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• *CONCORDIA*: NOVEL FEATURES IN A CBCA RESTRUCTURING •

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I. INTRODUCTION

In September 2018, Concordia International Corp. and Concordia Healthcare (Canada) Limited (collectively, "Concordia") implemented a plan of arrangement under the *Canada Business Corporations Act*[2] ("CBCA") that has the potential to expand the use of the CBCA arrangement provision through two innovative features. First, in approving Concordia's Plan of Arrangement, Morawetz R.S.J. of the Ontario Superior Court of Justice sanctioned relief which, in effect, limited recovery on equity claims embodied in class action proceedings which were extant to available insurance proceeds, and released all other equity claims against Concordia.[3] Such provisions, while common in plans of arrangement under the *Companies Creditors' Arrangement Act*[4] ("CCAA"), had not previously been implemented within a CBCA plan of arrangement. Second, Morawetz R.S.J. granted a preliminary interim order (containing a stay of proceedings) in circumstances where Concordia did not yet have an agreement with its stakeholders.

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The CBCA plan of arrangement provision has become an increasingly popular means of facilitating corporate debt restructurings and recapitalizations, avoiding recourse to insolvency legislation. As discussed in this article, the Concordia decision is another example of the flexible use of the CBCA plan of arrangement provision to implement balance sheet restructurings that would otherwise need to be implemented under the CCAA with the resultant increase in cost, delay and potential value destruction.

II. THE CBCA ARRANGEMENT PROVISION

Section 192 of the CBCA was traditionally used for reorganizations of share capital that were impractical to be effected under the other provisions of the CBCA. According to the Supreme Court, 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".[5] However, the flexibility of the arrangement provision has resulted in its use by corporations seeking to restructure debt, usually in connection with a more comprehensive balance sheet restructuring. The definition of "security" in the CBCA is expansive and includes a "debt obligation".[6] Therefore, on its face, the CBCA permits the reorganization of both debt and equity, allowing a corporation to restructure its debt outside of insolvency statutes.

Trizec Corp, Re[7] ("*Trizec*"), a 1994 decision out of Alberta, was one of the first cases to consider the use of section 192 to restructure debt. In that case, Trizec had negotiated for an infusion of capital in exchange for equity. In opposition, the junior debtholders contended that it was "inappropriate to use a plan of arrangement under section 192 to compromise debt".[8] They submitted that, as creditors, they must be paid in full before shareholders received any recovery. Justice Forsyth rejected that argument and approved the plan of arrangement, holding 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".[9]

Since *Trizec*, corporations have continued to use the CBCA arrangement provision to effect balance sheet restructurings, with the resultant benefits. These advantages can include lower costs, decreased time, avoiding potential insolvency-triggered defaults under debt instruments or other agreements, less court supervision and reduced stigma. Whether real or perceived, these advantages have led to an increase in section 192 restructurings, many of which have expanded the scope of the arrangement provision. The Concordia restructuring is the latest plan of arrangement to do so.

III. CONCORDIA'S PLAN OF ARRANGEMENT

The Company

Concordia, together with its subsidiaries, is an international specialty pharmaceutical company, focusing on European off-patent medicines, with sales in more than 90 countries and a diversified portfolio of more than 200 established off-patent products. Concordia's capital structure primarily consisted of its secured debt, unsecured debt and existing shares. When it first came before the Court for relief in 2017, Concordia's capital structure was unsustainable with approximately $4 billion of secured and unsecured outstanding debt obligations and 2017 EBITDA that was 33 per cent lower than its 2016 EBITDA. Accordingly, Concordia sought to reduce its debt obligations in order to achieve a superior capital structure.

The Preliminary Interim Order

The process for approval of a plan of arrangement under section 192 generally involves the corporation first applying for an interim order, which sets the wheels in motion with the calling of meetings, and second, applying for a final order approving the arrangement. However, in some CBCA proceedings, applicants have sought a "preliminary interim order" in advance of the interim order. On October 20, 2017, Concordia sought such an order. Typically, at the time of an interim order application, the company would have 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 may not yet have a fully finalized plan but is generally 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. In the examples of cases where preliminary interim orders had been made (including *Essar Steel*[10] and *Tervita Corporation*[11]), the company generally had a relatively defined framework for a deal with certain of its major stakeholders on a new capital structure. However, while Concordia had aspirations of reducing its debt by in excess of $2 billion, and while both of the ad hoc committees of Concordia's secured and unsecured debt securities were supportive of continued negotiations and did not oppose the order, no agreement on the specifics of the new capital structure had been agreed to at the time.

Regional Senior Justice Morawetz first set out the test for a preliminary interim order, which is the same test to be applied at an interim order application: (a) whether the basic statutory requirements are met; and (b) whether the application is being brought in good faith.[12]

The basic statutory requirements are established in subsections 192(3) and (5) of the CBCA: (1) the Arrangement constitutes an "arrangement" within the meaning of subsection 192(1) of the CBCA; (2) the Applicants are not "insolvent" within the meaning of subsection 192(2) of the CBCA; (3) it is not practicable for the Applicant to effect a fundamental change in the nature of the Arrangement under any other provision of the CBCA; and (4) the Applicants have given the CBCA Director notice.[13]

His Honour found that Concordia met all four statutory requirements.

First, the arrangement provisions in the CBCA have been applied very broadly to give effect to a number of complex transactions. Courts have held that "the word 'arrangement' is to be given its widest character, limited only by the corporation's own by-laws or general legislation"[14] and, as in this case, it has

been found to encompass balance sheet restructurings. Regional Senior Justice Morawetz 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".[15]

Second, the solvency requirement can be satisfied on the basis of only one of the applicants being solvent. One of the Concordia applicants was found to be solvent.

Third, the "impracticability" requirement is one of "practicability", not impossibility, and also considers the most efficient means of implementing the transaction. It was found that the contemplated transactions could be accomplished far more efficiently through the plan of arrangement provisions and therefore it was impracticable to use the other provisions of the CBCA.

And finally, the requisite notice was provided to the CBCA Director.

In considering whether Concordia was acting in good faith, Morawetz R.S.J. found that it was proceeding with the arrangement for a valid business purpose. His Honour therefore granted the preliminary interim order, including the stay of proceedings, finding that it would "assist the Company working to advance and finalize the terms of the Recapitalization Structure and to return to court for an Interim Order and to ultimately seek approval of a proposed Arrangement."[16]

The Interim Order

Following the granting of the preliminary interim order, Concordia continued its discussions and negotiations with ad hoc committees of it secured and unsecured debtholders, and developed its proposed Plan of Arrangement. On May 2, 2018, Concordia brought a motion seeking an interim order to set the wheels in motion for its Plan of Arrangement, including an order for the calling, holding and conduct of the meetings to vote on the Arrangement. The interim order also provided for notice to shareholders with respect to the equity claims relief.

The test for obtaining an interim order is the same test for a preliminary interim order, as discussed above. Therefore, Morawetz R.S.J. incorporated by reference the relevant sections of his preliminary interim order decision in deciding to grant the interim order.[17] His Honour also added 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".[18]

The Final Order and the Equity Claims Relief

At the final order application, Concordia sought approval of its Plan of Arrangement, which had been voted on by stakeholders, and the more novel "equity claims" relief. The equity claims relief was prompted by numerous securities class actions, alleging misrepresentations, brought by Concordia's shareholders. Concordia sought to: (1) terminate and cancel all of its existing shares; (2) release all "equity claims"; and (3) have all existing equity class actions claims filed against Concordia be limited in recourse and recovery to the available insurance proceeds.[19]

The definition of "equity claims" for this purpose was based on the definition in the CCAA, which essentially encompasses claims and proceedings based on equity interests, and has been found to include class actions brought by shareholders. Under the CCAA, equity claims are not to be paid until all non-equity claims are paid in full,[20] and similar equity claims relief has been granted in insolvency proceedings under the CCAA. Concordia submitted that the objectives of CCAA and CBCA plans of arrangement are to ensure the future viability of applicants, and therefore the principles applied by CCAA courts in granting such orders should also apply here. Concordia also submitted that given its debtholders were not obtaining full recovery on their claims, channeling the class actions claims to the insurance policies preserved value for the plaintiffs and was fair and reasonable. In addition, the CBCA plan of arrangement provisions are broad and provide for a court to make "any interim or final order it thinks fit", allowing for a fair amount of discretion to make such an order.

The test on a final order application is whether the arrangement is fair and reasonable. The Supreme

Court has held that this depends on two inquiries: first, whether there is a valid business purpose for the arrangement; and second, whether the proposed arrangement reconciles the "objections of those whose rights are being arranged in a fair and balanced way".[21] Regional Senior Justice Morawetz found that this test was satisfied on the facts.

His Honour granted the order, relying on CCAA precedents, and held that the equity claims relief was extensively negotiated, formed an integral part of the Plan of Arrangement, and was appropriate in the circumstances.[22] Overall, Morawetz R.S.J. found the Plan of Arrangement to be fair and reasonable.

IV. CONCLUSION

Regional Senior Justice Morawetz imported insolvency-type relief into Concordia's Plan of Arrangement. As he noted in his preliminary interim order decision: "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*".[23] This case has the potential to further expand the scope of CBCA plans of arrangement for large balance sheet restructurings. The broad discretion granted to courts under section 192, and the continuing complex and novel transactions brought within its provisions, may continue to push the boundaries of section 192 and the relief sought thereunder.

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1 Bennett Jones LLP acted as counsel to the ad hoc committee of unsecured debtholders.

2 R.S.C. 1985, c. C-44.

3 *Concordia International Corp., Re*, 2018 ONSC 4165. The implementation of Concordia's restructuring occurred on September 6, 2018.

4 R.S.C. 1985, c. C-36.

5 *BCE Inc v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560 at para. 128.

6 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 ss. 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".

7 *Trizec Corp., Re*, [1994] A.J. No. 577, [1994] 10 WWR 127 (Q.B.).

8 *Ibid* at para. 40.

9 *Ibid* at para. 42.

10 *Essar Steel Canada Inc., Re*, [2014] O.J. No. 3573, 2014 ONSC 4285, 243 ACWS (3d) 604.

11 Preliminary Interim Order, *Tervita Corporation, et al* (September 14, 2016) Calgary 1601-12176 (Alta. Q.B.).

12 *Concordia International Corp., Re* [2017] O.J. No. 5717, 2017 ONSC 6357 at para. 24.