaining assets and thus many remedial environmental costs are externalized to taxpayers and local communities. This has distributive effects in transferring wealth to senior creditors from the tax base. If the corporation continues and is in a position to generate further wealth, the environmental costs attributable to its prior activities are borne by the corporation, as opposed to the public generally. In order to reduce the distributive effects of environmental liability, both capital costs of remediation and long-term costs to quality of land, water, air, and human health must be appropriately valued in deciding on the future of the corporation.

Workouts facilitate the availability of financing for environmental maintenance or remediation by clarifying that creditors can conduct investigations or offer financing without acquiring the prior liability of the corporation. The availability of lender liability agreements with environmental authorities and, more recently, 'brownfields legislation' aimed at apportioning the risk and liability of revitalization of abandoned or contaminated lands during a workout, are positive public policy moves in recognition of the benefits of restructuring to environmental protection.[12] In the 1992 *Algoma Steel CCAA* plan, the provincial government offered some protection for the operating lender as consideration for it extending a further bridge loan of $60 million; default would have granted possession rights without attracting any environmental liability.[13] In *Anvil Range*, governmental stakeholders were instrumental, under the court's supervision, in creating a trust and working arrangement to ensure the corporation's environmental maintenance responsibilities were met pending development of a long-term plan. Amendments to bankruptcy legislation that have given priority to Crown claims for environmental clean-up costs over all other charges on the real property affected,[14] and the ability of insolvency officers to abandon or release their interest in property,[15] are aimed at encouraging creditors, through their officers, to consider taking steps to remedy environmental problems rather than abandoning the property. Since environmental costs are not considered administration costs, the costs of environmental remediation do not rank ahead of other claims in priority to any distribution to other parties of payouts of other assets, creating incentives for the Crown to negotiate going-concern solutions to environmental liability problems with creditors. There is strong public interest in ensuring that someone assumes responsibility for environmental protection at a time when the governance of the corporation is in disarray. This may result in a restructuring plan that includes a viable solution to the environmental problems that have been highlighted as the result of the insolvency, to the benefit of all stakeholders.

Recognition of Stakeholder Interests

This book has suggested that stakeholders such as workers, local governments, and trade suppliers frequently have investments and interests in a corporation beyond their fixed capital claims. These interests are not fully recognized in the current insolvency scheme. Tort claim-

ants such as those in the *Red Cross* case, while increasingly recognized as stakeholders with fixed, albeit contingent, capital claims, are also implicated in the workout by virtue of their specific claims and society's larger interest in creating incentives to prevent corporate harms. The allocation of decision and participation rights must recognize those who have investments at risk in the corporation, and who consequently have the incentive to develop a business and restructuring plan that will create efficiencies and added value for the corporation. The presence of workers, unions, local governments, and other stakeholders as parties to the court-supervised restructuring process is a vitally important development in this process. For tort claimants, the restructuring process may also provide a more cost-effective and expeditious resolution of their claims than civil litigation.

The conceptual scheme for recognizing equitable investments in restructuring proceedings will not negatively impact the current preferred claim provided for workers' fixed capital claims in bankruptcy proceedings. Workers rank fourth in the statutory priority for creditors. On bankruptcy, however, the priority for their fixed claims is limited to claims for compensation owed by the debtor for the six-month period immediately preceding the bankruptcy, to a maximum of $2,000.[16] Any claims for unpaid wages over and above that amount are unsecured claims. This wage preference has little value on liquidation, because often insufficient value remains after satisfying the claims of secured creditors.[17] Debtor corporations and secured creditors have benefited from the inability of workers to bargain for a risk premium. Secured debt shifts bankruptcy-related risk from secured creditors towards workers whose preferred wage claims are subordinated to those interests; thus, as a policy instrument for the protection of workers' interests, this statutory preference has limited value. Arguably, according workers and tort claimants higher priority, or greater quantum in that priority, or creating national insurance or wage and training adjustment programs would correct many of the current and historical distributive effects of the insolvency regime. Debt collection theorists would suggest that this is properly the subject of legislation, and a question of ensuring that priorities and cost allocations are the same in and out of insolvency and bankruptcy.

However, to date, suggestions that workers should receive some sort of 'super priority' in wage claims have not been able to garner political support. More systemic alternatives for protection of these interests, such as a national insurance scheme in which wage claims

are paid up to a prescribed limit, as occurs in Germany and the United Kingdom, have likewise failed to garner support from secured creditors, who have been the principal lobbyists in Canadian insolvency law reform. In Ontario, wage protection legislation enacted in 1991 was repealed a few years later.[18] In these circumstances, it is even more important that workers be afforded an opportunity to bargain what they can in the negotiations for a restructuring.

Equally, however, it is timely with the 2003 federal government review of the *BIA*, to seriously consider the priority and amount of workers' wage and other claims, precisely because of the current inequitable distributive effects of the system. Workers who have lost their jobs or are at risk of these loses are the least able to politically lobby for such change and it is in the public interest to seriously consider how better to protect the most vulnerable claimants when the firm becomes financially distressed. The legislative review process should account for those individuals that do not have the information or resources to have their voices heard. Moreover, enhanced priority of claims in bankruptcy would create ex ante incentives for corporate officers, as well as senior creditors monitoring the firm, to ensure that these claims are met prior to bankruptcy, in turn reducing harms to these investors. Similarly, it is timely to consider the costs and public policy implications of a national insurance system that would more appropriately allocate bankruptcy-related risk and offer greater protection to workers. This should be considered in conjunction with enhanced priorities. Both create incentives to pay workers' wages in a timely manner, to prevent preferred bankruptcy claims, and to control costs of an experience-rated or similar national insurance system. These more systemic remedies to insolvency harms deserve serious study and action. There are numerous models internationally that would facilitate a cost/benefit analysis of these remedies, including empirical study of the impact on credit availability, the upside benefits to the Canadian economy, and the synergistic effect of multiple strategies to allocate bankruptcy risk. These systemic remedies are complementary instruments to the restructuring regime suggested in this book. They would also create greater incentives to recognize workers' interests during negotiations for a workout.

The *CCAA* affords both the courts and the parties before them the greatest flexibility in recognizing the diverse interests of all those who have made equity, debt, and equitable investments in a corporation. Decision making should be undertaken with a view to enterprise wealth

maximization, having regard to all interests and investments at stake. This should include all traditional creditors, workers, local governments, and others who have not only fixed capital claims but also equitable claims on the insolvent firm. The framework suggests that on firm failure, workers and other stakeholders, depending on the circumstances, should have the right as equitable claimants to participate in negotiations and decisions in the development of a viable plan of compromise or arrangement. This role should be given substantive recognition, notwithstanding the fact that the capital claims of workers and other creditors are often very small compared to the claims of secured creditors.

Often with firm failure, there is untapped informational, organizational, and other human capital that could promote the development of a sound business plan and an enhanced governance structure. Arguably, there is also a broad range of other stakeholders, such as local communities or consumer groups, who, in particular situations, have interests at risk in the corporation. While the nature of these claims may be more difficult to quantify, this difficulty should not act as a bar to the participation of such stakeholders in the process, if the aim is to develop a restructuring plan that fairly allocates the risks and potential benefits of a financial turnaround of the corporation's economic situation. The court has the discretion to accord intervenor status even where there are no fixed capital claims. Granting such status would ensure that equitable interests are expressed to the court so that it in turn can undertake an effective balancing of interests. However, changes to recognize equitable investments must ensure that these newly acknowledged interests are properly balanced against those of secured lenders and other traditional creditors.

The recognition of both a procedural and substantive role for social stakeholders in the *Anvil Range* case represents an important step in the evolution of judicial thinking. The court recognized stakeholder interests beyond the very narrow paradigm of traditional creditors and shareholders. Those interests are both social and economic, although they may not be exclusively fixed capital claims. Similarly, while thousands of trade creditors and workers were not 'affected creditors' within the *Canadian Airlines* plan of arrangement, their interests were considered by the court in determining whether to approve the plan and a factor in its determination of the oppression allegations.

Some practical lessons for stakeholder groups seeking to participate for the first time in *CCAA* proceedings arise out of both the framework proposed and the cases studied. First, in seeking standing, it is essential to identify the nature of the claim or interest in the proceedings. The nature of the interest may be one or more of the following: an interest traditionally recognized by the court (fixed claims for wages or unpaid claims for trade suppliers); the type of interest more recently recognized by the court (tort claims); or an interest with potential for future recognition by the courts (the equitable investments made in a corporation by workers, local governments, small trade suppliers, or others). As suggested throughout this book, the nature of the interest will often include both fixed capital and equitable claims. Where the stakeholders have fixed claims, those claims may ensure that they are participants. They must then assert their equitable claims. The support of insolvency counsel may be crucial to a successful meshing of consideration of non-traditional claims with existing priorities in insolvency.

Second, the stakeholder seeking participation rights must frame any request for access to the proceeding in terms recognized by the court or in such a way as to persuade the court to consider granting such rights. In a case where the fixed claims of workers are satisfied early in the process, their equitable claims continue to exist. Similarly, a consumers' group or community organization with a particular nexus of interest in the corporation's activities may not have any fixed capital claims. In these cases it may be possible to use the criteria for intervenor status under such court processes as the Rules of Civil Procedure to successfully argue that the court should grant participation rights on the basis that their equitable investments are affected by the decision making concerning the future of the firm.

A number of devices could be deployed to enhance access to the workout process. While these could usefully be enshrined in legislation, it is worth emphasizing that the courts currently have discretion to consider them. While some devices have been deployed in particular cases, as indicated, there is not yet a consistent pattern such that multiple stakeholders can be confident of their participatory rights. Devices already recognized and utilized by the courts are indicated by the case name references in brackets at the end of the description.

RIGHT TO RECEIVE NOTICE

- Notice should be granted as of right on initial filing of *CCAA* applications to identifiable stakeholders. The granting of ex parte initial stays should be restricted to urgent situations, as they are now, with limited periods for parties to come back on notice; but

granting the stay should be made on the condition that the debtor is required to give notice to employees, their unions, local suppliers, governments, and any known tort claimants.

- Notice of *CCAA* proceedings and initial stay orders should be accessible in terms of language and should not unduly overreach in terms of issues addressed in advance of stakeholder consideration of those issues. (*Royal Oak Mines*)
- Use should be made of available methods of communication (e-mail, internet) and established relationships (unions) in order to give notice and to disseminate information, enhancing access to information and informed decision making. (*Algoma Steel, Red Cross*)
- Court orders should be sought to ensure that broader notice is given to stakeholders, both of initial filings under the *CCAA* and any subsequent motions or proceedings.

DISCLOSURE

- The current system of extensive disclosure needs to be reformed so that all interested stakeholders, and not merely the senior creditors, have access to the public records regarding the firm's financial distress.
- Information rooms and telephone hot lines should be established, and internet websites utilized in order to reach broad numbers of stakeholders, to reduce information asymmetries, and to lower transaction costs in the proceedings. (*Red Cross, Algoma Steel*)

ENHANCED PARTICIPATION RIGHTS

- The court should consider stakeholder requests for representative participation on a creditors' committee or any restructuring committee struck to advise the monitor or the debtor on the terms of a possible restructuring. (*Red Cross*)
- Worker representation at *CCAA* proceedings must be ensured, either through the union or, where the workplace is not unionized, by appointment of worker representatives. (*Anvil Range Mining Corporation, Algoma Steel, Canadian Airlines, Red Cross*)
- Appointments of representative counsel for workers, small trade suppliers, or tort claimants should be requested. (*Red Cross, Eaton's*)
- Funding for representation and/or participation on the creditors' committee on a priority basis should be provided out of the assets of the corporation, pension money in escrow, or, where appropriate, by the government. (*Eaton's, Red Cross, Algoma Steel*)

- Class proceedings legislation may be used to seek appointment of representative counsel. (*Red Cross*)
- Amicus curiae status can be granted to community stakeholders where parties before the court do not represent the particular environmental, consumer, social, or economic interests that should form part of the court's consideration of any proposed plan of arrangement or compromise.
- A variety of dispute resolution and interest-based mediation techniques may be utilized to ensure that those with both fixed capital and equitable interests can contribute their views on the reasons for the firm's financial distress and suggest potential going-forward strategies for generation of future value. (*Algoma Steel, Red Cross, Anvil Range*)

ENHANCED DECISION RIGHTS

- Access to negotiation and mediation in terms of resolving specific disputes and crafting a plan should be provided, together with the resources necessary to ensure that stakeholders are not disadvantaged by the power imbalances inherent in such processes. The role of the court in both mediating and in ensuring rights are not compromised contrary to law is key to this. (*Red Cross, Algoma Steel*)
- Definition of classes of creditors that more fully accounts for the nature of their interest in the firm should be created.
- Workers should be defined as a separate class of creditors, given the unique nature of their human capital investments.
- Claims for fixed capital and equitable claims should be quantified for purposes of voting on the *CCAA*, thus putting information regarding the consequences of particular insolvency outcomes before the court.
- Motions may be brought, where appropriate in the context of the *CCAA* proceedings, to deal with any breaches of fiduciary duty or oppressive conduct. (*Canadian Airlines*)
- Creative use of voting – one tort claimant, one vote – should be considered where the quantum of claims may be difficult to assess in a timely manner, thus enhancing the possibility for an expeditious going-concern solution. (*Red Cross*)

Some or all of these strategies may be appropriate in a particular insolvency case. As noted earlier, the challenge is to craft practical, cost-effective means of ensuring these voices and interests are accounted

for when deciding the firm's future. Traditional creditors have for many years received financial assistance from the estate of the insolvent corporation to permit their participation in the restructuring discussions, including representation on creditors' committees. More recently, the use of representative counsel has occurred where the debtor corporation believes that it is in its interests to handle diverse or complicated claims in this manner. Stakeholders who seek participation rights may be able to successfully argue to the court that effective exercise of those rights is contingent on receiving funding for representative counsel. Some of the procedures suggested are in a nascent stage of development; others could be considered by the courts and parties in future restructuring applications. As yet, there are no reliable enforcement mechanisms, although development of a more expansive fiduciary duty for financially troubled corporations, as well as the availability of the oppression remedy for actions during the restructuring proceedings, may provide a degree of enforcement capacity for non-traditional creditors.

Reconciling Interests of Public Interest Stakeholders with Those of Traditional Creditors

Ultimately, insolvency and bankruptcy is a creditor-driven regime. Creditors have statutory and contractual rights to realize on their claims if the debtor is unable to persuade them of the merits of a proposed restructuring plan. My intent in this book has been to suggest principles for the reconciliation of traditional creditors' rights with a judicial recognition of the 'public interest' in the restructuring of the insolvent corporation. As argued throughout, the optimal outcome of a restructuring process may be rehabilitation, liquidation, or some mix of restructuring and sale of all or part of the business assets. However, in deciding on the appropriate action there ought to be express recognition of the interests at stake and a role accorded to those interests in the decision-making process. The *CCAA* is the key legislative vehicle through which reconciliation of stakeholder rights can occur, with the courts performing an important facilitative and supervisory role in the process. The availability of specialized expertise and a strong commitment to expeditious and effective case management have resulted in highly successful restructurings and the evolution of the notion of 'public interest' as an important part of the equation.

As the discussion in this book has illustrated, the interests of workers, tort claimants, local governments, and others often converge with those of more traditional creditors. It is important to identify this convergence of interest if there is to be a successful workout for the corporation. Part of this determination requires a more textured understanding of where the costs lie, including the costs of firm failure and the transaction costs associated with enhanced participation rights and greater buy-in of the ultimate restructuring plan. Establishing a convergence of interests may contribute to the development of a going-forward strategy in the restructuring debate.

Cross-Border Insolvency Proceedings and Implications for the Public Interest

Multinational enterprises are generally engaged in global governance in terms of both decisions about resource allocation and going-concern business decisions. Yet when a multinational corporation approaches insolvency, its global management disappears, and with it the ability to make timely decisions. The corporation must deal with different creditors and different priorities in different statutory schemes, and thus the usual conflicts between stakeholders are exacerbated by conflict of law issues. This trend is likely to continue, given the strong interest that states have in protecting their domestic insolvency regimes. However, the increase in cross-border insolvencies gives rise to new issues and has direct implications for the development of an enterprise wealth maximization model.

In the past ten years, the courts have developed protocols on cross-border cooperation. The cases involved Canadian debtor corporations with significant operations and asset holdings in the United States, or vice versa, and thus the debtor corporations required recourse to protection of insolvency laws in both jurisdictions. The orders addressed coordination and cooperation in the administration of the proceedings, coordination in ongoing operations, asset sales and distribution, claims filing procedures, and choice of law issues; and coordination of development of plans in both countries. These protocols have reduced the cost of litigation and placed the focus on restructuring issues instead of conflict of laws disputes. A protocol sets out the ground rules by which concurrent insolvency proceedings can be coordinated. These include honouring the sovereignty of the respective courts; harmoniz-