2018 ANNREVINSOLV 27

Annual Review of Insolvency Law
Editor: Janis P. Sarra

27 — The Expanded Use of the CBCA in Debt Restructurings

The Expanded Use of the *CBCA* in Debt Restructurings

Sean Zweig and Preet K Bell [*]

I. — INTRODUCTION

Section 192, the plan of arrangement provision in the *Canada Business Corporations Act (CBCA)*, [1] is an increasingly popular means of facilitating corporate debt restructurings and recapitalizations. The attraction to the *CBCA* is in part due to the flexible interpretation ascribed to section 192 and the broad discretion granted to courts thereunder, which has allowed stressed and distressed companies to effect significant debt restructurings outside of insolvency statutes. While this was likely not the initial intention of the *CBCA* arrangement provision, it has now become a common occurrence. And, within these debt restructurings, companies are incorporating novel insolvency-type relief and utilizing the provisions in circumstances previously thought to be reserved for insolvency statutes.

This article explores certain recent *CBCA* debt restructuring approaches taken by parties that continue to expand the boundaries of the section 192 arrangement provision. First, a brief history of the section 192 arrangement provision and its statutory elements is considered. Second, we discuss the use of section 192 to effect debt restructurings. Third, a brief overview of a few recent cases serves to illustrate the use of section 192 in this manner. Finally, the article will consider six areas in which section 192 has expanded: (1) the meaning of the solvency requirement; (2) the use of preliminary interim orders; (3) the inclusion of non-*CBCA* entities as applicants; (4) the potential lack of a fairness opinion; (5) the use of shareholders' resolutions in lieu of a vote; and (6) the limiting and streaming of equity claims.

As this article will demonstrate, the flexibility and discretion of section 192 has allowed the use of innovative and novel orders to effect debt restructurings under the *CBCA*, and there is every indication that companies will continue to push such boundaries.

II. — BACKGROUND OF CBCA ARRANGEMENT PROVISION

The thrust of section 192 originated from the 1923 *Companies Act Amending Act*.[2] The operative provisions of that Act provided that:

> 112A. (1) Where a compromise or arrangement is proposed between a company and its shareholders or any class of them affecting the rights of shareholders or any class of them [...] a judge [...] may on application [...] of the company or any shareholder order a meeting of the shareholders of the company or of any class of shareholders [...].
>
> (2) If the shareholders, or class of shareholders, as the case may be [...] by three-fourths of the shares of each class represented agree to the compromise or arrangement either as proposed or as altered or modified [...] such compromise or arrangement may be sanctioned by a judge [...] and any reduction or increase of share capital and any provisions for the allotment or disposition thereof by say or otherwise as therein set forth, shall be confirmed by supplementary letters patent [...].[3]

These provisions applied equally to compromises or arrangements proposed under the *Winding-up Act*[4] and *The Bankruptcy Act*.[5]

The aim of the *Companies Act* was to respond to the need to alter shareholders' rights while still providing protection to shareholders.[6] However, the arrangement provision was removed from federal legislation in 1974 amidst concerns that "it was superfluous and that it could be invoked to squeeze-out minority shareholders unfairly".[7] As a result, when the *CBCA* came into force in 1975, it was absent the arrangement provision. Therefore, corporations seeking to restructure were solely reliant on insolvency statutes, such as the *Companies' Creditors Arrangement Act (CCAA)*,[8] which became more widely used in the 1980s.[9]

Recognizing the need for a corporate arrangement provision to effect complex transactions, section 192 was introduced into the *CBCA* in 1978.[10] The inclusion of section 192 was premised on the Minister of Consumer and Corporate Affairs' Report entitled, "Detailed background paper for an act to amend the Canada Business Corporations Act".[11] The objective of the arrangement provision, proposed as section 185.1 of the *CBCA*, was to provide "management and majority shareholders great flexibility to manage a corporation's internal affairs, and, at the same time [...] protect the interests of minority shareholders".[12] Section 185.1 authorized courts to approve a fundamental change by way of an arrangement where it was not practical to implement the change otherwise.[13]

The various provincial corporate statutes in Canada contain similar, although not identical, corporate arrangement provisions. However, the majority of corporate arrangements, and the relevant case law, is under the *CBCA*, which tends to provide more flexibility than its provincial counterparts.

BCE Inc v 1976 Debentureholders [14] presented the first opportunity for the Supreme Court of Canada to consider section 192 of the *CBCA*. Drawing on the report of the Minister of Consumer and Corporate Affairs, the Court held that the purpose of section 192 "is to permit changes in corporate structure to be made, while ensuring that individuals and groups whose rights may be affected are treated fairly". [15] *BCE* remains the leading authority on the elements of section 192 and the general test thereunder. However, as we will see below, the scope of section 192, and in particular the features of section 192 arrangements, have evolved and expanded since the Supreme Court's consideration in 2008.

III. — SECTION 192'S PROCEDURE & REQUIREMENTS

The mechanics of approving a plan of arrangement under section 192 are well established. First, the corporation must apply for an interim order, which sets the wheels in motion with the calling of meetings, and second, the corporation must seek a final order approving the arrangement. When applying for an interim or final order, the corporation must establish that:

(1) the statutory procedures have been met;

(2) the application has been put forward in good faith; and

(3) the arrangement is fair and reasonable. [16]

When seeking an interim order, courts focus on the first two elements. [17] Significant consideration as to whether the proposed arrangement is fair and reasonable is typically reserved for the final order hearing.

1. — The Statutory Requirements

The first consideration for an interim or final order is whether the statutory procedures or requirements have been met. Section 192 of the *CBCA* establishes several requirements that must be satisfied by an applicant corporation. Namely, subsections 192(3) and (5) provide that:

> [w]here it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision

> of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.
>
> An applicant for any interim or final order under this section shall give the director notice of the application [...]. [18]

Read together, section 192 sets out four main statutory requirements: (1) notice must be provided to the *CBCA* director; (2) the proposed arrangement must constitute an "arrangement" under section 192 of the *CBCA*; (3) it is not practicable to effect the proposed arrangement under any other provision of the *CBCA*; and (4) the applicant is not "insolvent". The case law suggests that the statutory requirements are rarely a significant hurdle to applicants.

i. — Provision of notice

The provision of notice to the *CBCA* director is uncontroversial. Section 192 requires that applicants provide notice to the director for both the interim and final order application. Where appropriate, the Director's Policy Statement ("Director's Policy") advises that notice for each stage should be accompanied by application materials, including any affidavits filed with the court and drafts of the orders sought. [19] As a practical matter, the *CBCA* director is generally given an opportunity to comment on drafts of all materials, including affidavits.

ii. — The proposed plan constitutes an arrangement

The broad and inclusive definition ascribed to an "arrangement" under the *CBCA* sets a low bar, which is advantageous for applicants. Pursuant to subsection 192(1) of the *CBCA*, an arrangement includes:

> (a) an amendment to the articles of a corporation;
>
> (b) an amalgamation of two or more corporations;
>
> (c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act;
>
> (d) a division of the business carried on by a corporation;
>
> (e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate;

(f) an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate; [...]

(g) a liquidation and dissolution of a corporation; and

(h) any combination of the foregoing. [20]

The Director's Policy adds that the arrangement provision is facilitative and should not be interpreted narrowly. [21] Likewise, Canadian courts have taken a very expansive view of arrangements. In *Re Fairmont Hotels & Resorts*, Farley J held that it would be an error in principle "to forget the very flexibility of the arrangement provision was designed to allow the solution of difficult and awkward situations". [22] Affirming Farley J's approach, Pepall J, in *Re Acadian Timber Income Fund*, held that "the word 'arrangement' is to be given its widest character, limited only by the corporation's own by-laws or general legislation". [23] Courts continue to confirm the expansive interpretation of "arrangement", stating that it "is not limited to the transactions listed in section 192(1)" and it "is a flexible statutory provision capable of 'incorporating whatever tools and mechanisms of corporate law the ingenuity of their creators bring to the particular problem at hand'". [24]

Essentially, so long as one aspect of the arrangement falls within the transactions listed above, courts appear to accept that it satisfies the definition of "arrangement".

iii. — Impracticability

The applicant must demonstrate that it is not practicable to effect a fundamental change in the nature of an arrangement under any other provision of the *CBCA*. According to the Director's Policy, impracticability will be satisfied where the applicant establishes that it would be "inconvenient or less advantageous to the corporation to proceed under other provisions of the Act". [25] Canadian courts have approached the impracticability test from a practical business sense. [26] As a result, consideration is often had for the efficiency offered by the arrangement. [27] Put simply, the proposed arrangement must be difficult to implement under the other provisions of the *CBCA*. The result is that the threshold for demonstrating impracticability is low.

iv. — The applicant(s) must not be insolvent

Subsection 192(2) of the *CBCA* provides that a corporation is insolvent: "(a) where it is unable to pay its liabilities as they became due; or (b) where the realizable value or the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes". [28] Both the case law and the Director's Policy have tempered the express statutory solvency requirement that the corporation must not be insolvent. The case law has established that the solvency requirement is satisfied at the interim order stage where at least *one* of the applicant companies is not insolvent or where the applicant will be solvent after the arrangement is implemented. [29] The Director's Policy concurs that the solvency requirement will not preclude arrangements where one or more of the principal corporate entities or the applicant is insolvent at the time of the interim hearing date. In *Re 9171665 Canada Ltd* ("*Connacher*"), [30] the Court faced the solvency requirement at the final order stage and held that to make a final order, the court must be satisfied that the entity emerging from the plan of arrangement will not be insolvent. This decision, which is discussed further below, gave some teeth to the solvency requirement. While applicants may be able to skate by it at the interim order stage with a newly incorporated shell company, they must be seeking to implement a plan of arrangement that will result in a solvent entity on the other end.

Notably, certain provincial corporate statutes do not contain a solvency requirement but, as stated by the *CBCA* director, "so long as the Act contains such a limitation, applicants should be prepared to demonstrate compliance with this limitation, as interpreted by the courts, both before the court and in the materials provided to the director". [31]

2. — The Application Has Been Put Forward in Good Faith

The second requirement for approval is that the application be put forward in good faith. This requirement is easily satisfied. Generally, an application is found to be put forward in good faith where the applicant demonstrates a valid business purpose for the application. [32]

3. — The Arrangement is Fair and Reasonable

At a final order application, the focus of the court's inquiry is generally on whether the plan of arrangement is "fair and reasonable", as the first two requirements, satisfaction of statutory procedures and good faith, are already considered at the interim order stage. In *BCE*, the Supreme Court held that whether an arrangement is fair and reasonable depends on two inquiries. [33] First, whether there is a valid business purpose for the arrangement. [34] Second, whether the proposed arrangement reconciles the "objections of those whose rights are being arranged in a fair and balanced way". [35]

i. — Valid business purpose

Determining whether there is a valid business purpose for the arrangement is inherently fact driven. Ultimately, the analysis will focus on the positive benefits to the corporation if the arrangement is approved. Here, the necessity of the proposed arrangement to the corporation is often an important factor.[36] For financially distressed corporations or those otherwise nearing insolvency, this test may be the easier of the two-pronged fair and reasonable analysis. While valid business purpose is also often considered when determining good faith at the interim order application, as set out above, the analysis of valid business purpose is usually more robust at a final order hearing.

ii. — Resolving objections in a fair and balanced way

To determine whether the objections of the affected parties are resolved in a fair and balanced way, the Supreme Court indicates that judges must have "regard to the ongoing interests of the corporation and the circumstances of the case".[37] Judges may look to several non-exhaustive indicia to determine whether the rights of affected parties have been appropriately balanced. These include:

(a) whether the arrangement has been approved by a majority of security holders;

(b) the repute of the advisors and directors who support the arrangement;

(c) whether a fairness opinion was prepared;

(d) whether shareholders have access to remedies;

(e) whether the compromise between classes of security holders is proportionate;

(f) whether an independent committee of directors approved the plan;

(g) the market's response to a proposed plan of arrangement where applicable;

(h) whether a practical alternative to the proposed plan is available;

(i) the terms of the proposed arrangement; and

(j) whether an informed and reasonable business person, acting in their own interest, would approve the plan.[38]

Particularly in debt restructurings, another relevant factor may be the priority that the securityholder would receive in the event of a liquidation.[39]

The standard for applicants to meet is not perfection.[40] Courts have recognized that in the context of a section 192 plan of arrangement numerous transactions may be considered fair and reasonable.[41]

IV. — USE OF THE CBCA TO EFFECT DEBT RESTRUCTURINGS

Although section 192 may facilitate a host of fundamental corporate changes, it has increasingly attracted the attention of corporations seeking to restructure debt, usually in connection with a more comprehensive balance sheet restructuring. As the statute permits the reorganization of both debt and equity, it can assist corporations in restructuring their debt outside of insolvency statutes such as the *CCAA*.[42] This has immediate benefit to the corporation as, among other things, it is more cost efficient as, for the most part, a *CCAA* restructuring would be more expensive and involve more stakeholders and professionals, and it also avoids the stigma of being "insolvent".

The arrangement provision was traditionally used for reorganizations of share capital.[43] However, to date, neither the Director's Policy nor Canadian courts have admonished its use for debt restructurings. The Director's Policy provides that transactions focused largely on the compromise of debtholder claims against insolvent entities are more appropriately managed under insolvency law. However, it also recognizes that "it may be appropriate to utilize the arrangement provision under the CBCA [...] to effect transactions affecting debtholders".[44]

Subsection 192(1) of the *CBCA* provides numerous examples of an "arrangement", including "an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate". "Security" is defined in subsection 2(1) as "a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation". Therefore, on its face, section 192 can be used to arrange debt obligations of a corporation. However, the *CBCA* has not been used to compromise trade debt or to deal with employee issues and similar matters often affecting an insolvent entity. The Director's Policy indicates that it "believes that ordinary unsecured creditors, such as trade creditors, do not properly fall within the definition of security holders, and has concerns about the use of the arrangement procedure to adversely affect or to compromise contingent claims or any other type of claim that is not a claim of a security holder".[45]

In light of the above, the *CBCA* has not been used to effect operational restructurings, but rather only balance sheet restructurings. Companies requiring operational restructurings must generally turn to an insolvency process, such as the *CCAA*.

Trizec was one of the first cases to consider the use of section 192 of the *CBCA* to restructure debt. Trizec Corporation Ltd ("Trizec") was indebted $1.357 billion to its senior debenture holders and $330 million to its junior debt holders.[46] Trizec had negotiated with Horsham Acquisition Corp for an infusion of capital in exchange for equity, contingent on the arrangement receiving court approval. In opposition, the junior debt holders contended that it was "inappropriate to use a plan of arrangement under section 192 to compromise debt". [47] They submitted that, as creditors, they ought to be paid in full before shareholders receive any recovery. Ultimately, Forsyth J rejected the arguments of the junior debt holders and approved the plan of arrangement. He found that "Parliament clearly intended that a plan of arrangement might involve a compromise on the part of all parties for the greater good of the whole". [48] The plan of arrangement was seen as a preferable alternative to liquidation.

Since *Trizec*, the prevailing view is that corporations may compromise debt securities in a plan of arrangement under section 192. [49] For financially distressed corporations, the *CBCA*'s arrangement provision offers several advantages to a restructuring proceeding under the *CCAA*. These advantages can include lower costs, retention of more of management's control and direction, temporal efficiency, avoiding potential insolvency-triggered defaults under debt instruments or other agreements, reduced court supervision, reduced risk to share price, and less stigma. [50] There are therefore many reasons why a company might prefer to effect a restructuring under the *CBCA*. Whether real or perceived, these advantages, have led to an increase in section 192 restructurings, many of which have, and may continue to, expand the scope of the arrangement provision.

V. — RECENT CASE EXAMPLES

Three recent cases serve as examples of the use of the *CBCA* arrangement provision to effect debt restructurings. These decisions illustrate the types of issues that can arise in *CBCA* restructurings and recapitalizations.

1. — Connacher

The significance of the *Connacher* decision lies in its unequivocal interpretation of the subsection 192(3) solvency requirement. *Connacher* also clarifies the power of a court to issue a "no-default order" under subsection 192(4) of the *CBCA*. Given the existing commentary on this decision, [51] a general overview will suffice for purposes of this paper.

Connacher Oil and Gas Limited ("Connacher") is an oil company engaged in the exploration of bitumen for, development, production and marketing. In 2014, due to the significant decline in the net realized price for its dilbit, an oil product created from bitumen, Connacher encountered severe liquidity problems. Cumulatively, Connacher's primary debt obligations were USD $128.4 million owed under a first lien credit agreement, as well as USD $550 million and $350 million in senior secured second lien notes. Connacher and Arrangeco, a newly incorporated shell company, proposed a plan of arrangement to significantly reduce Connacher's debt and annual interest costs. The proposed plan of arrangement purported not to directly affect the first lien credit agreement, but would settle the senior secured second lien debt. At the time of the interim order application, Connacher was in default under the first lien credit agreement. Jones J of the Alberta Court of Queen's Bench granted the interim order despite opposition from the first lien lenders, finding that the default issues would have to be dealt with at the final order application. After the interim order was granted, the first lien lenders, through the first lien agent, initiated an action in the Supreme Court of New York, as their debt instrument was governed by New York law, accelerating their debt and seeking judgment against Connacher. [52] The acceleration of debt within the New York action jeopardized Connacher's ability to emerge from the proposed plan of arrangement as a solvent entity.

At the final order stage, Jones J had two issues to resolve. First, the proper interpretation of the subsection 192(3) solvency requirement. The threshold issue was stated as "does the Court have the jurisdiction to issue a final order under the *CBCA* where the entity emerging from the Arrangement will or might be insolvent?" [53]

The second issue the Court had to consider was whether the broad power conferred by subsection 192(4) permitted a court to waive an event of default where an entity may not otherwise meet the solvency requirement. Since, as part of the final order, Connacher was also seeking an order waiving the default which the first lien lenders alleged was an acceleration of debt.

Responding to a novel solvency issue, Jones J held that to obtain a final order under section 192, the emerging entity must not be insolvent. For Jones J, where corporations fail to meet the section 192 solvency requirements, the compromise of their debtholders' claims are best dealt with under insolvency law. [54] With respect to the second issue, Jones J held that exercising the Court's discretion to grant a no-default order under subsection 192(4) "should be limited to circumstances involving corporations which do not, at that point in time, require the order to assert non-insolvency in reference to alleged events of default which may have already taken place". [55] In other words, the Court found that it is not appropriate for a court to essentially "deem away" events of default which underlie the determination of whether the entity emerging from the proceeding will not be insolvent.

Ultimately, *Connacher* demonstrates the limitations of section 192 for insolvent corporations, and provides some teeth to the solvency requirement. Where it is unclear whether the emerging entity will be solvent a final order will not be granted.

Connacher is also a fairly rare case in which a plan of arrangement was not permitted to proceed, [56] and it is not surprising that there are few such instances given that the majority of *CBCA* plans of arrangement are consensual. Similarly, in *Connacher,* the issue was ultimately settled between the parties and a plan of arrangement was eventually approved by the Court.

2. — Concordia

Concordia illustrates the use of two innovative features in a plan of arrangement. First, the granting of a preliminary interim order where no semblance of a plan of arrangement had been agreed to and second, the streaming of equity claims to insurance proceeds.

In late 2017, Concordia International Corp (”Concordia”), Concordia Healthcare (Canada) Limited, and its subsidiaries sought relief under the *CBCA*. [57] Concordia, together with its subsidiaries, is an international specialty pharmaceutical company, with sales in more than 90 countries and a diversified portfolio of more than 200 established off-patent products. At the time of its application, Concordia and its subsidiaries had an unsustainable capital structure with approximately $4 billion in outstanding secured and unsecured debt obligations. Accordingly, Concordia sought to reduce its debt obligations to achieve a superior capital structure. [58] To do so, Concordia wished to implement a recapitalization transaction through the section 192 arrangement provision. The transaction purported to, among other things, exchange common shares, secured terms notes, secured notes, secured FX swaps, unsecured notes, and unsecured bridge loans for new debt instruments and/or equity securities issued by Concordia. [59]

As described above, in a typical *CBCA* proceeding, the company first seeks an interim order and then applies for a final order. Typically, at the time of an interim order application, the company would have a proposed plan of arrangement and would seek to set the wheels in motion for the vote on that plan and other procedural steps. However, when seeking a *preliminary* interim order, the company may not yet have a fully finalized plan but is instead seeking the imposition of a stay of proceedings so that it can continue to negotiate with stakeholders and work on developing and finalizing a plan of arrangement, without fear of debtholders declaring defaults and taking enforcement steps. But even in the case of preliminary interim orders under the *CBCA*, the company generally has at least the framework for a deal with certain of its major stakeholders in the capital structure. Often, for example, there is a term sheet that has been agreed to, but the actual plan of arrangement and related documents are still in progress. However, that was not the case for Concordia; while Concordia had aspirations of reducing its debt by in excess of $2 billion, it had not yet reached an agreement with its major stakeholders at the time of applying for a preliminary interim order.

Nevertheless, in this case, Morawetz RSJ stated that “where there is an expectation of debt compromise, the parties should not hesitate to incorporate structures or processes that are found in the CCAA and the *Bankruptcy and Insolvency Act*”. [60] Moreover, the provision of full comeback rights and pivot rights (*ie*, to the *CCAA*) weighed in favour of approving the proposed preliminary interim order. [61] It should be noted that the debtholders did not object to the stay.

On 2 May 2018, Concordia came back to Court seeking an interim order to approve certain procedural matters, including the calling, holding and conducting of the meetings to vote on its proposed plan of arrangement. The test to obtain an interim order is very similar to that for a preliminary interim order; therefore, Morawetz RSJ mainly relied on his findings for the preliminary interim order to conclude that Concordia also met the test for the interim order. His Honour concluded that the interim order established "a process that is both fair and reasonable. Among other things, the Interim Order will enable the meetings to be called, held and conducted in a procedurally fair manner." [62]

Subsequent to the interim order, the meetings were held on 19 June at which 100 per cent of the secured and unsecured debtholders who voted, and 87.37 per cent of the shareholders who voted, voted in favour of the Arrangement.

At the final order application, Concordia sought approval of its plan of arrangement and also related relief, including novel "equity claims" relief which provided that:

a) existing shares be terminated and cancelled for no consideration;

b) all "equity claims", based on the definition in the *CCAA*; essentially claims and proceedings based on equity interests, be released; and

c) existing equity class actions claims filed against Concordia be limited in recourse and recovery to the available insurance proceeds. [63]

Morawetz RSJ approved the Plan as fair and reasonable on the basis that, among other considered factors, it significantly improved Concordia's financial position, it was the result of complex and lengthy negotiations with stakeholders, it was unanimously approved by Concordia's board of directors, the company obtained financial advice and a fairness opinion, and it was approved at the meetings of stakeholders. [64]

As discussed further below, the novel equity claims relief and the use of the preliminary interim order in this case demonstrate the flexibility of section 192 and the broad discretion it affords to courts.

3. — NCSG65

At the relevant time, NCSG Crane & Heavy Haul Corporation ("NCSG") was the parent company of approximately fifteen corporations primarily based in Edmonton, Alberta (collectively, the "NCSG Group"). The NCSG Group offered fully operated and maintained crane and heavy hauling services, supported by engineers and logistic coordinators. Reductions in the energy services industry between 2014-2018 adversely impacted the NCSG Group's profitability. Despite the NCSG Group's efforts to respond to the challenges faced in the energy services industry, its capital structure and financial obligations were unsustainable. This prompted the NCSG Group to consider restructuring its debt liabilities, namely, a secured credit facility amount of $189.9 million and second lien notes with $305 million outstanding.

In May 2018, NCSG applied for an interim order under section 192 of the *CBCA* to facilitate a series of recapitalization transactions. The arrangement sought to, among other things:

(a) amalgamate one member of the NCSG Group and ArrangeCo (a Canadian shell company);

(b) exchange debt common shares on a *pro rata* basis for the final settlement of the second lien notes;

(c) cancel the second lien notes and their corresponding indenture;

(d) terminate the NCSG stock option plan;

(e) dissolve NCSG and provide its existing shareholders with warrants on a *pro rata* basis; and

(f) transfer and assign all of NCSG's assets to a newly formed American holding company.

Taken together, the anticipated result of the proposed arrangement would be a reduction of the NCSG Group's total debt by $255 million and annual interest expenses by $29 million. At the time of the application, the NCSG Group, NCSG's shareholders and certain second lien noteholders, which held roughly 92.4 per cent of the outstanding principal amount of the second lien notes, supported the proposed arrangement.

Campbell J of the Alberta Court of Queen's Bench granted NCSG's interim order on 25 May 2018 and final order on 28 June 2018 without written reasons. NCSG's interim and final orders are testaments to the innovative approaches sophisticated parties are taking to restructure debt under section 192 of the *CBCA*.

Five features of the NCSG plan of arrangement merit mention. First, NCSG's proposed application involved only one corporation, ArrangeCo, incorporated under the *CBCA*. This issue is discussed in greater detail below. Second, NCSG sought to capitalize on the relaxed solvency requirement found in the case law. In particular, NCSG proffered ArrangeCo, a recently incorporated shell company, as the sole solvent entity amongst the group of applicants for the purposes of the interim order. Third, NCSG relied on a shareholders' resolution instead of a shareholder vote to approve the arrangement contrary to the recommendation in the Director's Policy, although the *CBCA* director did not oppose the arrangement. Fourth, the proposed interim order sought a broad stay of proceedings. The stay prevented the enforcement of any obligation, contract, or other agreement regarding the arrangement against the assets of the applicants. This included any defaults under the credit facility or second lien notes. While such stays of proceedings have become common in *CBCA* proceedings, this recent case is representative of the potential breadth of the scope of such a stay. Fifth, the arrangement was approved despite the fact that the company did not obtain a fairness opinion, again contrary to the recommendation in the Director's Policy. This is also discussed further below.

VI. — EXPANDING THE SCOPE OF THE ARRANGEMENT PROVISION

As noted above, the section 192 arrangement provision has proven to be a flexible and facilitative means of completing balance sheet restructurings. As such, it continues to attract the attention of entities that are over-leveraged and concerned about the sustainability of their capital structure. The recent increase in reliance on section 192 has assisted in both clarifying and, in some cases, expanding the scope of the provision. This section expands on some of the issues raised in the cases discussed above.

1. — The Solvency Requirement

Notwithstanding the plain language of subsection 192(3), which on its face states that the applicant corporation must not be insolvent, the *CBCA*'s arrangement provision has been applied to restructurings involving insolvent entities. The solvency requirement appears to have transformed over time. At first, it was given serious consideration, but as time went on, it appeared to be consistently diluted to the point where it seemed to be no hurdle at all. Then in 2015, the *Connacher* decision provided some clarity, and teeth, to the solvency requirement. This has required companies seeking to use section 192 to think beyond using a shell company to meet the requirement, and actually assess the solvency of the emerging business enterprise.

Subsection 192(3) states that where it is not practicable for a corporation that is not insolvent, the corporation can apply under section 192. The flexibility of section 192 arguably allowed courts to interpret this solvency requirement as a mere speed bump. Courts have repeatedly stated that so long as *one* of the corporate applicants is solvent, the solvency requirement is satisfied.[66] This has resulted in a common practice of incorporating a new *CBCA* shell company to affect a section 192 arrangement; that shell company is then amalgamated into an existing corporation as a step of the arrangement. The solvency requirement was therefore easily satisfied with the simple inclusion of a new shell company.

As section 192 was increasingly used for debt restructurings, another issue with respect to solvency began to arise: the solvency of the emerging entity at the final order stage. The Director's Policy notes that in *Re Computel Systems Ltd*, the applicant corporation, while insolvent at the interim hearing date, "reduced its stated capital by special resolution in order to satisfy the solvency requirement prior to the date the court was asked to grant final approval of the arrangement". [67] However, the Director's Policy goes on to say that notwithstanding that and similar cases, "the Director is unaware of a court expressly determining that the solvency requirement must only be at the final order stage". [68] While some cases expressed the thinking that applicants must emerge solvent, [69] the interplay with interim order solvency led to uncertainty. This came to a head in *Connacher*.

As described above, Connacher was in default under its first lien credit agreement; the outstanding debt was not purported to be dealt with under the proposed plan and Jones J found the default could not be waived. Therefore, the solvency of Connacher post-emergence was uncertain. Justice Jones held that the solvency requirement under the *CBCA* requires that the emerging entity and business enterprise be solvent. [70]

Connacher brought welcomed clarity to the solvency requirement. Specifically, *Connacher* responded to the Director's Policy's silence on whether all of the applicants needed to emerge as solvent entities. Considered in conjunction with existing case law, it now appears that in order to obtain an order approving a section 192 plan of arrangement, solvency should be tested both at the final order stage and upon emergence. While Jones J held that applicants do not need to establish their solvency on emergence for purposes of the interim order, the solvency of each applicant at the conclusion of the arrangement is to be considered at the final order stage.

Taken together, the implications of *Connacher* for solvency are two-fold. First, applicants cannot rely on establishing solvency at a single stage of the arrangement. Second, though applicants may continue to utilize shell companies for proving solvency at the interim order stage, they must demonstrate solvency of the enterprise upon emergence from the arrangement. Where applicants are unable to meet the solvency requirements, as characterized in *Connacher*, their debt restructurings are more properly facilitated under an insolvency statute, such as the *CCAA*.

Prior to *Connacher*, it appeared as though the solvency requirement had been diluted to the point at which it had no significant impact. *Connacher*, however, imposes clear boundaries on the solvency requirement that present a barrier to applicants who will not emerge as solvent entities following their proposed restructuring. The solvency requirement as articulated in *Connacher* has not yet been the subject of subsequent decisions, so it is not yet known exactly how it will be followed. Nevertheless, it stands for the proposition that solvency can no longer be satisfied solely through the use of a new shell corporation.

2. — Preliminary Interim Orders & Stay Provisions

As discussed above, a *CBCA* plan of arrangement typically proceeds in two stages. First, the applicant seeks an interim order on the basis that all of the section 192 statutory requirements are met and the arrangement is put forward in good faith. Second, the applicant returns for a final order where it must satisfy the court that each aforementioned condition is met and that the proposed arrangement is fair and reasonable. However, applicants relying on section 192 to effect debt restructurings have sometimes introduced an additional step by seeking a "preliminary interim order". Typically, when seeking an interim order application, the company has a proposed plan of arrangement and is seeking to set the wheels in motion for the vote on that plan and other procedural steps. However, when seeking a *preliminary* interim order, the company does not yet have a fully finalized plan and/or meeting materials but is generally seeking the imposition of a broad stay of proceedings so that it can continue to negotiate with stakeholders and work on developing and finalizing a plan of arrangement and/or meeting materials, without fear of debtholders declaring defaults and taking enforcement steps. Unlike the *BIA* and *CCAA,* the *CBCA* does not expressly provide for a stay of proceedings. Nonetheless, parties seeking to implement debt restructurings have requested that courts grant a stay pursuant to subsection 192(4) of the *CBCA*, which provides that a "court may make any interim or final order it thinks fit". [71] This authority has been used to authorize stays of proceedings affecting debtholders, suppliers and others. [72] Courts have recognized that they may also grant a stay pursuant to their inherent jurisdiction but generally rely on section 192(4). [73]

The Director's Policy does not indicate whether subsection 192(4) empowers a court to grant stays of proceedings or whether stay orders ought to be encouraged. However, in *Abitibi* and *Mobilicity*, the director remarked that stay orders outside of the context of the *CCAA* were unusual, and the director continues to include language to that effect in its non-appearance letters in cases involving stays. This comment has not stopped courts from endorsing stay provisions in cases involving the compromise of debt claims, nor has the director opposed such orders.

The Director's Policy also does not contemplate the use of *preliminary* interim orders, which include such stays of proceedings. However, as far as the authors are aware, the director has not opposed the granting of these orders either. The preliminary interim orders appear to be granted under the broad authority of subsection 192(4). Although the import of stay provisions into section 192 plans of arrangement has been the subject of some academic scrutiny, it has attracted little judicial pushback. Similarly, incorporating these broad stays into preliminary interim orders has been sanctioned by courts without real hesitation.

There is little judicial commentary on preliminary interim orders, as the majority are granted without reasons. [74] However, there are two decisions which provide some commentary on the issue, both decisions of Morawetz RSJ.

In *Essar Steel*, [75] the applicants brought what was essentially an *ex parte* motion for a preliminary order. The applicants were seeking, among other things, an order temporarily restraining certain rights to terminate, accelerate, amend or declare default or to take any other enforcement steps under certain agreements. Prior to coming to Court, the company had engaged in extensive negotiations with stakeholders such that a consensual restructuring agreement was agreed to and documented in a term sheet. However, the company and its stakeholders still needed to prepare the necessary documentation. Therefore, the applicants were not yet ready to proceed with an interim order application, but required a stay while they continued to develop and finalize the arrangement.

Regional Senior Justice Morawetz set out the two-part test for an interim order — the applicants' compliance with the statutory requirements and the applicants' good faith in putting forward the arrangement — and applied it to determine whether to grant the preliminary interim order. Therefore, the test at the first two stages was not seen to be any different.

Regional Senior Justice Morawetz noted that the applicants were seeking preliminary relief to give them "the time and stability necessary to finish negotiating and drafting, with affected Stakeholders, the definitive documentation required to implement the proposed Arrangement". [76] He found the Court had the authority under subsection 192(4) to make the order and impose the requested stay. Specifically, with respect to the stay, Morawetz RSJ found that it was similar to previous stays granted by Canadian courts and was "limited to only what is necessary for the success of the Applicants' restructuring efforts". [77] The stay was also set to automatically expire in a month, unless extended.

A few years later, Morawetz RSJ granted another preliminary interim order in *Concordia* [78] but this time, there was no term sheet; Concordia had aspirations of reducing its debt by in excess of $2 billion, but it had not yet reached an agreement with its major stakeholders at the time it applied for a preliminary interim order. Regional Senior Justice Morawetz applied the same two-part test prior to granting the preliminary order. One of the statutory requirements that had to be satisfied was whether the arrangement constituted an "arrangement" within the meaning of subsection 192(1) of the *CBCA*. As mentioned, in this case there was not a term sheet with respect to a plan yet. However, Morawetz RSJ found that this criterion was satisfied as the arrangement was "expected to include the exchange of the Secured Debt and Unsecured Debt...for new debt, equity of [Concordia], or a combination thereof". [79]

Regional Senior Justice Morawetz granted the preliminary interim order and imposed the broad stay of proceedings.

Concordia arguably pushed the envelope for preliminary interim orders by granting relief, including a broad stay of proceedings, based on the *expectation* of an arrangement. This case demonstrates the breadth of authority and discretion afforded to courts with respect to making orders under section 192. *Concordia* could potentially pave the way for more requests for preliminary interim orders so a company can negotiate with stakeholders under the protective umbrella of a stay of proceedings.

3. — Foreign Applicants

Prior to *Essar Steel* and *NCSG*, the inclusion of non-*CBCA* entities as applicants in a plan of arrangement was largely untested. Importantly, there is a distinction between having non-*CBCA* entities as "parties to" or "involved in" the arrangement and having non-*CBCA* entities as "applicants". The former is largely non-controversial. The definition of arrangement in subsection 192(1) includes transactions with a "corporation" and a "body corporate". A "corporation" is defined as a *CBCA* corporation; a "body corporate" is defined as "a company or other body corporate wherever or however incorporated". [80] Therefore, section 192 expressly contemplates arrangement transactions including non-*CBCA* entities, and such transactions are routinely implemented under section 192.

However, including non-*CBCA* entities as *applicants* is slightly different. Section 192 provides that a "corporation", which is defined as a *CBCA* corporation, can apply under section 192. The Director's Policy also states that "[t]he applicant under the arrangement provisions of the Act must be a 'corporation'." [81] Notwithstanding these statements, in at least two cases, non-*CBCA* entities were included as applicants.

The first case is *Essar Steel*. In *Essar Steel*, Essar Steel Algoma Inc ("Algoma"), Essar Steel Algoma Canada Inc ("Essar Canada"), Algoma Holdings BV, Cannelton Iron Ore Company ("Cannelton") and Essar Steel Algoma Inc USA ("Algoma USA") sought a preliminary interim order under section 192 of the *CBCA* with all of the entities as applicants. [82] For Morawetz RSJ, the inclusion of foreign corporations among the applicants was not contrary to the definition of "arrangement" contemplated in the *CBCA*, which includes both corporations and body corporates. Morawetz RSJ held that each applicant came within the definitions of "corporation" or "body corporate":

> Essar Canada is incorporated pursuant to the CBCA and as such is both a corporation and a body corporate within the meaning of the CBCA. Algoma is incorporated pursuant to the OBCA, and as such is a body corporate within the

> meaning of the CBCA. Cannelton and Algoma USA are Delaware corporations and each is a body corporate within the meaning of the CBCA.
>
> I am satisfied that the Arrangement contemplates the amalgamation of Algoma and Essar Canada into a corporation governed by the CBCA and accordingly, the amalgamation falls within the scope of s. 192(1)(c) of the CBCA. [83]

Regional Senior Justice Morawetz clearly found that non-*CBCA* entities are included in the definition of "arrangement" but did not expressly address their ability to be "applicants" in the context of section 192. He appears to rely on the fact that one entity is a *CBCA* corporation. In this manner, the analysis may follow the earlier cases considering the solvency test. The solvency test was found to be satisfied if one applicant was solvent; while this analysis was not expressly relayed by Morawetz RSJ, it may justify the conclusion that only one *CBCA* applicant is sufficient. In any event, *Essar Steel* provides authority for the use of non-*CBCA* entities as applicants.

More recently, the plan of arrangement in *NCSG* also had non-*CBCA* entities as applicants. [84] One of the applicants, ArrangeCo, was a *CBCA* corporation, but the remaining applicants, with the exception of leasing partnership, a limited partnership, were body corporates as defined under the *CBCA.* The leasing partnership was also proposed to be an applicant on the basis that while a limited partnership does not fall strictly within the definition of "body corporate", partnerships have been part of corporate arrangements in prior cases, in light of the flexibility of the corporate arrangement provisions.

While reasons were not provided by Campbell J of the Court of Queen's Bench of Alberta, the order was granted and the non-*CBCA* entities proceeded as applicants. This case therefore provides a further example of the inclusion of non-*CBCA* entities, including a limited partnership, as applicants under section 192.

4. — Fairness Opinions

Recognizing that the compromise of stakeholder rights is an inherent feature of debt restructurings, the Director's Policy suggests several safeguards to ensure that a proposed arrangement is fair and reasonable. One such safeguard is a fairness opinion. Although not required by the *CBCA*, the Director's Policy offers that a fairness opinion, prepared by an independent financial advisor, should be provided to all security holders where the proposed arrangement contemplates a compromise of debt. [85] According to the director, the fairness opinion ought to demonstrate that the proposed arrangement is advantageous to a liquidation for each class of security holder. [86] Additionally, the Director's Policy advises that the fairness opinion should provide an "inter-security holder class perspective". [87] Viewed in conjunction with the Supreme Court's commentary in *BCE* that a fairness opinion is a useful indication of whether a plan is fair and reasonable,[88] it is not surprising that fairness opinions have become common in *CBCA* restructurings.

However, despite the director's and the Supreme Court's endorsement of fairness opinions, it is unclear whether the purported benefits to security holders will outweigh the cost and time required to prepare one in all cases. Challenging the utility of fairness opinions in the context of a section 192 plan of arrangement is not novel. In "*CBCA* Section 192 Restructurings: A Streamlined Restructuring Tool or a Statutory Loophole?", the authors, Martin McGregor and Paul Casey reviewed the problems plaguing contemporary fairness opinions. For McGregor and Casey, the independence of the party providing a fairness opinion, its content, and the time at which it is provided, can undermine the utility of fairness opinions for security holders.[89] Although the authors did not advocate for eliminating fairness opinions, they discuss some potential shortcomings.

There is an additional potential shortcoming highlighted by two cases discussed below: a fairness opinion simply may not be necessary in all cases. Many debt restructurings implemented under section 192 involve sophisticated parties that are well-informed and an array of legal and financial advisors. The utility of a fairness opinion in these circumstances, particularly when the significant time and expense of such an opinion is considered, could be questioned.

NCSG[90] and *In the Matter of Proposed Arrangement Involving Gateway Casinos & Entertainment Inc et al*[91] demonstrate that courts may approve *CBCA* plans of arrangement without a fairness opinion in the right circumstances. In *Gateway Casinos*, the applicants, New World Gaming Partners Holdings British Columbia Ltd and its wholly owned subsidiary, Gateway Casinos & Entertainment Inc, did not seek a fairness opinion regarding their proposed plan of arrangement. In advance of the interim order, the applicants in *Gateway Casinos* sought confirmation from the *CBCA* director that a fairness opinion would not be required and that failure to obtain one would not serve as a ground for opposing the arrangement. The applicants provided the following rationale for not requesting a fairness opinion:

(a) the arrangement was proposed by the First and Second Lien Claimholders;

(b) the parties affected by the arrangement were sophisticated entities and had retained legal and financial advisors to protect their interests;

(c) the applicants were currently in default and any delay would jeopardize the implementation of the arrangement;

(d) the affected parties would receive adequate information;

(e) the proposed arrangement was the best alternative available to the affected parties; and

(f) the court responsible for granting the interim and final orders would review the plan and permit the affected parties to express their views of the arrangement's fairness. [92]

In *Gateway Casinos*, these arguments proved effective and led to the approval of the arrangement absent a fairness opinion. However, no written reasons were provided.

Relying on *Gateway Casinos*, the applicants in *NCSG* also sought court approval of their proposed arrangement without a fairness opinion. Many arguments advanced in *Gateway Casinos* were salient in *NCSG*. Namely, NCSG was in default of its second lien notes, meaning that further delay would be problematic, the affected parties were sophisticated and advised by professionals, and there was near unanimous support for the plan of arrangement. While no reasons were issued, the plan of arrangement was approved without a fairness opinion. [93] Approval of the applicant's plan of arrangement in *NCSG* marks the second judicial endorsement, to the best knowledge of the authors, of a *CBCA* restructuring without a fairness opinion.

Notably, in both of the above cases, there were unanimous shareholders' resolutions executed in advance of the final order hearing (discussed in the next section below). This likely contributed to the appropriateness of not having a fairness opinion as the shareholders had already unanimously approved the proposed arrangement.

The extent to which *CBCA* restructurings may be approved absent a fairness opinion remains largely untested. Where the parties are sophisticated and well-informed, have adequately protected their legal and financial interests, and overwhelmingly support the proposed plan of arrangement, a fairness opinion may not be necessary to provide the court with further comfort that the arrangement is fair and reasonable. In such cases, the cost incurred and the time required to prepare a fairness opinion could potentially be a disservice to stakeholders and unnecessarily delay the arrangement. Conversely, where the proposed arrangement is contested and/or the affected parties are minimally informed and/or less sophisticated, fairness opinions may be an important tool to safeguard the interests of stakeholders and provide the court with further information on which to base its decision.

5. — Shareholders' Resolutions

While not a statutory requirement, the approval of a proposed plan of arrangement by a majority of security holders in each class is considered a strong indication of a plan's fairness and reasonableness. In *BCE*, the Supreme Court held that, although a vote is not dispositive of "whether the plan should receive the approval of the court", it serves as a "key indication of whether those affected by the plan consider it to be fair and reasonable".[94] Equally, the Director's Policy suggests that obtaining majority approval of a proposed plan of arrangement, though not required by section 192 of the *CBCA*, is a practice to be encouraged.[95] Importantly, the Court in *BCE* left open the possibility that a plan of arrangement could be approved absent a vote. Drawing on *Trizec*, the Court in *BCE* held that where there has been no vote, courts may "consider whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan".[96] To date, the prevailing practice in section 192 restructurings has been to conduct a vote of all affected stakeholders.

However, *NCSG* and *Gateway Casinos* indicate that in certain cases, courts may accept a unanimous shareholders' resolution in lieu of a shareholder vote. Reliance on a unanimous shareholders' resolution is not altogether surprising where shareholder approval is a foregone conclusion. In such cases, using a resolution in lieu of a vote avoids the additional expense and time that accompany a shareholders' meeting. In *NCSG*, the existing shareholders unanimously supported the arrangement. Similarly, in *Gateway Casinos*, the shareholders, Gateway Casinos and New World, had negotiated an agreement to approve the proposed plan of arrangement. In both cases, the result of a shareholder vote would have been a foregone conclusion. Utilizing a resolution saved time and expense and was not seen as impacting the fairness and reasonableness of the proposed plan of arrangement.

Where it is clear that a proposed plan of arrangement will receive majority shareholder approval, a unanimous shareholders' resolution can be an advantageous tool. In these circumstances, corporations can potentially save the time and costly expenses associated with holding a formal shareholders' meeting.

6. — Limiting Equity Claims & Streaming Equity Class Actions to Insurance

Of additional significance in the development of section 192 restructurings is the "equity claims relief" granted in *Concordia*.

When it applied under the *CBCA* provisions, Concordia was facing numerous securities class actions, alleging misrepresentations, brought by its shareholders. It would have been unable to restructure, where debtholders converted to equity and significant new money was raised, with such substantial contingent liabilities. Therefore, as part of the final order, Concordia sought to limit those shareholders' recovery to available insurance proceeds. The applicants requested that all existing equity class action claims be limited "in their recourse and recovery in respect of such claims to the proceeds of the Insurance Policies".[97]

To support their request for relief, the applicants drew on the flexibility of section 192 and its likeness to *CCAA* restructurings. Counsel for the applicants contended that:

> the objectives of the CCAA plans of arrangement and CBCA plans of arrangement are to ensure the future viability of the applicants, and as such, the principles applied by CCAA courts in granting such orders should apply equally in the context of a restructuring under the CBCA plan of arrangement. [98]

Under the *CCAA*, class action claims of shareholders for breach of contract, misrepresentation, oppression, or breach of fiduciary duty, amongst other things, constitute "equity claims". And in *CCAA* proceedings, equity claims are not to be paid until all non-equity claims of creditors are paid in full. [99] With this foundation, the applicants argued that the claims of the shareholders, including the class action claims, constitute "equity claims" and should not diminish the recovery of creditors not paid in full. [100] Similarly, *CCAA* courts have granted orders channeling equity claims, including class action claims, to insurance proceeds. However, such orders are based on the principles of the *CCAA*. What was not clear was the application of these *CCAA* principles to section 192 of the *CBCA*.

When granting the final order, drawing exclusively on *CCAA* cases, Morawetz RSJ concluded that the relief requested regarding equity claims was appropriate in the circumstances. [101] Several facts appear to have been salient. First, Morawetz RSJ noted that the relief sought regarding equity claims was negotiated and supported by the vast majority of stakeholders. [102] Second, Morawetz RSJ accepted that the similarities between the *CCAA* and section 192 of the *CBCA* (both aiming to ensure the future viability of the applicants) militated toward comparable treatment of equity claims. [103] Therefore, in granting the relief requested by the applicants, Morawetz RSJ relied upon the *CCAA* cases that have endorsed the channeling of equity claims to the proceeds of insurance. [104] In these circumstances, Morawetz RSJ was satisfied that subsection 192(4) of the *CBCA* provided the authority to approve the proposed plan of arrangement, including the equity claims relief.

Regional Senior Justice Morawetz imported insolvency-type relief into the *CBCA* plan of arrangement. As he noted in the preliminary interim order application: "where there is an expectation of debt compromise, the parties should not hesitate to incorporate structures or processes that are found in the CCAA and the *Bankruptcy and Insolvency Act*". [105]

The *Concordia* decision further expands the scope of *CBCA* plans of arrangement for debt restructurings, expressly authorizing and approving the use of insolvency relief within section 192. As Morawetz RSJ held in *Concordia*, it may be that in certain circumstances, the import of the practices developed in the context of the *CCAA* are welcome in section 192 plans of arrangement involving the compromise of debt.

VII. — CONCLUSION

In 1993, Blair J stated that a corporate arrangement is capable of "incorporating whatever tools and mechanisms of corporate law the ingenuity of their creators brings to the particular problem at hand".[106] This quote was repeated by Farley J in 2006,[107] by Campbell J in 2009,[108] by Hoy J in 2010,[109] and most recently by Morawetz RSJ in 2017.[110] As the discussion in this article demonstrates, the sentiment first expressed by Blair J has been implemented in a variety of forms.

The flexible and facilitative nature of the section 192 arrangement provision continues to assist stressed and distressed corporations achieve a sustainable capital structure. Corporations have consistently been able to utilize section 192, avoiding recourse to insolvency statutes, to implement a number of creative and novel approaches to assist a company with effecting a significant debt restructuring. And *CBCA* courts continue to endorse the use of section 192 to facilitate debt restructurings for corporations and their stakeholders. As the cases discussed in this paper illustrate, the scope of the section 192 plan of arrangement continues to expand, as emerging *CBCA* plans of arrangement demonstrate the flexibility of the arrangement provision and its responsiveness to commercial realities. Combined with the broad discretion granted to courts under section 192, the boundaries of section 192 and the relief sought thereunder continue to be pushed. It remains to be seen what "ingenuity" will be pursued under section 192 next.

Footnotes

* Sean Zweig and Preet K Bell are both partners at Bennett Jones LLP. The authors wish to thank Joshua Foster, a student at Bennett Jones, for his tremendous assistance.

1 *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*].

2 *Companies Act Amending Act*, RSC 1923, c 39, s 4 [*Companies Act*]. *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR 560 at para 123 [*BCE*].

3 *Companies Act*, *ibid.*

4 *Winding-up Act*, RSC 1906, c 144, as it appeared in 1906.

5 *The Bankruptcy Act*, RSC 1919, c 36, as it appeared in 1919.

6 *BCE*, *supra* note 2 at para 123. See also Martin McGregor and Paul Case, "*CBCA* Section 192 Restructurings: A Streamlined Restructuring Tool or a Statutory Loophole?", in Janis P Sarra and the Honourable Barbara E Romaine, eds, *Annual Review of Insolvency Law 2013* (Toronto: Carswell, 2014) at 698 ["*CBCA* Section 192"].

7 Canadian Department of Consumer and Corporate Affairs, *Detailed Background Paper for an Act to Amend the Canada Business Corporations Act* (1977), Consumer and Corporate Affairs Background Paper at 5 ["Detailed Background Paper"].

8 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]; *Companies' Creditors Arrangement Act*, RSC 1970, c C-25, as it appeared in 1975.

9 See Alexis Teasdale, "Blurred Lines: The Sharpening of the Solvency Requirement and the Bounds of Judicial Power in Section 192 Arrangements under the *Canada Business Corporations Act* in *Connacher*", in Janis P Sarra and the Honourable Barbara E Romaine, eds, *Annual Review of Insolvency Law 2015* (Toronto: Carswell, 2016) at 374 ["Blurred Lines"].

10 *Ibid*; Detailed Background Paper, *supra* note 7 at 5. See also *BCE*, *supra* note 2 at para 123.

11 Detailed Background Paper, *supra* note 7.

12 *Ibid* at 5.

13 *Ibid* at 17.

14 *BCE*, *supra* note 2.

15 *Ibid* at para 128.

16 *Ibid* at para 137; *Re Trizec Corp*, [1994] 10 WWR 127 (Alta QB) at para 13 [*Trizec*].

17 *Re Essar Steel Canada Inc* (2014), 243 ACWS (3d) 604 (Ont SCJ) at para 26 [*Essar Steel*]; *Re 8440522 Canada Inc* (2013), 16 BLR (5th) 33 (Ont SCJ) at para 41 [*Mobilicity*]; *Re Tervita Corp*, [2017] AWLD 399, 2016 ABQB 662 (Alta QB) at para 22 [*Tervita*]; *Re Concordia* (2017), 285 ACWS (3d) 78 (Ont SCJ) at para 24 [*Concordia*]; *Re RGL Reservoir Management Inc* (2017), 286 ACWS (3d) 469 (Ont SCJ) at para 23 [*RGL*].

18 *CBCA*, *supra* note 1.

19 See Industry Canada, *Policy on Arrangements-Canada Business Corporations Act, section 192* (Ottawa: IC, 8 January 2014) at s 3.03-3.04 ["Director's Policy"].

20 *CBCA*, *supra* note 1.

21 Director's Policy, *supra* note 19 at s 1.02.

22 *Re Fairmont Hotels & Resorts Inc*, 2006 CanLII 57092 (Ont SCJ [Commercial List]) at para 1 [*Fairmont*].

23 *Re Acadian Timber Income Fund*, 2009 CanLII 72057 (Ont SCJ [Commercial List]) at para 8.

24 *Concordia*, *supra* note 17 at para 27, citing *Re Masonite International Inc* (2009), 56 CBR (5th) 42 (Ont SCJ [Commercial List]) at para 20 [*Masonite*], and *Fairmont*, *supra* note 22 at paras 1, 5.

25 Director's Policy, *supra* note 19 at s 2.06.

26 *Mobilicity*, *supra* note 17 at para 61.

27 *Concordia*, *supra* note 17 at para 43.

28 *CBCA*, *supra* note 1.

29 *Concordia*, *supra* note 17 at para 39, citing *Essar Steel*, *supra* note 17 at paras 38-39; *Mobility*, *supra* note 17 at para 53; *Amoco Acquisition Co v Dome Petroleum* (1988), 59 Alta LR (2d) 260 (CA), leave to appeal refused 1988 CarswellAlta 779, 1988 CarswellAlta 780, 89 AR 80n, 60 Alta LR (2d) lv, 40 BLR xxxii, 70 CBR (NS) xxxii, 89 NR 398n (SCC) at para 5 [*Amoco*].

30 *Re 9171665 Canada Ltd* (2015), 260 ACWS (3d) 273 (Alta QB) at para 27 [*Connacher*].

31 Director's Policy, *supra* note 19 at s 2.04

32 *45133541 Canada Inc*, 2009 QCCS 6440at paras 54-55 [*Abitibi*]; *Mobilicity*, *supra* note 17 at paras 47-48.

33 *BCE*, *supra* note 2 at para 143.

34 *Ibid*.

35 *Ibid*.

36 *Ibid* at para 146.

37 *Ibid* at para 148.

38 *Ibid* at paras 150-152; *Re Stelco Inc*, [2006] OJ No 593 (SCJ [Commercial List]) at para 12 [*Stelco*]; *Pacifica Papers Inc v Johnstone* (2001), 15 BLR (3d) 249 (BCSC), affirmed (2001), 93 BCLR (3d) 20 (CA) at para 145; *Trizec*, *supra* note 16 at para 11.

39 *Re Concordia International Corp*, 2018 ONSC 4165 at para 34 [*Concordia International*], citing *BCE*, *supra* note 2 at paras 147-150, 152-154 and *Trizec*, *supra* note 16 at para 43.

40 *BCE*, *supra* note 2 at 155.

41 *Re Magna International Inc*, [2010] OJ No 3454 (SCJ), affirmed 2010 ONSC 4685, 2010 CarswellOnt 6651, 101 OR (3d) 721, 75 BLR (4th) 163, 267 OAC 222 (Div Ct), at para 208. See also Dennis H Petterson & Matthew J Cumming, *Shareholder Remedies in Canada*, 2nd ed (Toronto: LexisNexis, 2018) at 18-26 ["Shareholder Remedies"].

42 *CCAA*, *supra* note 8. Under s 2(1) of the *CBCA*, a "security" means a "share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share of debt obligation". The inclusion of "debt obligation" in the statute's definition of security means that s 192(1)(e) and (f) can apply to "a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured". See also Simon B Scott, Timothy O Buckley & Andrew Harrison, "The Arrangements Procedure under Section 192 of the *Canada Business Corporations Act* and the Reorganization of Dome Petroleum Limited" (1990) 16 *Can Bus LJ* 296 at 301.

43 Shareholder Remedies, *supra* note 41 at 18-4.

44 Director's Policy, *supra* note 19 at s 2.05.

45 *Ibid.* The Director's Policy notes the decision in *Re Enron Canada Corp* (2001), 31 CBR (4th) 15 (Alta QB) [*Enron*], in which the Court dismissed an application under the *CBCA* seeking a stay under derivative contracts. Such a stay would not be available under federal insolvency statutes and therefore the Court found it was not appropriate to grant such a stay under the *CBCA*.

46 *Trizec*, *supra* note16 at para 3.

47 *Ibid* at para 40.

48 *Ibid* at para 42.

49 *Essar Steel*, *supra* note 17 at para 33.

50 See *CBCA* Section 192, *supra* note 6 at 686-691: the authors engage in a more comprehensive discussion of whether the advantages offered by the *CBCA*'s arrangement provision are real or perceived.

51 See generally Blurred Lines, *supra* note 9; Kevin J Zych *et al*, "Important Restrictions Placed on Use of CBCA for Debt Restructurings" (2015) 31:1 *BFLR* 197.

52 *Connacher*, *supra* note 30 at para 13.

53 *Ibid* at para 19.

54 *Ibid* at para 27.

55 *Ibid* at para 27.

56 See also *Enron*, *supra* note 45 and *Re Canadian Pacific Ltd* (1990), 73 OR (2d) 212 (HC), in which the *CBCA* plan of arrangement was initially rejected as it created an unfair treatment of classes of shareholders.

57 *Concordia*, *supra* note 17 at para 2.

58 *Ibid* at para 9.

59 *Ibid* at paras 20-22.

60 *Ibid* at para 49.

61 *Ibid* at paras 46-48.

62 *Re Concordia International Corp*, 2018 ONSC 3034 [unpublished] at para 24.

63 *Concordia International*, *supra* note 39 at para 15.

64 *Ibid* at paras 35-52.

65 As reasons were not issued in connection with this plan of arrangement, the facts in this section are taken from the court materials filed in connection with the Interim Order, *In the Matter of NCSG Crane & Heavy Haul Corporation*, (25 May 2018),

Calgary 1801-07060 (Alta QB) [*NCSG* Interim Order] and the Final Order, *In the Matter of NCSG Crane & Heavy Haul Corporation*, (28 June 2018), Calgary 1801-07060 (Alta QB) [*NCSG* Final Order].

66 *Concordia*, *supra* note 17 at para 34; *Essar Steel*, *supra* note 17 at paras 38-39; *Mobilicity*, *supra* note 17 at para 53; *RGL*, *supra* note 17 at para 33; *Trizec*, *supra* note 16 at para 17; *Amoco*, *supra* note 29 at para 5.

67 Director's Policy, *supra* note 19 at s 2.03. No citation is provided in the Director's Policy for this case.

68 *Ibid*.

69 See generally *Mobilicity*, *supra* note 17; *Stelco*, *supra* note 38.

70 *Connacher*, *supra* note 30 at para 27.

71 *CBCA*, *supra* note 1.

72 *Abitibi*, *supra* note 32 at paras 109-123. See also Blurred Lines, *supra* note 9 at 390.

73 *RGL*, *supra* note 17 at para 46. See also Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Reuters, 2013) at 624.

74 See Preliminary Interim Order, *Lightstream Resources Ltd, et al*, (13 July 2016), Calgary 1601-08725 (Alta QB); Preliminary Interim Order, *Tervita Corporation, et al*, (14 September 2016) Calgary 1601-12176 (Alta QB) written reasons released on 29 November 2016: *Re Tervita Corporation*, 2016 ABQB 662, approving the interim order indicates that Tervita obtained a preliminary interim order that granted it a stay on the basis of its intention to proceed with a plan of arrangement. In the meantime, Tervita negotiated a term sheet.

75 *Essar Steel*, *supra* note 17 at para 5.

76 *Ibid* at para 44

77 *Ibid* at para 49.

78 *Concordia*, *supra* note 17.

79 *Ibid* at para 28.

80 *CBCA*, *supra* note 1.

81 Director's Policy, *supra* note 19 at s 2.02.

82 *Essar Steel*, *supra* note 17 at para 1.

83 *Ibid* at paras 30-31.

84 *NCSG* Interim Order and *NCSG* Final Order, *supra* note 66.

85 Director's Policy, *supra* note 19 at s 4.04.

86 *Ibid*.

87 *Ibid*, s 4.05.

88 *BCE*, *supra* note 2 at para 152.

89 *CBCA* Section 192, *supra* note 6 at 719.

90 *NCSG* Final Order, *supra* note 66.

91 Final Order, *In the Matter of a Proposed Arrangement Involving Gateway Casinos & Entertainment Inc et al*, (16 August 2010), Vancouver S-105095 (BC SC) [*Gateway Casinos*].

92 *Ibid*.

93 *NCSG* Final Order, *supra* note 66.

94 *BCE*, *supra* note 2 at para 150.

95 Director's Policy, *supra* note 19 at s 3.09.

96 *BCE*, *supra* note 2 at para 151; *Trizec*, *supra* note 16 at para 31.

97 *Concordia International*, *supra* note 39 (Factum of the Applicants, Concordia International Corp and Concordia Healthcare (Canada) Limited) at para 69.

98 *Concordia International*, *supra* note 39 at para 49.

99 *CCAA*, *supra* note 8, s 6(8).

100 *Concordia International*, *supra* note 39 at para 62.

101 *Ibid* at para 52.

102 *Ibid* at para 50.

103 *Ibid* at paras 49, 51.

104 *Ibid* at para 51.

105 *Concordia*, *supra* note 17 at para 49.

106 *Re Olympia & York Developments Ltd* (1993), 102 DLR (4th) 149 (Ont Gen Div) at para 56.

107 *Fairmont*, *supra* note 22 at para 5.

108 *Masonite*, *supra* note 24 at para 20.

109 *Re Innvest Real Estate Investment Trust*, 2010 ONSC 4292 at para 48.

110 *Concordia*, *supra* note 17 at para 27; *RGL*, *supra* note 17 at para 26.