ALBERTA TEMPLATE INTERIM ORDER AND TEMPLATE FINAL ORDER FOR PLANS OF ARRANGEMENT INVOLVING THE ACQUISITION OF SECURITIES OF A CORPORATION
EXPLANATORY NOTES

Alberta Template Orders Committee - Rev. 2, December 2015

INTRODUCTION

For reasons of commonality, practicality and efficiency, the Alberta Template Orders Committee (the "**Committee**")[1] has approved a template interim order (the "**Template Interim Order**") and a template final order (the "**Template Final Order**" and together with the Template Interim Order, the "**Orders**") along with these explanatory notes to assist applicants and their counsel in drafting such orders in relation to plans of arrangement involving the acquisition of securities of a corporation under either the *Business Corporations Act*, RSA 2000, c B-9, as amended (the "***ABCA***") or the *Canada Business Corporations Act*, RSC 1985, c C-44, as amended (the "***CBCA***").

In creating the Orders, consideration was given to the model interim and final orders (the "**Ontario Orders**") that have been developed by the Commercial List Users' Committee of the Ontario Superior Court of Justice for use under section 192 of the *CBCA*, focusing on those areas where the Alberta practice or legislation diverged from that in Ontario. The Committee endeavoured to develop Orders that would be as similar as practicable to the Ontario Orders, while appropriately addressing Alberta-specific concerns.

The Orders are not meant to be the last word in either draftsmanship or applicability to each situation. Rather, the Orders are meant to serve as starting points from which any additions, amendments or deletions can be black-lined and brought to the attention of the Justice from whom an order is sought. The assistance of members of the judiciary to the Committee does not mean that there is any "arrangement" with the Court that an order will be granted in all instances where the proposed order approximates the Template Interim Order or Template Final Order, as applicable. In each application, the discretion of the presiding Justice will be completely unfettered by the use or non-use of the Orders.

The Orders are not applicable to all arrangements but specifically contemplate arrangements involving the acquisition of the securities of a corporation. For example, the Orders are not necessarily equally applicable to arrangements involving

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amendments to the articles of a corporation, amalgamations, liquidations or other forms of arrangements permitted under the *ABCA* or the *CBCA*.

In the case of transactions involving the transfer or exchange of trust units, consideration should be given to ensure that the planned transaction falls within the definition of "arrangement" as contemplated by Subsection 193(1) of the *ABCA* and Subsection 192(1) of the *CBCA*. In several cases, Courts have permitted the use of plans of arrangement to convert income trusts to corporate structures (see *Enbridge Income Fund Holdings Inc. (Re)*, 2010 ABCA 274; *Acadian Timber Income Fund (Re)*, [2009] O.J. No. 5517 (S.C.J.)).

Courts have also permitted trust–to-trust transactions, where the "corporate steps" in the transaction qualified as an arrangement under the relevant statute (see *Innvest Real Estate Investment Trust (Re)*, 2011 ONCS 4292, and the Alberta cases referred to therein). Caution should, however, be exercised. Attempts to structure trust-to-trust transactions for the sole purpose of utilizing plan of arrangement legislation by manufacturing "corporate steps" which bear little or no relationship to objectives which Sections 192 and 193 seek to facilitate may encounter judicial resistance.

In cases involving trusts, the Court has also considered whether the transactions contemplated are in compliance with the applicable trust indentures and trust law. It may therefore be advisable to consider the application of the relevant provisions of the *Trustee Act*, RSA 2000 c T-8, along with those of the *ABCA* and *CBCA*, as appropriate.

The Orders generally contemplate arrangements carried out by a reporting issuer, although the notes below provide some guidance on sections of the Orders that should be modified in the case of an arrangement carried out by a private corporation.

The Orders contemplate a meeting in respect of the arrangement of securityholders and, where appropriate, holders of rights to acquire securities (such as warrants or options), but not of other potentially affected persons such as creditors.

REVIEW OF THE TEMPLATE INTERIM ORDER

The following headings correspond to headings in the Template Interim Order and identify the paragraphs contained within those headings under discussion in these notes. Note that these explanatory notes do not address all sections and paragraphs in the Template Interim Order. Capitalized terms not otherwise defined have the meanings assigned to them in the Template Interim Order.

Style of Cause

Typically, the style of cause will indicate "Not Applicable" in the space provided to identify the Respondent(s).

Recitals

The recitals contemplate that notice has been given to the Director (in the case of a *CBCA* corporation).

For the purposes of the Template Interim Order, the "Information Circular" as defined may be more properly referred to as the "management proxy circular" for *CBCA* plans of arrangement, or in the case of some *ABCA* plans of arrangement, the "management information circular". This definition should be conformed, as appropriate.

General

Paragraph 1 along with paragraphs under the heading "The Meeting" addresses the securityholders (shareholders, holders of options or other instruments) that are entitled to consider and vote upon the Arrangement Resolution. Ensure that definitions conform to the terms of the Arrangement concerning entitlement to consider and vote.

The Meeting

Paragraph 3 sets out the quorum for the Meeting. Typically, the quorum set out in the interim order reflects the quorum requirements for a shareholders' meeting set out in the by-laws of the Applicant.

Paragraph 4 governs adjournments in the event a quorum is not present at the Meeting. This clause may vary between interim orders if it is included at all. Subsection 134(4) of the *ABCA* and subsection 135(3) of the *CBCA* provide that if a meeting of shareholders is adjourned for less than 30 days, it is not necessary (unless the by-laws otherwise require) to give notice of the adjourned meeting, other than by announcement at the earliest meeting that is adjourned, in the case of the *CBCA*, or at the time of adjournment, in the case of the *ABCA*.

Paragraph 6 includes language reflecting the provisions of section 137(2) of the *ABCA* which allow for a transferee of shares of a corporation after the Record Date to be included on the list of shareholders entitled to vote at the Meeting in certain circumstances. The *CBCA* does not have a similar provision. Note that the *ABCA* specifically refers only to transferees of shares, although the Template Interim Order refers to Securityholders for consistency.

Conduct of the Meeting

Paragraph 8 sets out the persons who are entitled to attend the Meeting (although not all such persons are necessarily entitled to vote). If holders of options or other instruments will have their rights affected by the Arrangement, consideration should be given to whether such holders should have the right to attend, or speak at the Meeting. It may be appropriate to modify this paragraph to reflect the applicable provisions in the Applicant's by-laws.

Paragraph 9 sets out the majority required to pass the Arrangement Resolution. Subsection 193(6) of the *ABCA* sets out the minimum majorities required to pass an Arrangement Resolution under the *ABCA*, which generally requires a minimum of a two-thirds majority of the applicable interest holders or class of interest holders. There is no such equivalent provision under the *CBCA*. Section 192 of the *CBCA* does not explicitly require securityholder approval as a pre-condition to a court order approving an arrangement. However, section 3.09 of Policy Statement 15.1 – *Policy Concerning Arrangements under Section 192 of the CBCA* (the "***CBCA* Policy**") states that the Director is of the view that, as a minimum, all securityholders whose legal rights are affected by a proposed arrangement are entitled to vote on the arrangement. Section 3.10 of the *CBCA* Policy states that while the type and levels of approval which a court will require before approving any proposed arrangement under the *CBCA* 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 *CBCA*. The Template Interim Order also contemplates that Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**") may also require "minority approval" (as such term is defined in MI 61-101) of the plan of arrangement. See also *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 ("***BCE***") at paras. 131-135 concerning "extraordinary circumstances" when "non-legal interests" will be considered on a section 192 application.

Paragraph 10 addresses the deposit of proxies. Consider whether the revocation of proxies needs to be addressed in the interim order in light of the provisions of subsection 148(4) of the *CBCA* and the *ABCA*. Any departure from the wording of subsection 148(4) must be brought to the attention of the Court.

Dissent Rights

Paragraph 15 provides for the grant of a right to dissent for shareholders under section 191 of the *ABCA* or section 190 of the *CBCA*, as applicable. Granting of dissent rights to shareholders in an arrangement is not specifically required under the *ABCA* or the *CBCA* (although subsection 192(4)(d) of the *CBCA* specifically allows the Court to make an order granting such dissent rights in relation to an arrangement) and there have been

circumstances where dissent rights have not been granted to shareholders. However, it is a generally accepted practice for both *CBCA* and *ABCA* plans of arrangement to grant dissent rights to shareholders. Section 4.06 of the *CBCA* Policy states that the Director believes that ordinarily shareholders should be permitted to dissent in respect of a proposed arrangement and that in cases where an arrangement is proposed under which shareholders will not be afforded dissent rights, the Director will examine carefully the reasons for not permitting shareholders to dissent. See also below under "*Review of the Template Final Order – Final Order – Paragraph 2*" a discussion of dissent rights as a factor relevant to the Court's determination of whether a plan of arrangement is "fair and reasonable".

Paragraph 16 includes provisions relating to the right to dissent typically found in interim orders. Subparagraph 16(a) may modify subsection 191(5) of the *ABCA* or subsection 190(5) of the *CBCA*, as applicable, both of which require a shareholder wishing to exercise dissent rights to send a written objection at any time before the meeting by instead requiring the objection to be sent by an earlier date. Notice of dissent by 5:00 p.m. two days prior to the Meeting is generally used so the Applicant has some notice of the level of dissent. Subparagraph 16(d) reflects the requirements of subsections 191(4) of the *ABCA* and 190(4) of the *CBCA*, which do not allow a shareholder to dissent with respect to less than all shares held by such shareholder.

Paragraph 17 reflects subsections 191(3) of the *ABCA* and 190(3) of the *CBCA* which require the fair value of the shares to be determined as of the close of business on the last business day before the Arrangement Resolution was adopted.

Notice

Paragraph 21 provides for the delivery of Meeting Materials to the securityholders, directors, auditors of the Applicant and the Director (in the case of a *CBCA* corporation). Note that paragraph 21 contemplates delivery of Meeting Materials by an Applicant that is a reporting issuer that must comply with National Instrument 54-101 - *Communication With Beneficial Owners of Securities of a Reporting Issuer* ("**NI 54-101**"). Appropriate modifications to the language of paragraph 21 should be made in the case of an applicant to which NI 54-101 does not apply. Further, subparagraph 21(b) contemplates that the Applicant will be sending Meeting Materials indirectly to Non-Objecting Beneficial Owners (as that term is defined in NI 54-101) ("**NOBOs**") through intermediaries in accordance with NI 54-101. Where an Applicant will be sending Meeting Materials directly to NOBOs in accordance with NI 54-101, appropriate modifications should be made to this paragraph.

Note that the Template Interim Order contemplates that Meeting Materials will be sent to the Director (in the case of a CBCA corporation) at least 21 days prior to the Meeting, although there is not a specific timing requirement in the *CBCA*. Subsection 192(5) of the *CBCA* requires such notice to the Director. The *CBCA* Policy states that the Director

should be provided with the required materials three working days prior to the final application.

Final Application

Paragraph 23 states that all securityholders and all other persons affected will be bound by the arrangement in accordance with its terms. This will be subject to the issuance of proof of filing of the articles of arrangement (in the case of an arrangement under the *ABCA*) and subject to the issuance of a certificate of arrangement (in the case of an arrangement under the *CBCA*).

REVIEW OF THE TEMPLATE FINAL ORDER

The following headings correspond to headings in the Template Final Order and identify the paragraphs contained within those headings under discussion in these notes. Note that these explanatory notes do not address all sections and paragraphs in the Template Final Order. Capitalized terms not otherwise defined have the meanings assigned to them in the Template Final Order.

Recitals

The recitals contemplate that notice has been given to the Director (in the case of a *CBCA* corporation).

The recitals state that it appears that it is impractical to effect the transactions contemplated by the arrangement under any other provision of the *ABCA* or the *CBCA*, as applicable. Subsection 193(3) of the *ABCA* and subsection 192(3) of the *CBCA* require that in order for an Applicant to avail itself of the arrangement provisions of the *ABCA* and the *CBCA*, respectively, it must not be practicable to effect an arrangement under any other provision of the respective acts. The threshold for impracticality was considered in *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.* 2005 ABQB 789. In that case, the Court stated that the "threshold for establishing impracticality is low and requires only that the applicant establish other provisions of the *ABCA* would be difficult to put into practice to achieve the same result . . . or that reasonable business objectives could not otherwise be achieved without onerous temporal and financial constraints". Section 2.06 of the *CBCA* Policy states that the Director endorses the view that the impracticability requirement means something less than "impossible" and, generally, that this requirement would be satisfied by demonstrating that it would be inconvenient or less advantageous to the Applicant to proceed under other provisions of the *CBCA*. The *CBCA* Policy states that despite this view, the arrangement provisions of the *CBCA* should not be utilized to subvert the procedural or substantive safeguards applicable to other sorts of transactions possible under the *CBCA*.

The recitals state (in the case of an Applicant under the *CBCA*) that it appears the Applicant is not insolvent. Subsection 192(3) of the *CBCA* (there is no equivalent provision in the *ABCA*) requires that an Applicant not be insolvent within the meaning of subsection 192(2) of the *CBCA* in order to carry out an arrangement. Sections 2.03 through 2.05 of the *CBCA* Policy include an extensive discussion of the application of insolvency limitations on arrangements under Section 192 of the *CBCA*. Among other things, the *CBCA* Policy notes certain circumstances in which arrangements have been approved notwithstanding subsection 192(3) of the *CBCA*, such as where an Applicant was insolvent at the time of the interim order but not at the time of the final order and where one of the principal corporate entities involved in the overall business transaction was insolvent but the Applicant was not.

The recitals state that the Court is satisfied that (i) the statutory requirements to approve the arrangement have been fulfilled, (ii) the arrangement has been put forward in good faith, and (iii) the terms and conditions of the arrangement and the procedures relating thereto are fair and reasonable, substantively and procedurally, to the securityholders. These are three criteria that the applicant bears the onus of proving in seeking approval of a plan of arrangement: see *BCE* at paragraph 137. The fair and reasonableness component of this test is discussed in detail below under the discussion of paragraph 2 of the Template Final Order.

Note that in circumstances where an exemption to section 3(a)(10) of the United States *Securities Act of 1933* is sought to be relied upon, it is customary to include a recital as follows:

"AND UPON being advised that the approval of the Arrangement by this Court will have the effect of providing the basis for an exemption from the registration requirements of the United States *Securities Act of 1933*, as amended, pursuant to section 3(a)(10) thereof, with respect to the issuance of the [**shares**] issuable pursuant to the Arrangement;"

Final Order

Paragraph 1 states that the Arrangement is approved by the Court.

Paragraph 2 of the Template Final Order states that the terms and conditions of the arrangement are substantively and procedurally fair and reasonable to securityholders and other affected parties. As stated in *BCE*, the onus is on the Applicant to establish that a plan of arrangement is "fair and reasonable". The Court in *BCE* stated that in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. The Court further stated that whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the

corporation's continued existence, the approval, if any, of a majority of shareholders and other securityholders entitled to vote, and the proportionality of the impact on affected groups. The Court noted that courts have taken into account whether the plan of arrangement has been approved by a special committee of independent directors, the presence of a fairness opinion and the access of shareholders to dissent and appraisal remedies in determining whether an arrangement is fair and reasonable.

The Court in *BCE* also stated that while the outcome of a securityholder vote on the arrangement was not determinative, the size of the majority in favour of the arrangement is an important factor. In *Tigray Resources Inc.* 2014 ONSC 1979, the Court reinforced this point and added that for the result of the securityholder vote to carry weight with a court, a significant number of shareholders must actually vote on the arrangement. The premium of consideration offered in an arrangement over the trading price of the Applicant's shares prior to disclosure of the arrangement and ability of the board of directors of the Applicant to entertain superior proposals from third parties pursuant to the arrangement agreement are also factors that have been considered by the courts (see *Re Aastra Technologies Ltd.*, 2014 ONSC 246).

CONCLUSION

The Committee hopes that the Orders will be a useful tool for both the bench and bar by providing a familiar and well-understood starting point. As counsel and the Court consider an appropriate order for a given arrangement, black-lining to the applicable template should enable them to expeditiously address changes needed to appropriately tailor the order to the circumstances.

The Orders are not intended to apply universally to every arrangement, nor are they intended to raise any sort of onus that will require counsel to meet some legal or evidentiary burden in order to depart from the templates. Rather, the Orders are intended as a practical help to the bench and bar, to ensure both are acquainted with typical provisions of a typical interim and final order, so that departures from such provisions can be quickly highlighted.

The Alberta Template Orders Committee