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Section 192 CBCA plans of arrangement – latest insights on virtual securityholder meetings and the solvency requirement

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Section 192 of the *Canada Business Corporations Act* (CBCA) provides a flexible tool that allows corporations to achieve important change and undertake various corporate transactions, subject to court approval and oversight. This article aims to provide an update on the Québec courts' acceptance of virtual securityholder meetings and approach to the solvency requirement.

Overview of the arrangement process

Corporations can consider plans of arrangement to undertake various corporate transactions, such as mergers, acquisitions, amalgamations or reorganizations. The key steps associated with a section 192 plan of arrangement are the following:

- Assess the business objectives, draft the plan of arrangement and obtain Board approval.
- Send relevant documentation to the Director appointed pursuant to the CBCA, who will review the proposed arrangement.
- File a court application to obtain the issuance of an interim order authorizing the company to call a special securityholders meeting to vote on the proposed plan. The interim order also sets out the time and format of the meeting, as well as the dissenting rights afforded to dissenting securityholders.
- Prepare and circulate an information circular.
- Hold the securityholders meeting and have the securityholders vote on the plan of arrangement. This can be done in person or virtually, as discussed below.
- File a court application to obtain the issuance of a final order sanctioning the plan of arrangement. Prior to issuing the final order, the court will notably ascertain that the plan is fair and reasonable and does not unfairly prejudice any interested parties, and that the solvency requirement is met. (More on this below.)

- Implement the plan of arrangement and complete any necessary filings with the relevant government authorities.

Virtual securityholder meetings

Corporations typically hold the securityholders meeting to vote on the plan of arrangement in accordance with the corporation's bylaws for securityholders meetings. From a statutory point of view, section 132(4)(5) of the CBCA provides that a virtual securityholder meeting can be held if the bylaws expressly permit it and if the platform being used permits all participants to communicate adequately with each other during the meeting.

However, since the COVID-19 pandemic, virtual shareholder meetings have gained popularity in large part due to their convenience and cost-effectiveness. Many publicly listed corporations have now turned to virtual formats to hold their annual general meetings. Special securityholder meetings to vote on plans of arrangement have not escaped this trend.

Québec courts have generally been amenable to the use of technological means to conduct these meetings as they allow for increased securityholder participation, which is particularly important when securityholders' rights are being arranged. Just in the last year, the holding of virtual-only meetings was approved by the Québec Superior Court in the section 192 plans of arrangement of Velan Inc.,[1] Dialogue Health Technologies Inc.[2] and LeddarTech Inc.,[3] as well as the provincial equivalent section 414 arrangement of IOU Financial Inc. under Québec's *Business Corporations Act.*[4] We can expect virtual-only securityholder meetings to continue being commonly used in the upcoming years, although the "default" format remains in-person meetings pursuant to the terms of the CBCA.

Solvency requirement

Pursuant to the CBCA, a company can apply to the court for approval of a plan of arrangement if it is not practicable for the company to effect fundamental changes to its capital structures otherwise, provided that the company is not insolvent. A corporation is insolvent if (a) it is unable to pay its liabilities as they become due or (b) the realizable value of the assets of the corporation is less than the aggregate of its liabilities and stated capital of all classes.[5] In practice, applicants will usually demonstrate solvency to the court by providing recent financial statements, cash flow projections, expert opinions or an affidavit as to the corporation's solvency from a member of senior management.

The CBCA does not specify if the solvency requirement is to be met both at the interim and final order stages, and if all applicants must be solvent for the requirement to bet met. However, case law suggests that it is sufficient for the company not to be insolvent at the time of the final order, even if it is insolvent at the interim order stage. For example, in *Arrangement relatif à Pétrolia Inc.*, since the company did not meet the insolvency test at the interim stage, it submitted to the Superior Court that they would adopt a resolution before the final order to reduce their stated capital and therefore comply with the solvency requirement of the CBCA at the final order stage.[6] This was sufficient in the Court's perspective to meet the solvency requirement.

Case law also suggests that the solvency requirement is met whenever there is at least one applicant that is not insolvent pursuant to the test set out by the CBCA.[7] A corporation could therefore consider incorporating a new shell company to act as an applicant and satisfy the

solvency requirement, which shell company would then be amalgamated with the principal corporation as a step in the arrangement.

However, in 2015, the Alberta Court of Queen's Bench found that applicants must also show that the entity that will emerge following implementation of the plan will be solvent to meet the solvency test.[8] In 2020, the Alberta Court of Appeal further determined that the post-emergence solvency requirement is met if the principal corporation is to be solvent following the implementation of the arrangement and for a reasonable period thereafter.[9] Although no timeframe was provided for what constitutes a "reasonable period thereafter", the Court in this case rejected the appellant's argument that the emerging entity could be insolvent within 10 months of the final order as a justification to find that the solvency requirement had not been met.

These decisions have yet to be discussed by the Québec courts, but corporations considering a plan of arrangement should nonetheless keep in mind that they may be required to demonstrate the solvency of the enterprise upon emergence from the arrangement and for a "reasonable period thereafter" to obtain approval of their plan of arrangement. In our experience, the CBCA Director will, at the minimum, require that the final order court application clearly set out how the solvency requirement will be met upon emergence prior to providing the coveted letter of non-appearance, which serves to confirm that the CBCA Director will not intervene at the final order hearing to contest the plan of arrangement.

Conclusion

Overall, section 192 of the CBCA provides corporations with a flexible mechanism to effect corporate transactions, subject to court approval. These transactions combine court oversight and securityholder approval to ensure that the process is fair. In recent years, Québec courts have been supportive of virtual shareholder meetings, which can maximize participation and convenience, and we expect this trend to only continue moving forward.

As for the solvency requirement, recent Canadian case law suggests that corporations must demonstrate solvency upon emergence from the arrangement and for a reasonable time thereafter. Where an applicant is unable to meet the solvency requirement of the CBCA, its debt restructuring may be more properly facilitated under an insolvency statute, such as the *Companies' Creditors Arrangement Act*.

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[1] *Arrangement relatif à Velan Inc.*, 2023 QCCS 1623.

[2] *Arrangement relatif à Dialogue Health Technologies Inc.*, 2023 QCCS 3213.

[3] *Arrangement relatif à Leddartech Inc*, November 8, 2023, 200-11-028823-238.

[4] *Arrangement relatif à Iou Financial Inc.*, 2023 QCCS 3632.

[5] Pursuant to section 192(2) of the CBCA.

[6] *Arrangement relatif à Pétrolia Inc.,* 2017 QCCS 2785, at paras. 31 to 35.

[7] See, notably, in Québec, *45133541 Canada Inc. (Arrangement relatif à)*, 2009 QCCS 6444, at

paras. 75 to 78.

[8] *9171665 Canada Ltd. (Re),* 2015 ABQB 633.

[9] *12178711 Canada Inc v. Wilks Brothers*, LLC, 2020 ABCA 430, at para. 51 (application for leave to appeal to the Supreme Court dismissed on May 27, 2021, no. 39560).