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SECURITIES FUNDAMENTALS: PLANS OF ARRANGEMENT
PAPER 1.1

Court Approval of Arrangements in British Columbia: A Brief Primer

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COURT APPROVAL OF ARRANGEMENTS IN BRITISH COLUMBIA: A BRIEF PRIMER[1]

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I. Introduction

In British Columbia, arrangements are effected under both the *Canada Business Corporations Act* ("CBCA") and the British Columbia *Business Corporations Act* ("BCBCA"). The arrangement provisions of these statues are valuable to securities practitioners as they provide considerable flexibility in effecting fundamental changes to corporations. This flexibility is tempered by the requirement to seek orders from the Supreme Court of British Columbia at two stages. An understanding of the court's considerations at both stages is essential to properly managing the transactional side of an arrangement.

II. The Nature and Purpose of the Arrangement Provisions

In the leading decision of *BCE Inc. v. 1976 Debentureholders*,[2] the Supreme Court of Canada explained that the arrangement process is generally applicable to change of control transactions that have two characteristics: the arrangement is sponsored by the directors of the target company, and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company. The purpose of the arrangement provisions is to allow significant changes in corporate structure to be made, while ensuring the fair treatment of individuals and groups whose rights may be affected. A fair balance must be struck between conflicting interests.

III. The Three-Stage Process for Approval of an Arrangement

The arrangement provisions contemplate a three-step process for approving an arrangement. The first step involves an application to a Master or Judge of the Supreme Court for an interim order for directions regarding calling a meeting of securityholders to consider and vote on the arrangement. The next step involves a meeting of the securityholders where the arrangements must be voted on and approved by special resolution. Generally only affected shareholders are given a vote, but in certain circumstances other securityholders will also be given voting rights. The final step involves an application to a Judge of the Supreme Court for a final order approving the arrangement. This is generally referred to as the "fairness hearing".

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2 2008 SCC 69.

IV. The Interim Order: Setting the Wheels in Motion

The interim order is generally obtained immediately prior to the mailing of the information circular containing the terms of the arrangement. Copies of the near-final circular and proxies are filed as exhibits to the affidavit sworn in support of the interim order application. This motion usually proceeds *ex parte* due to the administrative burden of notifying all interested parties.[3]

The case law provides that the purpose of the interim order is simply to "set the wheels in motion for the application process relating to the arrangement and to establish the parameters for the holding of shareholder meetings".[4] The courts have discretion to make any procedural orders they deem appropriate. The interim order will generally deal with matters such as: who will receive notice of the meeting and the proposed arrangement; voting rights and quorum at the meeting; solicitation of proxies; dissent rights; amendments to the plan of arrangement; who can attend at the final order hearing; when the final order hearing will be held; and adjournments of the meeting and final order hearing.

On the interim order application, the court will consider whether there are any procedural fairness concerns arising from the subsequent steps to take place, as set out in the interim order. The court will also consider whether the information circular provides sufficient disclosure. The circular must contain "sufficient detail to permit shareholders to form a reasoned judgment concerning the matter".[5] At this stage the court does not conduct a detailed examination of the information circular, nor does it "approve" or "authorize" the circular; the review is general in nature.[6] Despite this, judges will often have particular questions about the content of the circular, and it is important that the circular be as complete as possible before the interim order hearing.

When an arrangement is proposed under the CBCA, it is necessary to establish at both the interim and final order stages that the applicant corporation is not "insolvent" as defined in section 192 of the CBCA, that the Director of Industry Canada has been notified of the application; that the arrangement constitutes an "arrangement" as defined in section 192 of the CBCA; and that it is impracticable to effect a fundamental change in the nature of an arrangement under any other provisions of the CBCA.

V. The Final Order: Assessing Fairness

In seeking approval of an arrangement, the corporation bears the onus of satisfying the court that the statutory procedures have been met, the application has been put forward in good faith, and the arrangement is fair and reasonable.[7]

In order to determine whether a plan of arrangement is fair and reasonable, the court must be satisfied: a) that the plan serves a valid business purpose; and b) that it adequately responds to the objections and conflicts between different affected parties.[8] The valid business purpose prong is invariably fact-specific but recognizes that there must be a positive value to the corporation to offset the fact that rights are being altered. The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arrangement are being resolved in a fair and balanced way.

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3 *Re Pacifica Papers Inc.*, 2001 BCSC 701 at para. 36; *Mason Capital Management LLC v. Telus Corporation*, 2012 BCSC 1582 at para. 30.

4 *Re Acadian Timber Income Fund*, 2009 CarswellOnt 8086 at para. 6; *Mason Capital Management LLC v. Telus Corporation*, 2012 BCSC 1582 at para. 31.

5 *Re Pacifica Papers Inc.* at para. 39.

6 *Re Pacifica Papers Inc.* at paras. 42-43.

7 *BCE Inc.* at para. 137; *Re Plutonic Power Corporation*, 2011 BCSC 804 at para. 18.

8 *BCE Inc.* at paras. 138, 143; *Re Plutonic Power Corporation* at para. 18; *Mason Capital Management LLC v. Telus Corp.* 2012 BCSC 1919 at para. 206.

Significant emphasis is often placed on the outcome of the securityholder vote. Voting results provide a key indication of whether those affected by the plan consider it to be fair and reasonable (assuming affected securityholders have been given a vote).[9] Although the outcome of the voting process is an important factor in the determination, courts will also consider whether there are any factors which undermine the integrity of the voting process, such as whether there has been insufficient disclosure or coercion.[10]

Ultimately, whether a plan of arrangement is fair and reasonable is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other securityholders entitled to vote, and the proportionality of the impact on affected groups.[11] The courts have recognized that there is no such thing as a perfect arrangement.[12] Reasonableness is assessed in light of the specific circumstances of each case.

VI. Tips for Working Effectively with Your Litigation Team

In order to ensure that court approvals can be easily obtained, it is important to engage the litigators who will be responsible for obtaining the relevant orders early on in the transaction, ideally prior to execution of the arrangement agreement. Having litigators review the arrangement agreement and draft circular allows for an early consideration as to whether the proposed notice, voting and dissent provisions will likely be acceptable to the court before they are finalized. In addition, there are occasionally periods of time that it will be difficult to attend in chambers due to a judicial conference or for other reasons, and the transaction timetable should be reviewed with litigation counsel.

It is also important to keep in mind that affidavit evidence must be provided in support of both the interim and final order. With respect to the final order, the evidence must cover what happened at the meeting, and should contain the scrutineer's final report. Sufficient time should be scheduled between the meeting and final order hearing, particularly where the meeting is taking place outside of Vancouver. The affidavit must be complete when it is filed, and it may take time to finalize, swear, courier and file the original affidavit.

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9 *BCE Inc.* at para. 150.

10 *Re Plutonic Power Corporation* at para. 20; *Re Magna International Inc.*, 2010 ONSC 413 at paras. 172-179.

11 *BCE Inc.* at paras. 144-154; *Re Plutonic Power Corporation* at para. 18.

12 *Mason Capital Management LLC*, 2012 BCSC 1919 at para. 268.