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SENT BY ELECTRONIC MAIL

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Director General, Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor
Ottawa, Ontario K1A 0H5

Dear Mr. Halucha:

Comments on the Public Consultations on the *Canada Business Corporations Act*

This letter is in response to the request for comments regarding the *Canada Business Corporations Act* (the “CBCA”) published by Industry Canada on December 11, 2013. We commend Industry Canada on seeking public comment on potential reform to the CBCA.

This comment letter focuses on Item VIII in the request for comments, Arrangements Under the CBCA. The CAIRP recently undertook research with the aim of better understanding the developing case law treating arrangements under section 192 of the CBCA and the implications thereof to stakeholders. This research has laid the foundation for policy recommendations advanced by the CAIRP, which are set out below. The CAIRP believes that implementing the safeguards recommended below will help to preserve the integrity of the insolvency and restructuring regime, while maintaining the facilitative nature of section 192 and protecting the interests of stakeholders of insolvent and near-insolvent companies.

This comment letter makes recommendations designed to enhance stakeholder safeguards within the current paradigm of section 192 plans of arrangement. If a more complete overhaul of the plan of arrangement provision is intended, the CAIRP will be pleased to provide comments on future reform proposals, including an adaptation of the safeguards recommended herein.

We welcome any questions or requests for clarification you may have.

Yours truly,

Canadian Association of Insolvency and Restructuring Professionals

Per:
Paul M. Casey, CPA, CA, CIRP
Chair

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APPENDIX A SUMMARY OF CAIRP RECOMMENDATIONS

APPENDIX B CBCA SECTION 192 RESTRUCTURINGS 2008–2013

I. EXECUTIVE SUMMARY

The CAIRP believes that the intention of the arrangement provisions in section 192 of the *CBCA*¹ is to allow for solvent companies to undertake fundamental changes, including debt and equity restructurings, that are not practicable under other provisions of the Act. Access to the arrangement provisions is restricted by subsection 192(3), which states that only “a corporation that is not insolvent” may make an application for an order approving a s. 192 arrangement.

However, recent practice of the Director under the *CBCA* and the courts with respect to applicants under s. 192 is to endorse the position that *CBCA* arrangement provisions are intended to be facilitative and should not be construed narrowly. This position has led to a permissive approach by the courts to the solvency requirement, resulting in s. 192 being used to restructure companies that are insolvent. The CAIRP considers a s. 192 arrangement that contemplates both the compromise of debt and a stay order to be analogous to a restructuring of an insolvent or near-insolvent company, which presents actual or potential prejudice to stakeholders.

The CAIRP does not believe that the present s. 192 regime is appropriate for the restructuring of insolvent companies. A restructuring under the *CBCA* allows an insolvent or near-insolvent company to avoid filing under the *Companies’ Creditors Arrangement Act*² (the “*CCAA*”) and being subject to the *CCAA* stakeholder safeguards. More importantly, in the case of insolvent or near-insolvent companies or groups, a *CBCA* restructuring deprives stakeholders of the safeguards available under the *CCAA*. The CAIRP recognizes the importance of providing flexibility in restructuring procedures and, in particular, of seeking procedures that reduce transaction costs and timelines. The CAIRP is of the view that these aims are attainable within a *CBCA* restructuring with appropriate modifications to include stakeholder safeguards. In order to preserve the integrity, transparency and commercial certainty of the insolvency and restructuring regime in Canada, the CAIRP strongly recommends that certain stakeholder safeguards be implemented in s. 192 arrangements which contemplate both the compromise of debt and a stay order.

This comment letter makes recommendations designed to enhance stakeholder safeguards within the current paradigm of s. 192 plans of arrangement. In drafting this letter, the CAIRP considered alternatives to enhancing the current s. 192 paradigm including recommending (i) a strictly-applied solvency requirement; and (ii) a streamlined version of a *CCAA* restructuring – a so-called “*CCAA*-light”. However, the CAIRP believes that a strictly applied solvency requirement would unnecessarily restrict the facilitative nature of s. 192 and that, with appropriate safeguards, the Canadian restructuring regime benefits from flexibility in procedural options for restructuring insolvent companies. In addition, the CAIRP is of the view that the *CCAA* already sufficiently provides for a “light” approach, which would be unnecessary to duplicate under the *CBCA*. Further benefits to enhancing the current paradigm include maintaining regulatory certainty in the market and “normalizing” s. 192 arrangements and related court decisions to date, as opposed to creating a distinct gap in the jurisprudence.

¹ *Canada Business Corporations Act*, RSC 1985, c C-44, s 192(3) [*CBCA*].

² *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

II. INTRODUCTION TO CAIRP

The Canadian Association of Insolvency and Restructuring Professionals has over 900 general members, over 400 articling associates, and corporate and life associates. The CAIRP's mission is to advocate for a fair, transparent and effective system of insolvency and restructuring administration throughout Canada. CAIRP members represent over 95% of the trustees in bankruptcy licensed by Canada's Superintendent of Bankruptcy.

III. GENERAL COMMENTS ON CURRENT PRACTICE UNDER SECTION 192

The CAIRP has identified 12 proposed *CBCA* restructurings since 2008, in addition to one restructuring in 2002 and the 1998 restructuring of Trizec Corporation,³ an important precedent in s. 192 restructuring practice. In light of the marked increase in use of the s. 192 arrangement provisions in the context of insolvent companies, the research presented in this comment letter has focused on the 12 proposed *CBCA* restructurings in the 2008–2013 period. Of this population of 12 proposed *CBCA* restructurings, 9 were completed with *CBCA* final orders granted by the courts. Two of those 9 completed *CBCA* restructurings were converted from *CCAA* proceedings. Three of the 12 proposed *CBCA* restructurings were subsequently converted to *CCAA* proceedings. Throughout this paper, we will refer to this population of 12 proposed s. 192 arrangements for the purposes of illustration. Please see Appendix B – *CBCA* Section 192 Restructurings 2008–2013 for more details.

This comment letter makes a number of comparative references to the *CCAA*. The *CCAA* is the vehicle of choice for large company restructurings in Canada, and provides a well-developed regime for stakeholder safeguards. Furthermore, companies that have undergone s. 192 restructurings have done so as an alternative to the *CCAA*.

A. Perceived Advantages to Restructuring under Section 192

The CAIRP recognizes that a number of advantages are perceived in restructuring a financially distressed company by way of a *CBCA* arrangement rather than through a *CCAA* proceeding. Management is perceived to retain greater control over the company's operations in a s. 192 arrangement, where there is no provision for the appointment of a monitor. A monitor is appointed in all *CCAA* proceedings under s. 11.7 of the *CCAA*. Court supervision over the restructuring process is also perceived to be reduced in a s. 192 arrangement. Notwithstanding these perceptions, management control over the company's operations and over the restructuring process is only nominally, if at all, greater in a *CBCA* restructuring than in a *CCAA* proceeding. In a typical *CCAA* proceeding it is management, and not the monitor, who (i) maintains control over the company's operations, with Court approval required for significant transactions out of the ordinary course; and (ii) brings the initial applications and shapes the restructuring process.

A *CBCA* arrangement is perceived to offer a shortened restructuring timeframe and reduced transaction costs, both of which are based in part on the perception of reduced oversight by the courts over the company and process. Our analysis of 9 recently completed s. 192 restructurings indicates that the average duration from interim order to final order was 59.4 days. Yet comparing *CBCA* and *CCAA* restructuring timeframes is fraught with difficulties, as a s. 192

³ *Re Trizec Corp* (1994), 158 AR 33, 21 Alta LR (3d) 435 at p 444 [*Trizec*].

arrangement necessarily contemplates the compromise of a more limited universe of creditors and a narrower range of obligations. Further, the time spent by the company in the planning and negotiation stages in a *CBCA* arrangement is not reflected in the period between the dates on which the interim and final *CBCA* orders are granted.

Transaction costs are also perceived to be lower in a *CBCA* restructuring. Yet a narrow focus on professional fees does not account for the very real costs associated with the planning and negotiation period, including senior management time and compensation, and compensation earned by advisors in that period. Because these costs are internal to the company, they attract less attention than the professional fees (external to the company) generated in a court-supervised *CCAA* proceeding.

Finally, proceeding by way of a *CBCA* arrangement allows a company and its directors to avoid the perceived stigma of an insolvency filing. We suggest that directors of public companies perceive that there will be less association with insolvency and regulatory sanction in a *CBCA* arrangement than in a *CCAA* filing. Stigma remains a psychological factor, and it is difficult to assess the veracity or importance of this perception. However, the act of proposing, or of entering into, an arrangement or compromise with creditors may itself be an event of default under lending or credit agreements.⁴ The courts have acknowledged this in granting no-default orders in at least 7 of the *CBCA* restructurings reviewed which featured interim orders granted under s. 192. Future lending and credit agreements will evolve to include s. 192 arrangements compromising debt as events of default, to the extent not already included. In any event, the ability of an insolvent company and its directors to avoid a perceived stigma should not come at the expense of prejudice to the company's stakeholders.

B. Limitations of a Section 192 Plan of Arrangement as a Restructuring Tool

Leaving aside the solvency restriction, the CAIRP recognizes that the s. 192 arrangement provisions may be a useful tool for effecting a financial restructuring of a company. However, there are significant limitations to s. 192 that render it unsuitable for a full operational restructuring. These limitations include: the range of compromise available; the effectiveness of stay orders; and the absence of a practice surrounding debtor-in-possession (DIP) financing under s. 192. Nevertheless, these limitations have not precluded companies from attempting full operational restructurings under s. 192.

The primary limitation to restructuring under s. 192 is that that only the claims of securityholders may be compromised in a plan of arrangement, rendering it unsuitable for effecting a full restructuring of a distressed company. The provision contemplates only the compromise of securities of the company. This is further supported by the 2010 Policy Statement, which confirms the Director's view that the term "securities" as used in the *CBCA* does not encompass

⁴ In *Yellow Media*, the dissenting lenders stated in materials prepared for the court that the authorization and initiation of the s. 192 application by the company's board of directors created an automatic Event of Default, as defined under the relevant credit agreement. *Arrangement relatif à Yellow Media*, 2012 QCCS 4180 (available on CanLII) [*Yellow Media*], Motion for the Revocation of the Interim Order Dated July 23, 2012 and Other Related Relief, paras 27–30.

the claims of ordinary unsecured creditors or contingent creditors.⁵ A company with complex operations or complex commercial challenges will likely not be able to effect under s. 192 a restructuring that is sufficient to remedy the company's financial and operational issues.

Despite any strategic motives that may have been present, the attempted *CBCA* restructurings of forestry companies Abitibi-Consolidated Inc.⁶ in 2009 and Catalyst Paper Corporation⁷ in 2012 serve to illustrate the limitations of s. 192.

Abitibi was known to be facing financial difficulty for some time before making an application for a s. 192 arrangement. The breadth and scope of the s. 192 stay order sought, including a continued supply order, was a strong indicator that a limited restructuring under the *CBCA* would be insufficient for Abitibi. The Abitibi *CBCA* proceedings were converted to *CCAA* proceedings after only 34 days.

Similarly, the proposed *CBCA* arrangement by Catalyst paper was converted to a *CCAA* proceeding after only 14 days. The complexity of Catalyst's operations and relationships with suppliers and employees suggests in retrospect that a full operational restructuring was required, rather than the limited debt security restructuring available under the *CBCA*. The trigger for conversion to a *CCAA* proceeding was ostensibly the rejection of the company's *CBCA* proposal by one labour union local. It should be noted that this union local represented only 130 employees at a single plant, or roughly 8% of the company's total overall workforce.

The effectiveness of attempting a restructuring under current s. 192 practice is further called into question by stakeholders' unfamiliarity with stay orders granted under s. 192. In an affidavit registered with the court in connection with the *CCAA* filing, a Vice President of Catalyst stated,

Notwithstanding a stay of proceedings order under the *CBCA* proceedings, the Company received numerous calls and communications from numerous suppliers refusing continued supply without cash or advance cash payments. The stay order under the *CBCA* is not a familiar order to the Company's suppliers and it has not proven to be effective in dealing with supplier issues, despite the fact that the Company has paid supplier accounts on existing credit terms.⁸

The blurring of the separation between corporate and insolvency laws in s. 192 is at the root of the statement above. The insolvent company required, and expected, protection from creditors in order to effect its complex restructuring. Creditors and other stakeholders, on the other hand, expected to continue and protect their economic arrangements as negotiated in the absence of a *CCAA* filing and *CCAA* stay order.

⁵ Industry Canada (Corporations Canada), "Policy of the Director Concerning Arrangements under Section 192 of the *Canada Business Corporations Act*", January 4, 2010 at para 2.05, online: Industry Canada <<http://www.ic.gc.ca>> [Policy Statement].

⁶ *Re 45133541 Canada Inc*, 2009 QCCS 6444 (available on QL) [*Abitibi*].

⁷ *In the Matter of a Proposed Arrangement of Catalyst Paper Corporation* (17 January 2012), Vancouver No S-120362 (BC Sup Ct).

⁸ *In the Matter of Catalyst Paper Corporation*, No S-120712 (31 Jan 2012) (BC Sup Ct), Affidavit of Brian Baarda, para 115.

Absent safeguards on the granting of stay orders under s. 192, it is expected that distressed companies will continue to apply to the courts to restructure their operations under *CBCA* arrangements. While the CAIRP recognizes that a distressed company's financial condition and restructuring strategy may be in a state of flux as it nears insolvency, attempting a full restructuring under s. 192 amplifies the potential for prejudice to stakeholders as set out in this letter.

C. Creditor Expectations

Priority in recovery by creditors is generally well-established under Canadian insolvency law. Recent s. 192 practice has blurred the line between corporate law and insolvency law, and courts are left to balance an approach suitable for a corporate law provision with the principles underlying creditor and stakeholder safeguards in insolvency law. Priority among creditors is not contemplated in Canadian corporate law, as the corporate statutes are designed for going-concern entities. Therefore, where an insolvent or near-insolvent company is restructured under a *CBCA* plan of arrangement, priority in recovery is not defined. The result is creditor uncertainty regarding expectations of priority in recovery in a s. 192 restructuring.

Effective and efficient bond markets rely on predictability and consistency in the application of laws, rules and policy. Canada's bond markets are becoming increasingly sophisticated, including participation by distressed debt investors. The consequences of inconsistency in statutory treatment – e.g., with respect to priority in recovery in an insolvency situation – may negatively impact investment activity in the higher yield corporate bond market.

D. Securityholder Classification and Voting: Swamping and Cram-down of Creditors

Under current s. 192 restructuring practice, securityholders are typically classified into broad groups for the purpose of voting on a proposed plan of arrangement. This practice is supported by the Director's Policy Statement.⁹ Debtholders are typically grouped either into one class or two classes, being secured debtholders and unsecured debtholders. Equity holders, including common and preferred shareholders, are typically grouped together in one class. Broad classification lends itself to two significant sources of prejudice to securityholders: swamping and cram-down.

1. Swamping

Swamping refers to the ability to group dissenting creditors with supporting creditors, such that votes against a plan are "swamped" or overcome by votes in support of a plan. A system where holders of distinct debt instruments are classed together enables swamping of dissenting creditors. A closer look at the voting results in *Yellow Media* illustrates the risk of swamping. Despite an overall approval by more than 70% of debtholders and equity holders, the arrangement as originally proposed was rejected by strong majorities in four subgroups of debtholders and by 49.8% of preferred shareholders.¹⁰ However, each of these subgroups had

⁹ Policy Statement, *supra* note 5 at para 3.10.

¹⁰ The *Yellow Media* arrangement as originally proposed was passed with the support 70.39% overall of debt holders. Within the broad class of debt holders, however, the proposed arrangement was rejected by: (i) 84% in value of bank debt; (ii) 65.62% in value of one of the eight series of medium term notes; and (iii) 94.18% in value of convertible debenture holders. In addition, the arrangement as originally proposed was passed with the

been classified into broad classes, with the result that the plan was approved by more than the targeted 66.66% of securityholders in each of the broad classes.

2. Cram-down

Cram-down refers to the ability of a company to force a restructuring plan on a creditor or group of creditors, without the approval of the creditor or group of creditors. Under current practice, a s. 192 arrangement becomes binding on all securityholders once approved by the court. Approval by the affected securityholders is not a prerequisite to court approval. A court could approve a *CBCA* plan of arrangement absent approval by any class, or all classes, of voting securityholders.

The courts have considered a strong majority voting in favour as a factor in approving a proposed *CBCA* plan of arrangement.¹¹ However, the courts have not articulated what level of disapproval would be considered a factor in denying a proposed *CBCA* plan of arrangement. In certain cases, *CBCA* plans have been approved by the courts notwithstanding a rejection of the proposal by at least one affected class.

Under the *CCAA*, the double majority approval requirement acts as a safeguard against both swamping and cram-down. In a *CCAA* restructuring, all affected classes must approve the plan by a majority in number representing two-thirds in value of the class of creditors. Once a *CCAA* plan of arrangement has been approved by the creditors and the court, the plan becomes binding upon all creditors of the classes affected by, and having voted on, the plan. A court cannot approve a *CCAA* plan if it does not reach the double majority approval threshold.

3. Dissent Rights and Recourses Available to Dissenting Securityholders

A dissent right allows a securityholder dissenting from a proposed arrangement to tender his or her shares to the company in exchange for fair market value compensation. The Policy Statement presents dissent rights as a recourse available to dissenting securityholders and sets out the Director's position that dissent rights should be granted to securityholders in a proposed s. 192 arrangement. However, the notion of a dissent right is geared towards the context of a corporate arrangement, rather than a restructuring. Indeed, dissent rights were not contemplated in any of the 12 proposed or completed s. 192 restructurings studied.

The only recourses currently available to dissenting securityholders are (i) to vote against the proposed arrangement, or (ii) to attempt to challenge the arrangement in court. Issues surrounding voting by securityholders have been discussed above. With respect to challenging a proposed arrangement in court, our research has identified only one successful court challenge of an element in a proposed s. 192 restructuring plan. In *Yellow Media*, a group of highly-sophisticated, well-organized dissenting securityholders were successful in challenging a proposed amendment to the debtholders resolution seeking approval of the plan, after consents had been delivered to the company. The company and the dissenting securityholders later reached a negotiated deal on the proposed arrangement.

support of 77.26% of equity holders, but was rejected by 49.80% of preferred shareholders overall, failing to meet the requisite 66% approval threshold in each of the five preferred share series. See *Yellow Media*, *supra* note 4.

¹¹ See *Trizec*, *supra* note 3 at para 36.

4. Alternative Plans and Dual-Voting Mechanisms

Several innovative features were incorporated in the proposed 2013 *CBCA* restructuring of Mobilicity. Mobilicity was granted two concurrent s. 192 interim orders, for (i) an Acquisition Plan,¹² under which Mobilicity proposed to be acquired by a solvent entity, intended at the time to be TELUS Corp., and (ii) an alternative Recapitalization Plan.¹³ In addition, an innovative dual-voting mechanism was included in both interim orders, which provided that votes in support of the relevant *CBCA* plan would be deemed votes in support of an identical plan to be carried out under the *CCAA*, if required.¹⁴

Concurrent interim orders for alternative *CBCA* plans reflect the facilitative nature of section 192. However, application for concurrent orders for alternative plans also suggests a need for greater stakeholder safeguards as the debtor corporation may be insolvent, or at least near insolvent. Application for concurrent alternative plans also suggests that a motivation for applying for the *CBCA* interim orders may be to obtain a stay of proceedings in order to provide the debtor company breathing space to negotiate its survival. The CAIRP believes that the safeguards recommended herein, and in particular the interim stay order and stay order extension restrictions, will encourage the use of s. 192 arrangements in circumstances where the applicant company is ready to move forward with a limited restructuring.

Dual-voting mechanisms are a recent innovation in s. 192 restructurings. Under a typical dual voting mechanism, votes by affected securityholders in support of a proposed *CBCA* arrangement are deemed to be votes in support of an alternative *CCAA* plan. The CAIRP recognizes a potential for this innovative dual-voting mechanism to reduce overall costs in restructurings that are transitioned from the *CBCA* to the *CCAA*, provided that certain safeguards are in place. Specifically, dual-voting could be appropriate and beneficial where (a) the dual-voting is clearly disclosed to voting securityholders with sufficient notice prior to the vote, and (b) both the proposed *CBCA* plan and the alternative *CCAA* plan are either (i) identical, or (ii) are disclosed in detail to stakeholders prior to the vote and are not subject to amendment without a refreshed vote.

In *Mobilicity*, the alternative *CCAA* plans included in the dual-voting mechanism were to be identical to the proposed *CBCA* plans being voted on. In contrast, in *Yellow Media* the court sided with dissenting securityholders in striking down a proposed amendment to the debtholders' resolution seeking debtholder approval to the plan of arrangement. The proposed amendment to the resolution would have deemed votes in support of the proposed *CBCA* plan to be votes in support of an alternative *CCAA* plan, which was not understood to be identical to the proposed *CBCA* plan and had not been presented to voting securityholders. The amendment to the

¹² *In the Matter of a Proposed Arrangement of 8440522 Canada Inc and Involving Data & Audio-Visual Enterprises Holdings Inc, Data & Audio-Visual Enterprises Wireless Inc and Data & Audio-Visual Enterprises Leasing Inc*, (26 April 2013), Toronto No CV 13-10081-00CL, Interim Order (Acquisition Plan), (Ont Sup Ct J (Comm List)), online: Mobilicity <<http://www.mobilicity.ca>> [*Mobilicity Acquisition Plan Interim Order*].

¹³ *In the Matter of a Proposed Arrangement of 8440522 Canada Inc and Involving Data & Audio-Visual Enterprises Holdings Inc, Data & Audio-Visual Enterprises Wireless Inc and Data & Audio-Visual Enterprises Leasing Inc*, (26 April 2013), Toronto No CV 13-10081-00CL, Interim Order (Recapitalization Plan), (Ont Sup Ct J (Comm List)) online: Mobilicity <<http://www.mobilicity.ca>> [*Mobilicity Recapitalization Interim Order*].

¹⁴ *Mobilicity Acquisition Plan*, *supra* note 19 at para 27; *Mobilicity Recapitalization Plan*, *supra* note 20 at para 27.

resolution was proposed after consents to the *CBCA* plan had been delivered. The court focused on the attempt to deem consent for one plan to be consent for a hypothetical plan under a different statute and procedural context.¹⁵ The court in *Mobilicity* was not troubled in its reasons that the dual-voting mechanism deemed support for a *CBCA* plan to be support for a plan under the *CCAA*, likely in part due to the fact that the dual-voting mechanism and the alternative plans had been presented to voting securityholders.

E. Stakeholder Safeguard Triggers

In light of the prejudices to stakeholders identified in this comment letter, the CAIRP recommends that certain mandatory stakeholder safeguards be implemented under s. 192.

Recommendation: Mandatory stakeholder safeguards should be triggered in section 192 applications which contemplate both the compromise of debt and a stay order.

In formulating this comment letter, the CAIRP considered two approaches to triggers for the recommended safeguards: solvency-dependent and relief-dependent.

A solvency-dependent approach would involve mandating a strict solvency test under s. 192. If an applicant company failed the solvency test, the safeguards would be triggered for the proposed arrangement. A solvency-dependent trigger would aid in addressing the broader question of the blurring of jurisdictions between corporate law statutes governing solvent companies and insolvency statutes governing restructurings and insolvency proceedings. However, the CAIRP recognizes the value of flexibility in restructuring regimes. A strictly-applied solvency-based trigger would limit the flexibility of the provision, for example in precluding an insolvent company from access to an arrangement under s. 192 whereby the company proposed to sell itself, or all of its assets, to a bidder where all outstanding obligations would be satisfied. A drawback to a solvency-dependent trigger and a strict solvency test is the reliance on and analysis of financial data that would be required. No matter how robust, a bright-line solvency test brings with it a potential for ambiguity. Reliance on financial data also poses a potential issue related to the capacity of the court, both in expertise and in time, to assess the financial data and make a solvency determination, and potential conflicting opinions presented by the parties.

A relief-dependent approach would preserve the flexibility of the arrangement provision, while ensuring stakeholder safeguards are in place in appropriate circumstances. The CAIRP believes that creditors' interests are most vulnerable in restructurings of insolvent companies, as attested to by the stakeholder safeguards now mandated under the *CCAA*. Section 192 restructurings typically involve two elements of relief sought by an applicant company that is insolvent or near-insolvent. Under this relief-dependent model, stakeholder safeguards would be triggered in an application that contemplates both a stay order and a compromise of debt. As acknowledged by the Director, the contemplation of a compromise of debt is an indicator of the insolvency or near-insolvency of a company proposed to be arranged.¹⁶ Nevertheless, requiring the contemplation of

¹⁵ *In the Matter of a Proposed Arrangement concerning Yellow Media Inc et al*, 2012 QCCS 4180 (available on CanLII).

¹⁶ Policy Statement, *supra* note 5 at para 2.05.

both a stay order and a compromise of debt to trigger the recommended safeguards is a practical way to circumscribe their impact to only those proposed arrangements where stakeholder interests are most vulnerable.

IV. ISSUES AND RECOMMENDATIONS

A. Notice Regarding Section 192 Applications

The CAIRP acknowledges that the notice requirements under s. 192 were drafted with corporate arrangements in mind, and not insolvent company restructurings. However, in light of the recent use of *CBCA* arrangements in insolvent company restructurings, the CAIRP believes that notice provisions under s. 192 should be more closely aligned with notice provisions under the *CCAA*.

Under current s. 192 practice and the Policy Statement, ‘notice’ relates primarily to notice to securityholders of the vote on the proposed arrangement.¹⁷ The Director’s view is that notice should be provided to all securityholders entitled to vote in respect of the plan, including sufficient information to form a reasoned judgment on the proposed plan. Notice of an application for a s. 192 interim order is not required to be made, including to securityholders proposed to be affected under the plan of arrangement. In this respect, the s. 192 concept of notice is more analogous to notice required under securities law and regulations – e.g., notice of a shareholders meeting for a vote to approve a proposed takeover bid – rather than notice of a filing in the context of an insolvent company.

In contrast, model *CCAA* initial orders state that notice of the application is to be made to secured creditors likely to be affected by the charges granted in the initial order. In practice, notice of a *CCAA* application may be abridged by the court, or a *CCAA* application may be made *ex parte*.¹⁸ However, stakeholder rights are balanced by a provision in the standard *CCAA* initial order that any interested party may apply to the court to vary or amend the initial order, typically on seven days’ notice to any other party likely to be affected by the order sought.¹⁹ No similar comeback clause is typically included in a s. 192 interim order. The CAIRP believes that a potential for prejudice is created by notice requirements that leave stakeholders under one restructuring regime disadvantaged vis-à-vis stakeholders under a competing restructuring regime.

The CAIRP believes that, in an optimal scenario, notice of an application for a s. 192 arrangement which contemplates both the compromise of debt and a stay order would be delivered to all parties proposed to be affected under the arrangement. The CAIRP’s position, therefore, is that the notice requirements in s. 192 arrangements contemplating a stay order and the compromise of debt should be aligned with general practice and requirements in *CCAA* proceedings. This will ensure that notice provisions under the *CBCA* arrangement regime are

¹⁷ Policy Statement, *supra* note 5 at 3.06–3.07.

¹⁸ Lloyd W Houlden, Geoffrey B Morawetz and Janis P Sarra, *2012 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2011) 1114–1115.

¹⁹ Ontario Superior Court of Justice, Commercial List, Model *CCAA* Initial Order, online: Ontario Courts <<http://www.ontariocourts.ca>> at para 51.

neither more favourable to insolvent companies nor less favourable to stakeholders than under the CCAA.

Recommendation: An application for a s. 192 arrangement contemplating a stay of proceedings and the compromise of debt should be made on notice to affected stakeholders.

Specifically, the CAIRP recommends the following safeguards with respect to notice be triggered by an application for a s. 192 arrangement contemplating a stay of proceedings and the compromise of debt:

- (i) A s. 192 application should be made on notice to all securityholders proposed to be affected under the arrangement (which notice may be abridged by the court, where it deems appropriate);
- (ii) An applicant should file with the court, appended to its s. 192 application, a list of affected holders of securities above a *de minimis* level (the “Notice List”);
- (iii) The Notice List should be provided to the supervisor (see below), who should liaise with stakeholders on the Notice List in preparing the supervisor’s reports to the court; and
- (iv) The supervisor should be empowered to add the names of stakeholders who request to be added to the Notice List.

Implementation of these recommendations would reflect an acknowledgement of the impact of a proposed s. 192 arrangement contemplating a stay of proceedings and a compromise of debt on the legal and economic rights of stakeholders of the applicant. Securityholders should be apprised at the earliest instance of a proposed impairment of their legal or economic rights, and should be apprised of all other applications and supervisor’s reports filed with the court. Broadening the range of stakeholders entitled to notice and integrating this notice requirement with the role of the supervisor will serve to mitigate the risks of stakeholder rights being substantively affected without notice and will enhance the transparency of the process for creditors, other stakeholders, and capital market participants.

B. Information Gap

Stakeholders and securityholders in a s. 192 restructuring are at an information disadvantage relative to stakeholders and creditors in a CCAA proceeding. The Policy Statement acknowledges that the *CBCA* and regulations do not provide guidance on what information should be disclosed to securityholders in a proposed s. 192 plan of arrangement that contemplates a compromise of debt, beyond the general principle that voting securityholders receive sufficient information to form a reasoned judgment on the proposed plan. The Director’s position calls only for disclosure by the debtor-corporation of debtholders who (i) are related persons with respect to the debtor-corporation, (ii) hold 33% or more of the total debt in a voting class, or (iii) are entitled to vote in more than one class. The CAIRP is of the view that discrepancies in disclosure requirements under competing restructuring regimes present a potential for prejudice to stakeholders.

Further, unlike in a CCAA proceeding, there is currently no provision under s. 192 for a court-appointed official to ensure the sharing of information in a proposed arrangement. In a CCAA proceeding, the court appoints a monitor, who is a licensed trustee, under s. 11.7 of that Act to oversee and monitor the business and financial affairs of the debtor company. An information officer appointed under Part IV [Cross-Border Insolvencies] of the CCAA performs a similar yet more limited role in ensuring the sharing of information. The CAIRP is of the view that a court-appointed official would enhance the sharing of information in a s. 192 restructuring and mitigate any stakeholder information disadvantage.

Recommendation: The appointment of a supervisor should be mandatory in s. 192 arrangements which contemplate both the compromise of debt and a stay order.

On an application for a s. 192 arrangement which contemplates a stay order and a compromise of debt, the court would appoint a licensed trustee as supervisor. Trustees in bankruptcy have specialized training and extensive experience in insolvency and restructuring administration, and are licensed and regulated by the Superintendent of Bankruptcy.

The supervisor's role would be to disseminate information among affected securityholders and to the court, with the objective of helping to inform and protect the interests of the stakeholders of the restructuring company. Specific duties of the supervisor would include:

- (i) acting as information officer for all stakeholders and make available notices, key documents and materials relating to the company and the proposed arrangement;
- (ii) acting as the point of contact for stakeholders affected by a stay order, and reporting to the court at each order extension hearing; and
- (iii) filing reports with the court at defined intervals and at hearings seeking stay order extensions and plan amendment or approval.

The appointment of a supervisor would provide a summary level of supervision over the impact of the arrangement on stakeholders, including any impact on ordinary unsecured creditors, notwithstanding the Director's position that unsecured creditors are not to be affected in a s. 192 arrangement. In consultations for Janis Sarra's 2012 *Insolvency Toolkit*, insolvency practitioners noted that the lack of a monitor in a CBCA arrangement proceeding can lead to a "gap in terms of an impartial officer to give advice to the court on the integrity of the process or the outcome."²⁰ The important role played by a court-appointed official in ensuring information sharing is reflected in the codification and development of the role of the monitor under the

²⁰ Janis Sarra, *Examining the Insolvency Toolkit: Report of the Public Meetings on the Canadian Commercial Insolvency Law System*, Seventh Annual Lloyd Houlden Memorial Research Fellowship Award Working Papers, July 2012, online: Canadian Insolvency Foundation <<http://www.cairp.ca/canadian-insolvency-foundation>> [Sarrra, *Insolvency Toolkit*].

CCAA. The role of a CCAA information officer, first used in the *Olympia & York* (“O&Y”) proceedings, further reflects the importance of ensuring a flow of information.²¹

The CAIRP proposes that the role of a supervisor would be more restricted than that of a monitor,²² akin to the role of an information officer. The policy-making and compliance role of the Director would be maintained, as the supervisor’s mandate would not extend to monitoring for strict compliance by the applicant with the Director’s Policy Statement.

A supervisor would file periodic reports with the court assessing the impact of stay orders granted, as well as the process of developing the plan of arrangement. A supervisor’s report filed at a stay order extension hearing would assess the ongoing impact of the stay order on stakeholders. A supervisor’s report at a hearing seeking to amend a proposed plan of arrangement would discuss the supervisor’s view on the fairness of the proposed amendment within the context of the process of developing the plan. A supervisor’s report filed at an approval hearing would assess the fairness of the proposed arrangement to affected stakeholders from a financial perspective.

Precedent for the appointment of a licensed trustee in a s. 192 arrangement can be found in *Look Communications*,²³ where a monitor was appointed on a restricted mandate to manage and conduct a sales process for substantially all of the assets of Look Communications Inc. Neither the appropriateness nor the novel nature of appointing a monitor in a *CBCA* proceeding was discussed in the publicly available orders in that proceeding, including the order appointing the monitor, the order expanding the monitor’s mandate, and the subsequent order sealing the Monitor’s report. More generally, authority under the *CBCA* for the appointment of an outside professional in relation to the affairs of a corporation can be found in section 220, for the appointment of a liquidator, and in section 230, for the appointment of an investigator.

The CAIRP acknowledges that the appointment of a supervisor may increase the professional fees associated with a section 192 restructuring, encumbering one of the perceived advantages of a *CBCA* restructuring. However, the CAIRP believes that value of the supervisor’s role in

²¹ The O&Y Information Officer was appointed to improve creditor access to relevant documents and ordered by the court to distribute reports on a monthly basis to the creditors’ committees, providing information on, *inter alia*, the financial affairs and cash flows of O&Y operations. Duties of information officers typically include responding to reasonable information requests from stakeholders and providing the court with scheduled periodic reports and recommendations regarding the recognition of a plan of reorganization. Fees and disbursements of the information officer are typically deemed to be costs of the proceeding. See Yoine Goldstein, David A Brown, Mark E Meland, and I Berl Nadler, “Olympia & York: Navigating Uncharted Waters”, *Case Studies in Recent Canadian Insolvency Reorganizations*, Jacob S Ziegler and David E Baird, eds (Toronto: Carswell, 1998) 151 at 157.

²² The practice of appointing a monitor in CCAA proceedings began in the 1980s and 1990s, and was codified in the 1997 amendments to the CCAA. The role of the first monitor was to monitor the management of the debtor and report any untoward activity to the court and the secured creditor. Since that time, the scope of the monitor’s mandate has included assisting the debtor in the development of a plan, acting as watchdog for creditors and reporting financial and other relevant information to the court and creditors. The monitor’s role has become an essential feature in the protection of stakeholder interests in CCAA restructurings.

²³ *Look Communications Inc v Look Mobile Corp*, Ont Supt Ct J [Comm List] Docket No 08-CL-7877 (Newbould J) (available on WL Can).

increasing the transparency of the process and informing and protecting stakeholder interests outweighs any increased supervisory expense to the company.

Provision for an arrangement supervisor would also provide a greater degree of continuity should a proposed *CBCA* arrangement be transitioned to a proceeding under the *CCAA*. Given the perceived benefits of a *CBCA* restructuring, it may be that insolvent and near insolvent companies will continue to first attempt to restructure through a section 192 plan of arrangement, before making a *CCAA* filing. Not all of these attempts will be successful – see the attempted s. 192 restructurings of Abitibi and Catalyst Paper. In these circumstances, the CAIRP believes that the appointment of a licensed trustee as supervisor would facilitate a transition to a *CCAA* filing if necessary. The licensed trustee would be qualified and available to transition from the role of supervisor under s. 192 to that of monitor under the *CCAA* proceeding, should the *CCAA* court see fit to appoint them as monitor. These efficiencies include the continued use of established notice lists, websites, and other communication protocols. If the court does not see fit to make the appointment or should the parties seek the appointment of a different trustee, the reports of the supervisor would assist in bringing the monitor up to speed. A transition facilitated in this way would assist in reducing time, court costs and professional fees through the overall restructuring process.

C. Stay Orders

The CAIRP believes that stay orders available to a financially distressed company under *CBCA* s. 192 should not be more favourable to the company than stay orders available under the *CCAA*, with respect to the duration of the stay order, notice to affected parties and scope of the order.

1. Interim Stay Orders

Recommendation: Interim stay orders granted under s. 192 should be restricted in duration and scope.

Specifically, the CAIRP makes the following recommendations.

- (i) Interim stay orders should be limited in duration to 30 days, consistent with the duration of initial stay orders under the *CCAA*.

An applicant would be required to apply to the court extensions to the interim stay order, limited to 45 days per stay order extension. Stay order extension applications will provide the court an opportunity to consider the supervisor's report and to hear submissions by affected stakeholders. The 30-day interim stay order recommendation is aligned with the 30-day initial stay order limit under the *CCAA*,²⁴ and the 30-day automatic stay available upon the filing of proposal or a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act* (“*BIA*”) Part III [Proposal] provisions.²⁵

²⁴ Pursuant to s. 11.02(1) of the *CCAA*, *supra* note 2, the court may grant an initial stay order for a maximum duration of 30 days.

²⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 69(1) and 69.1(1) [*BIA*].

- (ii) The permissible scope of stay orders under s. 192 should be limited to no-default orders and stays of proceedings against the exercise by creditors of remedies under affected security agreements.

Consistent with the limited scope of financial restructuring available under the *CBCA*, the scope of stay orders granted under s. 192 should be restricted to no-default orders and to stays of proceedings against the exercise of remedies in security agreements. The permitted scope of *CBCA* stay orders should not encompass continued supply orders, the granting of which suggest the impairment of rights of trade creditors, a group deemed by the Director under the *CBCA* to be outside the scope of ‘securityholders’.²⁶

- (iii) No order made under s. 192 should have the effect of requiring the further advance of money or credit.

In addition, no order made in a s. 192 proceeding should be permitted to require a supplier to advance further credit to the applicant or other companies proposed to be arranged, or to prohibit a person from requiring immediate payment for goods or services, in alignment with the safeguards under the *CCAA*.²⁷ The CAIRP does not believe that the *CCAA* concept of critical supplier should be imported into s. 192, because this concept relates to operational restructuring.

- (iv) The treatment of eligible financial contracts in *CBCA* stay orders should be consistent with the treatment of such contracts under the *CCAA* and other insolvency statutes.

In order to ensure predictability and consistency, the courts should not be permitted to grant a *CBCA* stay order which would affect or impair the rights of a counterparty to an eligible financial contract in a manner that would not be available under the *BIA* or *CCAA*.²⁸

- (v) Stakeholders affected by a stay order may apply to the court for interim relief, on 7 days notice to the applicant and the Notice List.

Stakeholders whose legal rights are impaired by a *CBCA* stay order should be entitled to apply to the court to vary the interim order.

2. Stay Extensions

Recommendation: Restrictions should be imposed on extensions of stay orders granted under s. 192.

In addition to the restrictions above with respect to interim stay orders, the CAIRP recommends specific restrictions on extensions of *CBCA* s. 192 stay orders:

²⁶ Policy Statement, *supra* note 5 at para 2.05.

²⁷ See *CCAA*, *supra* note 2, s 11.01.

²⁸ The *CCAA* safeguards for eligible financial contracts (EFCs) continue to be the subject of discussion and calls for amendments to insolvency legislation. To maintain the consistency in the treatment of EFCs that is sought by this recommendation, the relevant *CBCA* provisions should be amended alongside any future amendments to the relevant provisions in the *BIA* and the *CCAA*.

- (i) Extensions of the *CBCA* interim stay order should be limited to 45 days, granted at the discretion of the court.

We have aligned the 45-day stay order extension limit with the stay provisions that apply to proposals under the *BIA* Part III [Proposal]²⁹ to reflect that a *CBCA* restructuring should be a more streamlined and limited restructuring option. In contrast, an interim stay order under the *CCAA* may be extended on any terms imposed by the court.³⁰ In light of the potential for increased stakeholder prejudice where a s. 192 restructuring and stay order is drawn out, the CAIRP does not believe that providing discretion to the court to extend stay orders for any duration would be appropriate in the context of a streamlined, limited *CBCA* restructuring. We note that some commenters have called for reform to the *BIA* Part III [Proposal] provisions during the upcoming 2014 *BIA* and *CCAA* legislative review. Should the duration of stay orders and stay extensions available in proposals under Part III of the *BIA* be extended, we recommend that the *CBCA* s. 192 stay order restrictions be revised correspondingly.

- (ii) Applications for stay order extensions would trigger notice to the Notice List.
- (iii) Affected stakeholders would be entitled to be represented and heard at an extension application hearing.
- (iv) The supervisor would file at the hearing a report on the necessity of the stay order extension, the company's progress in developing and implementing its *CBCA* plan, and the expected timetable for completion.

The report of the supervisor on a stay order extension application would include the supervisor's assessment of the degree of necessity of the requested stay order to the success of the restructuring. The impact on each affected stakeholder should be assessed in this light. As a matter of practice, broad, third party stay orders should be afforded further attention in such reports than narrowly applied, first party stay orders, given their potentially far-reaching impact.

Collectively, these recommended restrictions on the application of stay orders will provide greater certainty and greater protection to insolvent company stakeholders, aligning the safeguards under the *CBCA* with those already built into the *CCAA* regime.

D. Fairness Opinions

The provision of fairness opinions at the securityholder vote and to the court on application for a final order has become common practice in s. 192 restructurings. Nevertheless, the courts are paying increasing attention to the content of fairness opinions. The CAIRP recognizes a role for enhanced fairness opinions as an indicator to the courts and the Director, and potentially to stakeholders, of the fairness of a proposed s. 192 arrangement.

²⁹ See *BIA*, *supra* note 25, ss 50.4(9) and 69.1(1). Section 50.4(9) provides that a debtor may apply to the court for 45-day extension to file a proposal. The automatic stay order available under section 69.1(1) on the filing of a notice of intention to file a proposal does not terminate where the period to file a proposal has been extended under s. 50.4(9).

³⁰ *CCAA*, *supra* note 2, s. 11.02(2).

Recommendation: Fairness opinions with enhanced independence and content standards should be mandatory in arrangements which contemplate both the compromise of debt and a stay order.

In practice, fairness opinions are addressed solely to the company proposed to be arranged and include restrictions and limitations on reliance by other parties. The result is narrow fairness opinions that do not typically address the fairness of a proposed arrangement as among differing classes of securityholders. However, the CAIRP has concerns that narrow fairness opinions are being given elevated status beyond their stated audience, including their use by the courts as general indicators of the fairness of a proposed transaction.

In light of this elevated status of fairness opinions, the CAIRP believes that where a proposed arrangement contemplates the compromise of debt and a stay order, enhanced standards with respect to content of fairness opinions and independence of fairness opinion providers should be required.

1. Independence of Fairness Opinion Providers

Recommendation: Fairness opinion providers should be independent from the proposed arrangement and from all significant parties.

The Director's position on independence is that a financial advisor providing a fairness opinion be independent from all parties involved in the arrangement; where the financial advisor cannot attest to independence from all parties involved, disclosure is required of any relationship with a party. This disclosure is to include whether the compensation of the financial advisor is in any way contingent on the consummation of the arrangement.

Despite the *CBCA* Director's position on independence of fairness opinion providers from parties to the arrangement, in all 7 s. 192 proceedings studied in which fairness opinions were available, each of the respective *CBCA* fairness opinions was provided by the same financial advisors that advised on the restructuring transaction itself. Further, each of the financial advisors providing the respective fairness opinion received at least some portion of its compensation contingent upon completion of the arrangement. In *Yellow Media*, a "substantial" portion of the compensation to be received by the financial advisors was contingent upon completion.³¹

The CAIRP believes that more stringent standards for independence of fairness opinion providers from the proposed arrangement and from the parties involved should be required in s. 192 arrangements which contemplate both the compromise of debt and a stay order. Independence from the proposed arrangement includes an absence of significant conflicts of interest. Specifically, the CAIRP proposes the following safeguards:

- (i) Fairness opinion providers must not be acting or have acted as financial advisor to the applicant on the proposed arrangement itself.

³¹ Fairness Opinion provided by BMO Capital Markets, 22 July 2012, page 1, Exhibit F to Yellow Media Inc Management Information Circular, 30 July 2012, online: <<http://www.sedar.com>>; and Fairness Opinion provided by Canaccord Genuity, 22 July 2012, page 2, Exhibit G to Yellow Media Inc Management Information Circular, 30 July 2012, online: <<http://www.sedar.com>>.

- (ii) Fairness opinion providers must not be currently acting or have acted within 2 years as financial advisor to (i) the applicant or any affiliates of the applicant, or (ii) any significant creditor or shareholder of the applicant that is a signatory to an agreement to support the proposed arrangement.

Fairness opinion providers that do not satisfy the two-year look-back should be prepared to demonstrate that appropriate ethical wall procedures are in place to avoid the sharing of any information, advance opinions, or strategic or investment objectives.

The restriction on fairness opinion providers not having acted as financial advisors to the applicant, either on the transaction itself or generally within the past 2 years, will enhance the perceived, if not actual, independence of the provider. This recommendation reflects the requirement that auditors of financial statements of reporting issuers not have participated in the preparation of financial statements they audit.³² In an insolvency context, this recommendation also reflects the CCAA restriction against the auditors of a debtor acting as monitor in a proceeding involving that debtor without specific authorization from the court.

- (iii) Fairness opinion providers must not receive any form of consideration for the provision of the fairness opinion that is contingent upon completion of the proposed arrangement.

An express requirement that fairness opinion providers be independent of significant conflicts of interest reflects a recognition that conflicts of interest may also develop through contingent fee arrangements and from exposure to the company through stock, debt or derivative instruments.

- (iv) Where the fairness opinion provider or an affiliate is a significant creditor or shareholder of the applicant, or otherwise has significant investment exposure (e.g., through the holding of derivatives), the fairness opinion provider must be prepared to demonstrate that appropriate ethical wall procedures are in place to avoid the sharing of any information, advance opinions, or strategic or investment objectives.

To be clear, the CAIRP makes no suggestion of impropriety on the part of any provider of a fairness opinion in any of the s. 192 arrangements studied. However, in light of the elevated status of fairness opinions as indicators of fairness of a proposed arrangement, the CAIRP believes that stricter standards of independence should be applied to fairness opinion providers.

2. Content of Fairness Opinions

Recommendation: Fairness opinions should be required to include a consideration of fairness to and among all classes of affected securityholders, and specific reasons for concluding the arrangement is fair.

The Policy Statement sets out the Director's view that a fairness opinion should contain the following elements:

³² See Chartered Accountants of Canada, "Guide to Canadian Independence Standards (2009 Update)" pp 7-8, online: Institute of Chartered Accountants, Ontario <<http://www.icao.on.ca>>.

- (i) Why the proposed arrangement is advantageous to all securityholders.
- (ii) Demonstration that each class of securityholder would be in a better position under the proposed arrangement than in a liquidation.
- (iii) Assessment of fairness among securityholder classes.

Our research has indicated that *CBCA* fairness opinions provided have not contained the third element, namely fairness of the proposed arrangement as among classes of affected securityholders. The CAIRP believes that this deficiency should be addressed.

In addition, the CAIRP believes that the value of fairness opinions as indicators of fairness would be enhanced by the inclusion of a fourth element of content:

- (iv) Specific reasons for the conclusion that the arrangement is fair or not fair to securityholders, from a financial point of view.

The need to provide reasons to support a conclusion of fairness would seem implicit in the three elements set out in the Director's Policy. However, the fairness opinions reviewed in this research did not set out reasons to support the respective conclusions of fairness. A specific requirement to provide reasons seeks to improve the information available to stakeholders, to the court, and to the Director.

V. COMMENTS ON IMPLEMENTATION OF SAFEGUARD REFORMS

The CAIRP strongly believes that the safeguards recommended herein should be incorporated into the s. 192 arrangement regime. Our position is that these proposals should be secured in legislation where possible, and also be reflected in revisions to the Director's Policy Statement.

To enhance the effectiveness of the Policy Statement as a tool for implementing or reflecting existing and recommended safeguards, the CAIRP recommends that the Director take an active role in enforcing strict compliance with the provisions of the Policy Statement. Pursuant to s. 192(5), the Director is entitled to appear and be heard in person or by counsel at any interim or final order hearing.³³ The Policy Statement reiterates the discretion of the Director to appear and make submissions at any interim or final court hearing where the Policy has been strictly complied with. Where there has not been strict compliance, "there is a greater likelihood that the Director may choose to be represented in court".³⁴ The CAIRP believes that in order to strengthen both the existing and recommended safeguards, the Director should intervene in s. 192 hearings to note for the court record any deficiencies in compliance with the Policy. Appearance by the Director may be persuasive to a court in its determination of the fairness of a proposed arrangement, thereby leading to a body of best practices to be followed in future proposed arrangements. It is also likely that deficiencies identified by the Director will be addressed by future applicants.

³³ *CBCA*, *supra* note 1, s 192(5).

³⁴ Policy Statement, *supra* note 5 at para 3.02.

Implementation through a revised Policy Statement may also serve as a regulatory proving ground for the safeguards, allowing for refinement prior to incorporation through legislative amendment. However, in order to preserve the integrity of the restructuring regime in Canada, the CAIRP strongly believes these safeguards should be legislated under the *CBCA* during the current legislative review. While the Director's Policy Statement may be persuasive, legislated safeguards will be binding on courts and parties to future proposed arrangements. The importance of the dual objectives set out above – the protection of the interests of stakeholders beyond securityholders and the preservation of the credibility of the Canadian restructuring regime – warrants clear statutory authority for these safeguards.

APPENDIX A
SUMMARY OF CAIRP RECOMMENDATIONS

The mandatory safeguards set out below should be triggered by a s. 192 application for an arrangement that contemplates both a stay order and a compromise of debt.

I. NOTICE REGARDING SECTION 192 APPLICATIONS

1. A s. 192 application should be made on notice to all securityholders proposed to be affected under the arrangement (which notice may be abridged by the court).
2. An applicant should file with the court, appended to its s. 192 application, a list of affected holders of securities above a *de minimis* level (the “Notice List”).
3. The Notice List should be provided to the supervisor, who should liaise with stakeholders on the Notice List in preparing the supervisor’s reports to the court.
4. The supervisor should be empowered to add the names of stakeholders who request to be added to the Notice List.

II. APPOINTMENT OF A SUPERVISOR

1. A supervisor should be appointed in s. 192 arrangements which contemplate both the compromise of debt and a stay order.
2. A supervisor should be required to be a licensed trustee in bankruptcy and would:
 - (a) act as information officer for all stakeholders and make available notices, key documents and materials relating to the company and the proposed arrangement;
 - (b) act as the point of contact for stakeholders affected by a stay order; and
 - (c) file reports with the court at defined intervals and at hearings seeking stay order extensions and plan amendment or approval.

III. STAY ORDERS GRANTED UNDER SECTION 192

A. Interim Stay Orders

1. Interim stay orders should be limited in duration to 30 days, consistent with the duration of initial stay orders under the *CCAA*.
2. The scope of stay orders under s. 192 should be limited to no-default orders and to stays of proceedings against the exercise by creditors of remedies under security agreements.
3. No order made under s. 192 should have the effect of requiring the further advance of money or credit.
4. The treatment of eligible financial contracts in *CBCA* stay orders should be consistent with the treatment of such contracts under the *CCAA* and other insolvency statutes.

5. Stakeholders affected by the stay order should be able to apply to the court for interim relief, on 7 days notice to the applicant and the Notice List.

B. Stay Order Extensions

1. Extensions of a *CBCA* interim stay order should be limited to 45 days, at the discretion of the court.
2. Applications for stay order extensions should trigger notice to the Notice List.
3. Affected stakeholders should be entitled to be represented and heard at a stay order extension application hearing.
4. The supervisor would file at the hearing a report on the necessity of the stay order extension, the company's progress in developing and implementing its *CBCA* plan, and the expected timetable for completion.

IV. FAIRNESS OPINIONS

A. Independence of Fairness Opinion Providers

1. Fairness opinion providers must not be acting or have acted as financial advisor to the applicant on the proposed arrangement itself.
2. Fairness opinion providers must not be currently acting or have acted within 2 years as financial advisor to (i) the applicant or any affiliates of the applicant, or (ii) any significant creditor or shareholder of the applicant that is a signatory to an agreement to support the proposed arrangement, or must be able to demonstrate implementation of appropriate ethical wall procedures.
3. Fairness opinion providers must not receive any form of consideration for the provision of the fairness opinion that is contingent upon completion of the proposed arrangement.
4. Where the fairness opinion provider or an affiliate is a significant creditor or shareholder of the applicant, or otherwise has significant investment exposure (e.g., through the holding of derivatives), the fairness opinion provider must be prepared to demonstrate implementation of appropriate ethical wall procedures.

B. Content required in Fairness Opinions

1. A demonstration of why the proposed arrangement is advantageous to all securityholders.
2. A demonstration that each class of securityholder would be in a better position under the proposed arrangement than in a liquidation.
3. An assessment of fairness among securityholder classes.
4. Specific reasons for the conclusion that the arrangement is fair or not fair to securityholders, from a financial point of view.

APPENDIX B
CBCA SECTION 192 RESTRUCTURINGS 2008–2013

See attached.