Financial Services Flash

AIRD & BERLIS LLP
Barristers and Solicitors

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Compromising Debt Under Section 192 of the *Canada Business Corporations Act*

One of the often-overlooked statutes that can be used to compromise and rearrange the debt of a corporation is the *Canada Business Corporations Act* (the "**CBCA**"). Section 192 of the CBCA provides corporations governed by that statute with the power to make application to a court for approval of an "arrangement" which can involve, among other things, the exchange of securities of the corporation for property, money or other securities of the corporation. Canadian courts have interpreted the definition of "arrangement" broadly so as to encompass novel, complex and unique transactions, including the compromise of debt. In well-known and recent cases such as *Temebec Arrangement Inc.*, *Mega Brands Inc.* and *Abitibi-Consolidated Inc.*, Canadian courts have granted orders that provide for a process, the primary purpose of which is the compromise of debt. In fact, the practice of compromising debt under the CBCA has been endorsed by the Director appointed under the CBCA (the "**Director**"), as reflected in Policy Statement 15.1 concerning arrangements under section 192 of the CBCA (the "**Policy Statement**"). The primary advantage of an arrangement under the CBCA is that it can be completed quickly and without the added expense of court-appointed officers that accompany more extensive restructurings under the *Companies' Creditors Arrangement Act* or the *Bankruptcy and Insolvency Act*.

It is important to note that an arrangement under section 192 of the CBCA will only be available in limited circumstances. A corporation seeking to effect an arrangement under the CBCA has to demonstrate that it is solvent, that it is not practicable for the corporation to carry out the arrangement under any other provisions of the CBCA and that the change being sought by the corporation is of a fundamental nature. For most corporations in financial distress, solvency is the toughest hurdle. However, use of section 192 has been approved by Canadian courts in circumstances where the applicant corporation is insolvent at the interim hearing date, but is solvent at the date of the final order approving the arrangement, as well as in cases where there are two or more applicants as long as one of them is solvent.

In order to compromise debt under the CBCA, the Director, in the Policy Statement, has also recommended that the applicant corporation should address certain additional safeguards by disclosing various information relating to debtholders, ensuring that voting requirements are met and obtaining an opinion as to the fairness of the proposed arrangement to debtholders opposite the potential outcomes if the arrangement is not completed. While the solvency and additional requirements of the Director may make section 192 of the CBCA less than ideal in all circumstances, it is undoubtedly one of the tools that should be considered when corporations are facing the need to perform a debt restructuring. The limits of the use of section 192 have not been tested to the fullest extent.

The Financial Services Group at Aird & Berlis LLP has a great deal of experience in advising corporations and debtholders in arrangements and other restructuring transactions. We are currently acting for a group of debtholders where the interim order regarding the process was just granted, with the arrangement expected to be finalized in June 2010. For more information on arrangements under the CBCA, please contact any member of the Financial Services Group. Details can be found on our **Financial Services, Insolvency and Restructuring web page**, by clicking on **members**.

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