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ASSOCIATION CANADIENNE
DES PROFESSIONNELS DE L'INSOLVABILITÉ
ET DE LA RÉORGANISATION

March 15, 2019

SENT BY EMAIL

Mrs. Elizabeth Pillon
Chair, CLUC Model Order Subcommittee
c/o Stikeman Elliott
5300 Commerce Court West
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Toronto, ON M5L1B9
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Re: Model CBCA/OBCA Interim and Final Orders

Dear Elizabeth,

Thank you for providing CAIRP the opportunity to comment on the draft Model CBCA/OBCA Interim and Final Orders. In preparing these comments we have consulted with several highly respected corporate practice CAIRP members who have an intimate understanding of the issues[1]. I trust our comments will be received favourably and given due consideration by your subcommittee.

- In preparing the drafts, we understand the CLUC Model Order Subcommittee considered the CAIRP recommendations as set out in the report dated February 19, 2013 ("**CAIRP CBCA Report[2]**") but did not incorporate the proposed revisions. Considering the CAIRP CBCA Report was intended as a background document for legislative reform and that no such reform has yet been undertaken by the government[1], we can understand why the recommendations were not incorporated in the Model Orders, which are intended to reflect the practice based on current legislation. However, considering the matters raised in the CAIRP CBCA Report highlight risk factors in dealing with CBCA arrangements that should be taken into consideration by lawyers preparing the motions and by the Judge charged with supervising the proceedings, it seems appropriate to include the summary recommendations as an appendix to the Model Interim Order and include a footnote early in the document, as a practice note, pointing out that these are matters the Court may wish to consider in the context of the orders.
- The style of cause refers to ABC Company (as the Applicant) and XYZ Company (presumably as a guarantor of ABC's liabilities which are subject to compromise). This is not immediately clear in the model orders or accompanying notes. It may be simpler to refer to the applicant company only, with other parties to be added on an exceptional basis based on the circumstances of each case.
- Fully agree that Third Party Releases should be considered on an exceptional basis.

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1 CAIRP thanks Paul Casey, Jean-Daniel Breton and Jonathan Krieger for their invaluable contributions to the development of CAIRP's commentary of the draft Model CBCA/OBCA Interim and Final Orders.

2 The CAIRP CBCA Report was used as the basis of preparation of a submission to Industry Canada in connection with a Public Consultation on the CBCA, sent to Mr. Paul Halucha in May 2014.

- The Notice of Meeting should be sent to all affected Securityholders, whether they are subject to compromise or any stay of proceedings.
- Paragraph 9 refers to "initial notice". Should this be defined in the Model Order? What exactly is this?
- Paragraph 9 – Text seems odd. Suggest rephrasing as follows: "**THIS COURT ORDERS** that any amendment, modification or supplement to the Arrangement or Plan of Arrangement [made after initial notice is provided] which would, if disclosed, reasonably be expected to affect a Securityholder's (…)". As well, the reference to paragraph 8 seems unhelpful, considering that paragraph 8 deals with inconsequential changes, while paragraph 9 deals with changes that are expected to have some importance.
- Paragraph 12 – Suggest that reference to "counsel" for the Securityholders listed be included for required Notice.
- Paragraph 12(d) – Replace "respective directors and auditors" with "directors, officers, and auditors". Not sure why the "respective" qualifier is included.
- Further, you will know that certain CBCA reorganization proceedings introduced the concept of using the votes/proxies and claims files for a CCAA proceeding, if the CBCA Plan fails and the Company is required to seek protection under the CCAA. Assume we are intentionally staying quiet on this practice for the purpose of the Model Order. If the view is that this is not appropriate, perhaps this should be discussed in a Note.
- Paragraph 13 – The Model Order states: "in the event that ABC elects to distribute the Meeting Materials…" [emphasis added]. Suggest that this should not be elective for the Applicant but a requirement that the Applicant send the Notice of Meeting and other critical documents to affected Securityholders. Overall, the text seems unclear, as it is difficult to appreciate in which circumstance ABC may not elect to distribute the Meeting Materials in view of the text of paragraph 12 compels it to do so.
- Paragraph 18 – In the second last line, "on" should be deleted.
- Paragraph 19 and Note 22 regarding classes of Securityholders – Suggest that the Model Order would be improved if it introduces the concept of Classes of Securityholders, which would differentiate between shareholders, and different classes of Noteholders based on their claims against the Company (secured, priority, rights). Para 20 could then refer to each class of affected Securityholder voting in favour of the Plan in order for it to be accepted (subject to Court approval).
- Paragraph 20 - ABC Investments Inc is a company that was not referred to before and is not described in any way. This is intended to account for a vote that meets both a majority test of 2/3 of all voting people and a test of a simple majority (over 50%) of a subset of everybody (maybe unrelated people?), described in the footnote as a "majority of the minority", but the text is not sufficiently clear. Also, if the approval test is both a majority and a majority of the minority, why was the "and" removed between 20(i) and 20(ii)?
- Paragraphs 20 and 21 – Would it not be appropriate to specify how the vote is to be taken (i.e. a single vote or by class of securities)?
- Paragraph 21, last line - Assume the text should read "Securityholder" instead of "Shareholder".
- Dissent Rights only address Shareholders. Is it appropriate to ignore non-shareholder Securityholders who may be compromised by the Plan but have dissented?

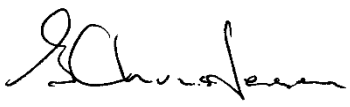
- Paragraph 23 – "XYZ Sub" is not defined. Should it even be included here?
- Paragraph 24 – Intro sentence should refer to Paragraph 22.
- Paragraph 26 - If required Notice is better clarified, this paragraph should refer to all materials.
- Paragraph 28 and Para 31 – Should list all Securityholders who are being compromised or are subject to a stay of proceedings. Suggest that this could be included as an explanatory footnote. For consistency within the Model Order, "[Applicant's Company's]" creditors should be replaced with "ABC's".
- Schedule A – From the CAIRP recommendations and the CBCA Director's Policy, we believe a Footnote to this Schedule should be added to state that this extraordinary relief should not apply to trade creditors. Secondly, the initial stay should be limited to 30 days. References to Noteholders/Notes should be amended to Securityholders for consistency.
- Schedule A - Should refer to "Industry Practice" rather than "Practise".
- Schedule A – Paragraph 1(i) - Replace "the Applicants" with "ABC" for consistency.
- Schedule A – Paragraph 2 – Replace "stakeholders" with affected classes of "Securityholders".
- Schedule A, Paragraph 1(i) - The term is likely "Securityholders" instead of "Noteholders"?
- Schedule A, Paragraph 1 - Write out rather than abbreviate BIA.
- Schedule A - Consider whether the list that appears after the words "as a result of" is sufficient. Should it not also cover an interruption in meeting the terms of the Security held, such as an interruption in payments of the notes or a breach in covenants while the Plan progresses, or is it thought that the items listed as i) and iii) are sufficiently vague to cover all situations that need to be stayed?

  If the stay is intended to cover a situation of default because it is necessary to interrupt payments while the Plan progresses, should there not be an authorization from the Court to suspend payments for this purpose?

  The general principle of the CBCA arrangements is that the applicant is intended to be not insolvent, and as such it would be expected that the company continues to honour its obligations in the normal course, but practically speaking, it would be difficult in some cases to implement a Plan while everything in sight continues to move.
- The terms Arrangement and Plan of Arrangement are used throughout the text without being defined anywhere. It would be preferable for clarity that these be defined early in the document.

We trust you will find these comments useful in your Subcommittee's important role of improving the functionality of the CBCA/OBCA Model Orders. Please let me know if CAIRP can be of any further assistance in this matter.

Sincerely,



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