Policy concerning Arrangements Under Section 192 of the CBCA

Policy Statement 15.1
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1. Introduction and Statement of General Principle

1.01 This policy sets out the position of the Director appointed under the *Canada Business Corporations Act* (the "Act") as to the permissible use of and appropriate procedural safeguards and substantive requirements applicable to arrangements under section 192 of the Act.

1.02 The Director endorses the position that the arrangement provisions of the Act are intended to be facilitative and should not be construed narrowly. This position is subject to the express limitations in the Act and to the proviso that any proposed arrangement transaction must satisfy requirements of procedural and substantive fairness.

1.03 In order to assist applicant corporations, this policy also sets forth certain policy and practice guidelines aimed at facilitating the Director's review of proposed arrangements. While such policy and practice guidelines do not necessarily have the force of law, the Director believes that the policies and practices outlined represent appropriate conduct on the part of corporations proposing to enter into arrangement transactions. The Director takes the position that any proposed departures from such policies and practices should be discussed in advance with the Director or the Director's staff. The Director may appear before the court pursuant to section 192(5) of the Act to oppose the proposed arrangement at an interim or final court hearing if the Director believes that departures from the following guidelines are not warranted in the particular case.

1.04 The Director believes that by communicating these guidelines to security holders and corporations which are considering entering into arrangement transactions, the instances in which the Director finds it necessary to actively intervene in arrangement proceedings can be reduced. However, nothing in this policy is intended to constitute a binding statement of how the Director will respond to any particular arrangement transaction. Moreover, this policy is not intended to be a substitute for professional legal, accounting and business advice or for the exercise of professional judgment by legal, accounting and business advisers in any particular case.

2. Scope of Permissible Use of Arrangement Provisions

2.01 The Director endorses the view that the arrangement provisions of the Act are intended to be facilitative and notes that the arrangement provisions of the Act have been utilized by corporations to effect a wide range of different types of transactions, such as "spin-offs" of business enterprises, combinations of business enterprises, continuances of corporations to or from other jurisdictions and so-called "going-private" transactions.

2.02 The applicant under the arrangement provisions of the Act must be a "corporation". The Director also notes that there are certain additional jurisdictional limitations embodied in section 192 of the Act. These include the requirements that (a) the applicant must not be

insolvent (as defined in subsection 192(2) of the Act), (b) it not be practicable for the corporation to carry out the arrangement under any other provision or provisions of the Act, and (c) the arrangement provisions of the Act may only be utilized by a corporation to effect a fundamental change in the nature of an arrangement. The limitation that any exchange of securities must not constitute a take-over bid, as defined was removed in the recent amendment, to the Act. The following sets forth in more detail the Director's views with respect to certain aspects of each of the following limitations.

a) Solvency Limitations

2.03 The applicant corporation must not be insolvent within the meaning of subsection 192(2) of the Act. The Director is aware that the arrangement provisions of the Act have been utilized in circumstances where the total business enterprise affected by the arrangement was not solvent (at least as of the date of the interim hearing). Such plans have proceeded on two bases. The first is on the basis that the applicant, while insolvent at the interim hearing date, is solvent at the date of the final order. See, for example, Re Computel Systems Ltd., where the applicant corporation, while insolvent (as defined in subsection 192(2) of the Act but solvent under applicable insolvency legislation) 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. Notwithstanding Computel Systems Ltd. and other precedents for plans proceeding on this basis, the Director is unaware of a court expressly determining that the solvency requirement must only be met at the final order stage. The second basis is where the applicant corporation is solvent but one of the principal corporate entities involved in the overall arrangement transaction is not solvent. This was the case in Savage v. Amoco Acquisition Co. where the court ruled that use of the arrangement provisions of the Act is not limited to cases where none of the corporations involved is insolvent provided that the arrangement, as proposed, is not a sham. More recently, in Re St. Lawrence & Hudson Railway Co. the court described the solvency requirement in subsection 192(2) of the Act as requiring only that at least one of the corporate applicants under the plan of arrangement must not be insolvent (as defined in subsection 192(2) of the Act).

2.04 The Director acknowledges that certain other corporate statutes do not impose a solvency limitation on arrangements, but believes that 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 with notice of the interim hearing. Where it is not apparent from the affidavit materials provided with notice of the interim hearing that there is compliance with the solvency limitation, the Director may request additional financial information demonstrating compliance. Where the Director is not satisfied that compliance with the solvency limitation has been demonstrated, the Director may intervene.

2.05 The use of the term "security holder", rather than "shareholder", in section 192 of the Act clearly allows courts to entertain proposed arrangement transactions which alter debtholders' rights. (The Director believes that ordinary unsecured creditors, such as trade creditors, do not properly fall within the definition of security holders [1], 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, as was attempted in Re Enron Canada Corp.). The Director, mindful of the solvency limitations, is of the opinion that transactions involving principally the compromise of debtholder claims against insolvent business enterprises may be more appropriately carried out under the provisions of applicable insolvency law. Nonetheless, the Director recognizes that it may be appropriate to utilize the arrangement provision under the CBCA to effect transactions affecting debtholders, provided the statutory requirements are met. While insolvency legislation may provide guidance as to appropriate procedural safeguards, the Director believes that the applicant should provide, at a minimum, the safeguards set out in paragraphs 3.06, 3.08, 3.09, and 4.03 of this Policy, for arrangements contemplating the possible compromise of debt. Specifically, these provisions address disclosure, voting requirements, and independent opinion reports. These safeguards are not only strongly endorsed in arrangements involving debtholder claims against an insolvent corporation but also in arrangements involving debtholder claims against a corporation that, while not insolvent, is near insolvency. To determine whether a corporation involved in the arrangement is near insolvency, the Director will look to available financial and operating indicators. Presence of one or more of the following may indicate that a corporation is near insolvency:

- The arrangement contemplates a compromise of debt
- A note to the corporation's audited financial statements warning the reader of the potential inappropriateness of the use of generally accepted accounting principles that are applicable to a going concern because there is significant doubt about the appropriateness of the assumption.
- An action by a bond rating service that may indicate a solvency problem. These actions include a rating suspension, a rating downgrade from investment grade to non-investment grade, or a lower rating if the corporation is already in the non-investment grade range, and an issuance of a press release indicating that the corporation is on a credit watch with negative implications or that the rating outlook has changed from stable to negative in cases where a negative outcome may suggest a solvency problem.
- Where the corporation's shares are listed, a trading suspension has been ordered by a stock exchange because the corporation's financial condition does not meet the requirements for continued trading.
- The resignation of all or substantially all of the directors of the corporation within the year immediately preceding a court application for approval of an arrangement.

(b) Impracticability Requirement

2.07 The Director endorses the view that the impracticability requirement means something less than "impossible" and, generally, that the test would be satisfied by demonstrating that it would be inconvenient or less advantageous to the corporation to proceed under other provisions of the Act. The Director endorses this view subject to a concern that the arrangement provisions of the Act not be utilized to subvert the procedural or substantive safeguards applicable to other sorts of transactions possible under the Act.

(c) Fundamental Change

2.08 Subsection 192(3) of the Act allows the arrangement provisions of the Act to be used only in circumstances where the corporation proposes to effect a fundamental change in the nature of an arrangement. The Director recognizes that the term arrangement is not exhaustively defined in subsection 192(1) of the Act and believes that use of the arrangement provisions of the Act is not necessarily limited

to arrangement transactions involving one or more of the types of transactions provided for under other provisions of Part XV - "Fundamental Changes" of the Act. There must, however, be a proposed fundamental change in the nature of an arrangement to the applicant in order to proceed under section 192 of the Act and the Director has concerns with respect to the use of the arrangement as a procedural tool to affect stakeholders' rights in the absence of a proposal to effect a fundamental change to the applicant. The Director is also of the view that subsection 192(3) of the Act requires that the applicant corporation itself undergo a fundamental change and that it is not sufficient that another body corporate involved in the arrangement transaction undergoes a fundamental change. The Director notes, however, that this requirement will be satisfied if the applicant corporation itself undergoes any one or more of the transactions specifically enumerated in subsection 192(1) of the Act. For example, in the case of an arrangement consisting of an exchange of securities within the meaning of paragraph (f) of subsection 192(1) of the Act, as it is the corporation whose securities are being acquired rather than the issuer of the securities, that is effecting the arrangement, it is the former corporation that would be the proper applicant.

3. Procedural Guidelines

(a) Interim Orders

3.01A practice has developed in arrangement transactions whereby a corporation proposing to carry out an arrangement will apply to court seeking an interim order governing various procedural matters prior to the calling of any security holder meetings to approve the proposed arrangement. The Director endorses this practice and believes that ordinarily it would be appropriate for a corporation proposing an arrangement to apply for an interim order which addresses the following general matters:

1. information and notice requirements for the calling of meetings of shareholders and other security holders;
2. class voting requirements, if applicable;
3. quorum requirements;
4. the levels of approval required of each class of security holder (including any appropriate "majority of minority" approval requirements);
5. dissent and appraisal rights of shareholders; and
6. notice requirements in connection with the final hearing to approve the arrangement.

This is not intended to be an exhaustive list of the matters that may be appropriate for the court to deal with in the interim order, but only to illustrate those matters which the Director believes would ordinarily be appropriate for applicants to seek to have the court address at an interim hearing.

(b) Notice to the Director

3.02 Subsection 192(5) of the Act requires the applicant to give notice of the application to the Director and entitles the Director to appear and be heard in person or by counsel. Section 192 specifically requires that notice be given of both the interim and final application proceedings. While as a matter of law, the required notice to the Director is a combined function of applicable rules of civil procedure and judicial discretion, the Director believes that as a matter of practice it is desirable to establish minimum notice requirements. The Director regards the following notice requirements as the minimum notice sufficient to enable the Director to determine whether to appear and make submissions at any interim or final court hearing in cases where the applicant has strictly complied with the requirements of this policy. Where the applicant is not complying strictly with the policy, there is a greater likelihood that the Director may choose to be represented in court, and in this situation, the minimum notice might not be sufficient. In this case, the applicant would be well advised to provide the Director with the full notice provided under applicable rules of procedure, in order to avoid the necessity of the Director requesting a postponement of the court hearing.

3.03 With respect to interim hearings, the Director believes that ordinarily the applicant should provide a minimum of five working days' of the date of the initial interim hearing. The notice should be accompanied by materials sufficient to allow the Director to make a proper determination of compliance with statutory requirements and as to whether minimum standards of procedural fairness are being observed. Ordinarily, this would consist of the following:

1. affidavit materials being filed with the court (in final, or final draft form), and specifically including affidavit and other materials demonstrating that the corporation is not insolvent within the meaning of subsection 192(2) of the Act and an explanation as to why it is not practicable for the corporation to achieve the objective of the proposed arrangement under other provisions of the Act;
2. draft form of notices of meeting to shareholders and other security holders;
3. draft management proxy circular describing the proposed arrangement (in reasonably final form and including a description of the plan of arrangement and the holdings of significant security holders);
4. draft form of proxy;
5. draft plan of arrangement;
6. draft interim order; and
7. the most recent financial statements of the applicant corporation, if they are not part of the information circular.

3.04 With respect to the final hearing, ordinarily the Director should be provided with affidavit materials (in draft form where necessary) being filed or to be filed with the court at least three working days' prior to the date of the final hearing. Such affidavit materials should specifically include the following:

1. (i) report on attendance and quorum at each meeting;
2. (ii) report of the results of ballots of each meeting to approve the arrangement (including separate tabulation of voting demonstrating any required "majority of minority" approvals);
3. (iii) issued interim order; and
4. (iv) draft final order. (Note that where the arrangement involves an amalgamation of a body corporate with a corporation, it may be prudent for the final order to contain a clause directing the relevant authority of the jurisdiction governing the body corporate to amend

its records to recognize that amalgamation as of the time it becomes effective pursuant to the arrangement.)

As soon as practicable thereafter, final copies of all affidavit and other materials filed with the court should be filed with the Director.

3.05 In setting forth these guidelines, the Director recognizes that it may not be appropriate or practicable to comply strictly with these requirements in every case, but believes that applicant corporations should be in a position to justify departures from the foregoing guidelines and to provide the Director with sufficient information in a timely manner to allow the Director to determine whether intervention is appropriate. Applicants who do not afford the Director the opportunity to review the necessary information sufficiently in advance of any interim or final hearing are inviting the Director to appear in order to seek an adjournment of the hearing on this basis. Where the Director does not intend to seek an adjournment or to intervene, the Director will send to the applicant, by fax, a letter of non-appearance prior to the court hearing.

(c) Information and Notice Requirements to Affected Constituencies

3.06 Generally, the Director believes that notice should be given to those security holders entitled to vote in respect of a plan and that all security holders affected by a plan (see discussion in paragraph 3.07 below) should be entitled to vote in respect of that plan. The general principle governing information and notice requirements should be that shareholders and other security holders voting on a proposed arrangement receive sufficient information to allow them to form a reasoned judgment as to whether to support or to vote against the proposal. In determining what specific disclosure is appropriate, corporations should, at a minimum, provide all disclosure required by the regulations under the Act which would otherwise be applicable to the various elements of an arrangement otherwise specifically provided for in the Act (e.g. amalgamations, amendments to articles, etc.). In addition, where an arrangement transaction effects a result which is in substance the same as another type of transaction specifically provided for in the Act (e.g. an amalgamation), the issuer should provide to security holders any additional material disclosure which would be required to be provided under the Act in connection with the substantively equivalent transaction. Where the plan of arrangement contemplates a possible compromise of debt (see discussion in paragraph 2.05), the Act and regulations, however, provide no assistance. The Director's position, in these circumstances, is that disclosure should be made of known security holders (who are debtholders) (1) who are "related persons", as defined in section 4 of the *Bankruptcy and Insolvency Act*[2], with respect to the debtor-corporation, (2) who hold a significant proportion (33% or more) of the total debt held by their voting class, or (3) who are entitled to vote in more than one class of securities. Recognizing that there may be difficulties in determining who all the security holders are, the Director requires, at a minimum, the corporation to obtain the information on a "best efforts" basis. The corporation must be able to satisfy the Director that such an undertaking was done.

(d) Dissemination of Information

3.07 The Director believes that meeting materials should generally be provided to security holders only through a method expressly permitted under the Act. In particular, the information circular sent to security holders in connection with the meeting to approve the plan of arrangement should, absent unusual circumstances, only be transmitted electronically to those security holders who have consented to receive materials in that form. A practice has evolved of providing portions of the meeting materials in paper form and providing other parts of the materials on CD ROM, sending them electronically or advising security holders that they are available electronically or in paper form upon request. Although the Director believes that all of the meeting materials should generally be provided to security holders in paper form (unless they have otherwise consented), the Director will not generally object to exhibits or schedules to the information circular being provided by the various methods described above, so long as the information circular (together with the plan of arrangement documents and shareholder resolution thereto) are provided through a method expressly permitted under the Act and so long as the applicant confirms in the affidavit materials to be filed in connection with the interim hearing, that such method of dissemination is in compliance with applicable Securities Law Requirements (as defined in paragraph 3.10 below).

(e) Voting Requirements

3.08 Section 192 of the Act does not require security holder approval as a pre-condition to a court order approving an arrangement. However, the Director is of the view that, at a minimum, all security holders whose legal rights are affected by a proposed arrangement are entitled to vote on the arrangement. The Director is also of the view that, notwithstanding that a proposed arrangement may not affect the legal rights of holders of securities of a particular class, it may nevertheless be appropriate in cases where a proposed arrangement fundamentally alters the security holders' investment, whether economically or otherwise, that the right to vote on the arrangement should be provided to these security holders. For example, in an arrangement involving a divestiture of significant assets, the Director will review the financial statements, looking at such factors as the percentage of assets being "dividended-out", credit ratings and the rights of participation of any preferred shareholder classes. At the same time, the Director recognizes that in determining whether debt security holders should be provided with voting and approval rights, the trust indenture or other contractual instrument creating such securities should ordinarily be determinative absent extraordinary circumstances.

3.09 While the type and levels of approval which a court will require before approving any proposed arrangement are ultimately a matter of judicial discretion, the Director believes that normally class voting and voting approval requirements should be determined with reference to the class voting rules and levels of approval that would apply if the various elements of the transactions comprising the arrangement were carried out separately under the provisions of the Act. In this respect, the Director believes that the fundamental objective of class voting requirements is to ensure that security holders having a sufficient commonality of interest are grouped together for voting purposes and security holders without a sufficient commonality of interest be allowed a separate vote. The Director believes that where the applicant proposes at the interim hearing stage that different classes of security holders be grouped together for voting purposes, the burden of persuasion rests with the applicant to justify why such an arrangement is consistent with procedural fairness. In arrangements contemplating the possible compromise of debt (see discussion in paragraph 2.05), the Director also believes that grouping security holders who are debtholders based on commonality of interest is appropriate. For example, because the debtor-corporation involved in the arrangement is at risk of becoming insolvent resulting in little or no economic value in equity, the Director accepts that the grouping together of common and preferred shareholders for voting purposes will usually be appropriate. Where common and preferred shareholders are grouped into one class, the Director, however, believes a separate tabulation of votes should be kept. Among other reasons, a separate tabulation would

serve as a safeguard against the possibility of a subsequent determination that separate votes should have been taken. In the Director's opinion, the appropriate voting level for debtholders is two thirds in value of the total debt held by all the debtholders of each class present, personally or by proxy.

3.10 The Director believes that in certain circumstances it may be appropriate to require that security holder approval be demonstrated to have been obtained on a disinterested basis (i.e. by those security holders in a class who do not have any collateral interest in the approval of the arrangement). Ordinarily, it will be sufficient for such purposes if the applicant adheres to the requirements for "majority of minority" approval of transactions imposed under applicable securities laws (such as Ontario Securities Commission Rule 61-501 and Quebec Securities Commission Policy Statement Q-27) and of relevant Canadian stock exchanges (collectively, "Securities Law Requirements") with respect to related party or non-arm's length transactions. Where the arrangement will effect a going-private transaction (as defined in the regulations under the Act), the affidavit materials to be filed in connection with the interim hearing should include express confirmation that the arrangement will comply with, if applicable, the majority of minority approval and other requirements of "applicable provincial securities laws", as contemplated under section 193 of the Act. Where the arrangement will effect a squeeze-out transaction (as defined in the Act), the affidavit materials to be filed in connection with the interim hearing application should include express confirmation that the arrangement will comply with the "majority of minority" requirements of section 194 of the Act. For other arrangements, and where Securities Law Requirements are not applicable to the arrangement, the Director nevertheless believes that ordinarily the principles established by such Securities Law Requirements relating to "majority of minority" security holder approval requirements should be followed by applicant corporations. In arrangement transactions contemplating a possible compromise of debt (see discussion in paragraph 2.05), the Director believes that the principles underlying the "majority of minority" voting requirements are applicable. In particular, the Director strongly endorses a "majority of minority" approval where the security holder who is a debtholder is related to the debtor corporation. A "related person" is one who falls within the definition of "related persons" as set out in section 4 of the *Bankruptcy and Insolvency Act*[3]. Where the debtholder is related to the debtor corporation, the Director accepts as an alternative to the "majority of minority" voting, a voting scheme that prohibits a related debtholder from voting for but not against the plan of arrangement.

(f) Final Order

3.11 At the hearing of the application for the final order, the court will consider whether there has been compliance with the terms of the interim order and will make its final determination as to the fairness of the arrangement. The Director will also have an opportunity to consider the arrangement in final form in determining the position that will be taken at the hearing. Although the Director will endeavour to raise, prior to the interim hearing, at the interim hearing, or otherwise as soon as practicable, any objections the Director may have to a proposed arrangement (provided there has been compliance with the requirements respecting notice to the Director), the Director will not be bound at the final hearing by any position the Director has taken with respect to the apparent fairness of the arrangement in connection with the interim hearing.

(g) Amendments to the Plan of Arrangement

3.12 Certain plans of arrangement are drafted to permit amendments to the plan. While the Director does not object to such provisions being included in a plan of arrangement, certain procedural safeguards should be provided for and followed by the applicant corporation. The Director should be notified of any amendment to a plan of arrangement. If an amendment occurs before the meeting of security holders to approve the plan, then the amendment should be expressly brought to the attention of security holders before the vote on the plan. Depending on the nature of the amendment, consideration will have to be given to the need to amend the information circular and send to security holders the amended information circular or supplemental information circular. Any amendment made after the security holder vote and before the fairness hearing should be expressly brought to the attention of the judge at the hearing for the final order. No amendments, except with court approval, should be made to a plan of arrangement after the final order is granted.

(h) Filing of Articles of Arrangement

3.13 In order to facilitate future dealings relating to the corporation resulting from the arrangement, the Director recommends that article provisions of the corporation resulting from the arrangement be set out in the articles of arrangement in a manner which closely parallels the format utilized for articles of incorporation. The Director notes that the instructions to Form 14.1, Articles of Arrangement, effectively requires such presentation for arrangement transactions involving an amalgamation. The Director's experience is that this can be best achieved by attaching a form as an annex to the articles of arrangement, following the format of articles of incorporation, setting out these provisions. The Director believes that this is particularly important since the name which will appear on the certificate of arrangement will often not be the same as the name of the resulting corporation (since the name(s) of the applicant(s) are recorded on the certificate of arrangement). The Director is also of the view that where one of the elements of an arrangement is an amalgamation, the effect of the arrangement on the corporation continuing from such amalgamation should be the same as if the amalgamation were carried out under the provisions of sections 180 to 186 of the Act. Accordingly, the Director strongly recommends that the plan of arrangement (contained in the articles of arrangement) in such cases contain express provisions to the same effect as is set forth in section 186 of the Act.

4. Substantive Fairness

4.01 The Director believes that in addition to demonstrating compliance with jurisdictional requirements (discussed above in Section 2) and statutory and court-ordered procedural requirements (including those designed to ensure procedural fairness), there rests with the applicant proposing an arrangement an onus to demonstrate that the proposed arrangement is fair from the perspective of the security holder constituencies whose rights are affected by the arrangement.

4.02 Although the substantive fairness of a proposed arrangement is a determination ultimately to be made by the court in each particular case, the Director also will consider the fairness of the proposed arrangement. In the Director's fairness review, the Director will consider the materials provided in connection with the interim hearing application and, in particular, overall financial statements and the overall financial position of the corporation and other bodies corporate involved in the arrangement both before and after giving effect to the

proposed arrangement. In addition, certain practices have developed in the context of arrangement transactions with respect to the use of fairness opinions and the extension of dissent and appraisal rights to shareholders and, as these are considered by the Director in the review of the application, the Director believes that it would be appropriate for him to comment on such practices.

(a) Fairness Opinions

4.03 A practice has developed whereby corporations proposing to carry out an arrangement will typically commission and provide to affected security holder constituencies an opinion of a financial adviser to support the conclusion that the proposed arrangement is "fair and reasonable" to relevant security holder constituencies. While fairness opinions are not required under the Act, the Director strongly endorses the practice of obtaining fairness opinions as a means of providing objective evidence that a proposed arrangement is fair. Ideally, fairness opinions should be provided by financial advisers who are independent from all parties involved in the arrangement. However, the Director recognizes that providers of opinions are not always independent as that term is interpreted under applicable Securities Law Requirements. Accordingly, the Director requires, at a minimum, disclosure of any relationship the providers of the fairness opinion may have with any party involved in the arrangement and whether their compensation is, in any way, contingent on the consummation of the transaction on which they have expressed an opinion and confirmation that the provider of the fairness opinion has represented that notwithstanding such relationships or arrangements it believes it is independent. The Director recognizes that there will be circumstances in which an applicant will believe that a fairness opinion is not necessary (such as where the arrangement is inherently fair to all security holders). An applicant who does not intend to obtain a fairness opinion should be prepared to justify its position to the Director. Where the plan of arrangement contemplates a possible compromise of debt (see discussion in paragraph 2.05), the Director's position is that an opinion report of an independent financial adviser be provided to all security holders, setting out reasons why the plan of arrangement is advantageous to them. The report should demonstrate that each class of security holders would be in a better position under the arrangement than if the corporation were liquidated. A financial adviser, in these circumstances, should generally be an accountant or person with a financial background who has experience in assessing liquidation values.

4.04 Without attempting to limit or dictate the considerations which are appropriate for an independent financial adviser to consider in opining as to the fairness of any proposed arrangement, the Director believes that, ordinarily, for the fairness opinion to be meaningful, the person providing the opinion must be in a position to state that the arrangement is fair to each class of security holders affected by the arrangement. In the Director's view, a fairness opinion addressed only to selected classes of security holders and which does not address fairness from an inter-security holder class perspective (i.e. fairness among security holders), provides only limited evidence as to the fairness of any proposed arrangement and invites inquiry as to the fairness of the arrangement to classes of security holders to whom the opinion is not addressed.

(b) Dissent and Appraisal Rights

4.05 Although the provisions of paragraph 192(4)(d) of the Act (under which a court may order that shareholders are entitled to dissent under section 190 of the Act) are drafted in permissive rather than mandatory terms, the Director believes that ordinarily shareholders should be permitted to dissent in respect of proposed arrangements. Accordingly, in cases where an arrangement is proposed under which shareholders will not be afforded dissent and appraisal rights, the Director will examine carefully the reasons for not permitting shareholders to dissent. In this respect, the Director believes that the applicant corporation should be prepared to justify (in both the materials submitted to the Director with notice of the interim hearing and before the court) why it would not be appropriate in the particular case to extend dissent and appraisal rights to shareholders. In the absence of a satisfactory justification, the Director may determine that it is appropriate to intervene before the court at any interim or final hearing to object to a proposed arrangement on this basis.

5. Miscellaneous

5.01 The Director and the staff of Corporations Canada are available for consultation with interested persons as to the interpretation and application of this policy in particular situations. If significant issues may be involved, the consultation should be initiated at the earliest possible date.

5.02 From time to time this policy will be amended to address developments in the law, experience with the application of this policy and experience with transactions to which this policy applies.

5.03 The Director welcomes any comments or questions which corporations, security holders, counsel or others may have with respect to this policy. For the purpose of consultation, comments or questions, please contact the Manager, Arrangements & Exemptions, at 613-948-4035 or the Director, Compliance & Policy Directorate, at 613-941-5757. Both can be contacted in writing at the following address:

Compliance & Policy Directorate
Corporations Canada
Industry Canada
9th floor, Jean Edmonds Tower South
365 Laurier Avenue West
Ottawa ON K1A 0C8
Fax:: 613-941-5781

Annex A

Bankruptcy and Insolvency Act
Section 4

(1) In this section,

"related group" means a group of persons each member of which is related to every other member of the group;

"unrelated group" means a group of persons that is not a related group.

(2) For the purposes of this Act, persons are related to each other and are "related persons" if they are

1. individuals connected by blood relationship, marriage or adoption;
2. a corporation and
    1. a person who controls the corporation, if it controlled by one person,
    2. a person who is a member of a related group that controls the corporation, or
    3. any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or
3. two corporations
    1. controlled by the same person or group of persons,
    2. each of which is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,
    3. one of which is controlled by one person and that person is related to any member of a related group that controls the other corporation,
    4. one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,
    5. one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other corporation, or
    6. one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other corporation.

(3) [Relationships] For the purposes of this section,

1. where two corporations are related to the same corporation within the meaning of subsection (2), they shall be deemed to be related to each other;
2. where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by whom the corporation is in fact controlled;
3. a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, shares in a corporation, or to control the voting rights of shares in a corporation, shall, except where the contract provides that the right is not exercisable until the death of an individual designated therein, be deemed to have the same position in relation to the control of the corporation as if he owned the shares;
4. where a person owns shares in two or more corporations, he shall, as shareholder of one of the corporations, be deemed to be related to himself as shareholder of each of the other corporations;
5. persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;
6. persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship to the other;

    f.1 persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and

7. persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or sister, to the other.

1 While "security holder" is not defined in the Act, the term "security" means a share of any class or series of shares or a debt obligation of a corporation. "Debt obligation" is defined to mean a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured. A "holder" as defined in Part VII of the CBCA, which governs the transfer or transmission of a security, means a person in possession of a security issued or endorsed to him or her or to bearer or in blank. Given these definitions and relying on the *ejusdem generis* principle of interpretation, the Director's position is that the term "security holder" would include debtholders such as debenture and bond holders but not ordinary unsecured creditors. Return to 1

2 See Annex A for the provisions of Section 4 of the *Bankrupcy and Insolvency Act*, R.S.C., 1985, c. B-1, as amended. Return to 2

3 See Annex A for the provisions of Section 4 of the *Bankrupcy and Insolvency Act*, R.S.C., 1985, c. B-1, as amended. Return to 3