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Corporate Governance and Insolvency and Restructuring Professionals

Jeffrey C. Carhart

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Introduction

Corporate governance issues have been in the news a great deal since the spectacular collapses of Enron and WorldCom last year. However, on any given file, insolvency practitioners can move very quickly from being people with a normal amount of interest in this subject to people with an immediate and very real concern about a specific corporate governance issue. Indeed, there are very few files that insolvency and restructuring professionals become involved in which do not entail at least some corporate governance issues.

This chapter will discuss:

(1) The duties and potential liabilities of corporate directors to creditors;
(2) The legislative initiatives in the United States dealing with corporate governance and their impact in Canada;
(3) The relationship between insolvency and restructuring practitioners and corporate directors/management, including:
   (a) the real and practical duties that directors owe to corporate stakeholders;
   (b) the increasingly common role of the Chief Restructuring Officer (CRO);
   (c) managing a company in a time of crisis;
   (d) what can be done to try to protect directors; and

(e) some of the general ethical issues facing insolvency practitioners from a corporate governance perspective.

Duties and Responsibilities of Corporate Directors

Returning briefly to first principles, under Canadian corporate law, directors are, in the absence of a unanimous shareholders' agreement to the contrary, responsible for managing or supervising the management of the business and affairs of their corporation.[1] Of course, directors appoint officers, such as a chief executive officer (CEO), to manage the corporation on a day-to-day basis.

For many years, the basic "standard of care" required of corporate directors has been put in the following statutory terms in the Canada Business Corporations Act:

> "122.(1) — Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> "(a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> "(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."[2]

The following has been cited as a particularly good summary of the responsibility of a board of directors and the relationship between the board and the management:

> "What a CEO really expects from a board is good advice and counsel, both of which will make the company stronger and more successful; support for those investments and decisions that serve the interests of the company and its shareholders; and warnings in those cases in which investments and decisions are not beneficial to the company and its stakeholders."

1 Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended, Section 102.
2 Canada Business Corporations Act, Section 122.

However, it should be noted that the author of these words was Ken Lay, the former CEO of Enron Corporation.[3]

Duties of Directors to Creditors

Historically, there has been some significant Canadian authority to suggest that corporate directors do not owe a fiduciary duty to creditors. For example, in *Royal Bank of Canada* v. *First Pioneer Investments Limited, Hogarth and Spence,*[4] Mr. Justice Parker commented, in part, "I have found no authority . . . to say that the directors' fiduciary duties extend to the creditors of the company".[5]

Commentators have noted[6] that this position was out of step with British, Australian and American jurisprudence — at least when the company was insolvent. Indeed, in the 1994 case of *Re Plan of Arrangement Proposed by Trizec Corporation and Horsham Acquisition Corp.*,[7] Forsyth J. provided an indication that the Canadian position may have changed when he stated, in part, with respect to the directors of Trizec, "I acknowledge that a specific duty to shareholders

3 As quoted in *The Economist*, 11 January 2003, at p. 61. The issue of the standard of care which should be expected of corporate directors is something which has been around for a long time. The following historical note is found at pp. 6–7 of Canadian Company Law, Cases, Notes & Materials, Second Edition, E.E. Palmer, D.D. Prentice and B. Welling (Butterworths, Toronto, 1978): "In *Re Denham & Co.* (1883), 25 Ch.D. 752, a director who trusted his fellow directors did not look into any of the books and did not attend a single board meeting in four years was found not liable for fraud by the rest of the board and the auditors. The subjective nature of the skill requirement is revealed by his description as 'a country gentleman and not a skilled accountant'. Again, in the classic English tradition, in *Re Cardiff Savings Bank*; *Bute's (Marquis) Case*, [1892] 2 Ch. 100, a young nobleman inherited the presidency of a bank at the age of six months. He attended one board meeting in thirty-eight years and was found not liable for irregularities in the bank's lending operation."

4 (1979) 27 O.R. (2d) 352; affirmed (1981) 32 O.R. (2d) 121 (Ont. C.A.); reversed in part on other grounds (1984) 12 D.L.R. (4th) 1 (S.C.C.).

5 *Royal Bank of Canada* v. *First Pioneer Investments Limited, Hogarth and Spence*r (1979) 27 O.R. (2d) 352, at p. 354.

6 Weisberg, Laurie (with the assistance of Latham, L. Joseph and Collins, Paul), *Responsibilities of Directors of Financially Troubled Corporations: Is There a Duty to Creditors*? (1993); Hansell, Carol and Gillies, James, Canadian Institute Conference: Securities Regulation Super Conference Nearing the Brink, "Financial Crisis and Issues For the Unrelated Director", Queen's Annual Business Law Symposium materials (Carswell, 1995) at p. 159.

7 (1995) 20 B.L.R. (2d) 202 (Alberta Queen's Bench).

becomes intermingled with a duty to creditors when the ability of a company to pay its debts becomes questionable."[8]

In this regard, in March 2003, certain former directors and executives of Dylex Ltd. — which had gone bankrupt — tried unsuccessfully to have a claim against them by the trustee in bankruptcy dismissed on the basis that the directors did not owe a duty to creditors. The claim centered around a sale transaction whereby Dylex was sold to Hardof Wolf Group, which company then allegedly siphoned millions of dollars from Dylex. Mr. Justice Lederman was not prepared to accept the directors' counsel's arguments to the effect that directors do not owe a fiduciary duty to creditors in Canada.[9]

Oppression Remedy

Against the backdrop of the "debate" about whether Canadian corporate directors owe a duty to creditors *per se*, a very wide-ranging "oppression remedy" was introduced into the Canada Business Corporations Act and most Provincial Corporate Statutes starting in the 1970s. It is worth looking at the extremely wide scope of some of the wording in, for example, Section 238 of the Ontario Business Corporations Act:[10]

> "248. (1) A complainant and, in the case of an offering corporation, the Commission, may apply to the court for an order under this section.
>
> "(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> "(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

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8 *Re Plan of Arrangement Proposed by Trizec Corporation and Horsham Acquisition Corp.* (1995) 20 B.L.R. (2d) 202 (Alberta Queen's Bench) at p. 214; *Canbook Distribution Corp.* v. *Borins* (1999) 45 O.R. (3d) 565.

9 Unreported decision, Ontario Superior Court of Justice, File Number 02-CL-4651, www.can/ii.org/on/cas/ONSC/2003/2003ONSC/0334.html; Shaw, Holly, "Ruling Sets Stage for Dylex Trial", *National Post*, 12 March 2003.

10 R.S.O. 1990, c. B.16, as amended.

"(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

"(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

"that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

"(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

"(a) an order restraining the conduct complained of;

"(b) an order appointing a receiver or receiver-manager;

"(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

"(d) an order directing an issue or exchange of securities;

"(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

"(f) an order directing a corporation . . . or any other person, to purchase securities of a security holder;

"(g) an order directing a corporation . . . or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

"(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

"(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements . . . or an accounting in such other form as the court may determine;

"(j) an order compensating an aggrieved person;

"(k) an order directing rectification of the registers or other records of a corporation . . .;

"(l) an order winding up the corporation . . .;

"(m) an order directing an investigation . . .; and

"(n) an order requiring the trial of any issue."

Although it took some time and some case law,[11] it has now been established that a creditor can successfully pursue a corporate director in Canada under the oppression remedy in the corporation's statutes. For example, in *Prime Computer of Canada Limited* v. *Rodger Jeffrey and Robinson & Jeffrey Limited*,[12] a corporate director was ordered (under the oppression remedy) to repay excessive salary which he took at a time when his company was in "dire financial straits" and during which it had unpaid debts to the applicant trade creditor.[13] Also, in *Canadian Opera Company* v. *670800 Ontario Inc., c.o.b. as Euro-American Motor Cars and Van Essen*,[14] a corporate director was also found personally liable in an action initiated

11 An early important case was the decision of McDonald, J. of the Alberta Queen's Bench in the 1988 case of *First Edmonton Place* v. *31588 Alberta Ltd., Majeski, Johnson and Sereda* (1988) 40 B.L.R. 28. Although — in a very careful and thorough judgment — McDonald, J. ultimately disallowed an oppression action to continue on the particular facts of that case (which included the fact that the applicant, a commercial landlord, was not actually a creditor of the company in question at the time at which the allegedly oppressive conduct involving the corporate directors occurred), he did hold (at page 57) that an ordinary creditor could validly be a "proper person" to bring an oppression action relating to actions by directors of a corporation where, for example: "the conduct of the directors . . . constituted using the corporation as a vehicle for committing a fraud upon the applicant" or "the act of the directors . . . constituted a breach of the underlying expectation of the applicant arising from the circumstances in which the applicant's relationship with the corporation arose".

12 (1991) 6 O.R. (3d) 733.

13 Mr. Jeffrey "could offer no explanation" as to why his salary went from Cdn $54,300 in 1988 to Cdn $134,400 in 1989.

14 (1990) 75 O.R. (2d) 720.

under the oppression remedy in the Ontario Business Corporations Act, which involved the misappropriation of funds paid to the corporation.

In *Sidaplex — Plastic Suppliers Inc.* v. *The Elta Group Inc., Frank Lin and Kimoto Canada Inc.*,[15] the facts were somewhat unusual. In essence, Sidaplex had obtained a judgment against Elta Group concerning some trade debt. In turn, Elta Group obtained a letter of credit in favor of Sidaplex to support Elta Group's obligation to honor the judgment. The letter of credit was for a fixed term and expired on 12 February 1995. However, Mr. Justice Blair found at trial that both Sidaplex and Elta Group "assumed" that the letter of credit would in fact be renewed automatically. Then, contrary to the Bulk Sales Act, and after the letter of credit in favor of Sidaplex had expired, Elta Group entered into an agreement to sell all of its assets to Kimoto Canada Inc. The proceeds from that sale (approximately Cdn $530,000) were used in part to pay the Elta Group's bank debt (approximately Cdn $320,000), which had been guaranteed by Frank Lin, a director of the Elta Group corporation.

Understandably, both at trial and in the Court of Appeal, there was much discussion of the Bulk Sales Act.[16] However, insofar as an oppression action against Mr. Lin personally was concerned, the Court of Appeal did not reverse any of the reasons of Mr. Justice Blair,[17] which were, in part, as follows:

> "Courts have made orders against directors personally in oppression remedy cases. . . . These cases, in particular, have involved small closely held corporations, where the director whose conduct was attacked has been the sole controlling owner of the corporation and its sole and directing mind; and where the conduct in question has rebounded directly to the benefit of that person.
>
> "Such is the case here. Mr. Lin is the sole shareholder, director and officer of Elta. He is the one who has benefited personally from the events that have transpired because he has

15 (1998) 162 D.L.R. (4th) 367 (Ontario Court of Appeal).

16 Among other things, the sale by Elta Group to Kimoto was declared "void" under the Bulk Sales Act, and a trial of an issue was directed as to "whether Sidaplex waived its entitlement to assert a claim for a remedy under . . . the [Bulk Sales] Act".

17 *Sidaplex — Plastic Suppliers Inc.* v. *The Elta Group Inc., Frank Lin and Kimoto Canada Inc.* (1995) 131 D.L.R. (4th) 399, at pp. 405–407.

been relieved of his substantial exposure under his personal guarantee for Elta's indebtedness to the bank. Sidaplex, on the other hand, appears to be the only loser. All other creditors have been paid. Sidaplex has been deprived of the security for which it bargained, and upon which it relied, and has been left with a "paper" judgment when it should have not have been. That security — the letter of credit — while not directly guaranteed by Mr. Lin personally, was based upon the company's line of credit at the bank, which was in turn buttressed by Mr. Lin's guarantee. The evidence is that the bank looked primarily to that guarantee for its security, and the bank's testimony, at least, is that it would have been prepared to renew the letter of credit had Mr. Lin made the request and had he been prepared to support the renewal with his guarantee.

"Lawyers and judges tend to worry and fuss a great deal about whether or not a given set of circumstances permits the piercing of the 'corporate veil'. They do so for legitimate reasons pertaining to corporate law. While personal liability of a director in an oppression remedy situation may be founded upon such a base — as it was in the authorities referred to above — the issue, in my view, is not so much one of piercing the corporate veil as it is a question of the overall application of s. 248(2) of the OBCA and the interplay between its various provisions.

"When 'oppressive' conduct (in the broad sense) has been found to have occurred under s. 248, the court has a very broad discretionary power to 'make an order to rectify the matters complained of'. That broad discretionary power, under s. 248(3), is to 'make any interim or final order it thinks fit', including:

"(j) an order compensating an aggrieved person;

"In its targeting of the kinds of conduct encompassed by the oppression remedy provision of the Act, the legislature has focused specifically upon the acts or omissions of the corporation (s. 248(2)(a)), the business or affairs of the corporation (s. 248(2)(b)) and the exercise of the powers of the directors (s. 248(2)(c)). In a small closely held corporation such as Elta, it is the director who is in the position of Mr. Lin, who is the source of all such conduct. When the power of the director is exercised in a fashion which causes an act or omission of the corporation which effects an unfairly prejudicial result, or a result which unfairly disregards the interests of the complainant — or which causes the business or affairs of the corporation to be conducted in a manner which has the same effect — those powers themselves have been 'exercised in a manner' which is caught by the section, in my opinion. Liability, therefore, lies directly with the director, under the section, in appropriate cases.

"This, in my view, is one of those cases. The proper way in which to rectify the matters complained of in this case is to make an order directing that Mr. Lin pay to Sidaplex the amount of Elta's judgment debt that should have been continually secured by the letter of credit, but which was not. That amount, as I have indicated, is Cdn $97,076.36, together with accrued interest. I so order."

Equitable Subordination

In the 2002 case of *C.C. Petroleum Ltd.* v. *Allen*,[18] Mr. Justice O'Driscoll of the Ontario Superior Court recognized the application of the doctrine of equitable subordination in Canada.[19] In a particular case, this doctrine may be used against corporate directors. In the *C.C. Petroleum* case, the result was that, among other things, the claims of the wives of the directors of an insolvent corporation (and which were purportedly secured claims) were subordinated to the unsecured claims of a trade creditor who had been induced to supply petroleum products at a time when the corporate directors "knew that [the company] was insolvent [and] that there was no money available to make the payments".[20]

18 (2002) 35 C.B.R. (4th) 22.

19 Interestingly, *C.C. Petroleum* is also another case which established that a "creditor" of a company is a party with "status to bring an oppression remedy application": *C.C. Petroleum Ltd.* v. *Allen* (2002) 35 C.B.R. (4th) 22, at p. 33.

20 *C.C. Petroleum Ltd.* v. *Allen* (2002) 35 C.B.R. (4th) 22, at p. 33.

The doctrine of equitable subordination has a long history in the United States. As noted by Lawrence Crozier,[21] "[i]n its original form, equitable subordination was designed to prevent a director, officer or person in control of a corporation benefiting from a breach of fiduciary duty or other insider malfeasance . . .". Generally speaking, under American law,[22] it has been held that, in order for the doctrine to apply:

(1) The person in question must have engaged in some kind of inequitable misconduct;
(2) That misconduct must have conferred an unfair advantage on the person or must have resulted in an injury to the creditors of an insolvent company (or other entity); and
(3) The use of the doctrine must be consistent with the bankruptcy statute.

Canadian courts have circled around the issue of whether the doctrine is available under Canadian law.[23] In *C.C. Petroleum*, Mr. Justice O'Driscoll simply commented:

> "Because of the ubiquitous and rampant fraud of the Defendants, the [General Security Agreement] secured claim of the female Defendants, should be postponed to the claim of the Plaintiffs. The Defendants engaged in fraudulent conduct, acquired an unfair advantage and injured the Plaintiff. In my view, all the prerequisites are present for the application of the doctrine of equitable subordination and the remedy should be granted."[24]

Need for Directors to Keep Creditors in Mind

Of course, there are a host of different types of insolvency proceedings in Canada. They include "pure bankruptcy" as well as receiverships, which category includes court-appointed receiverships,

21 Crozier, Lawrence, "Equitable Subordination of Claims in Canadian Bankruptcy Law" (1993) 7 C.B.R. (3d) 40.

22 *Re Mobile Steel* (1977) 563 F.2d 692.

23 Telfer, Thomas, "Transplanting Equitable Subordination: The New Free-Wheeling Equitable Discretion in Canadian Insolvency Law?" [2001] 36 C.B.L.J. 36. Among other things, Professor Telfer explores the idea that Canadian courts may apply an "equitable subordination doctrine that departs from . . . American cases" (page 69).

24 *C.C. Petroleum Ltd.* v. *Allen* (2002) 35 C.B.R. (4th) 22, at p. 34.

private receiverships and court-ordered interim receiverships pursuant to section 47.2 of the Bankruptcy and Insolvency Act of Canada.[25]

This chapter will focus mostly on situations where insolvency and restructuring professionals become involved with a company which has not yet become either formally bankrupt or subject to some kind of receivership. As such, there is still an opportunity to try to save the business.[26] Of course, having said that, one of the main challenges is to be aware of the corporate governance issues and the responsibility of directors to creditors in the course of such an effort. In that regard, perhaps Harold (Hap) Stephen addressed the issue of whether directors "need" to keep the interests of creditors in mind most succinctly in his article entitled "Directors' Liabilities and Responsibilities in a Restructuring", when he said:

> "The legal debate as to directors' responsibilities to . . . creditors is somewhat academic when a company becomes insolvent. A financial restructuring usually won't be successful unless the directors assume some degree of . . . obligation to all of the stakeholders."[27]

Corporate Governance Reform Legislation

Of course, most of the basic legal principals discussed so far — including the introduction of the oppression remedy and the developing case law in that regard — were all well in place before the "corporate governance crisis" of the last year or so, which included Enron, Worldcom and other corporate failures such as Adelphia Communications and Global Crossing as well as the kind of corporate misconduct that occurred at Tyco International. In what is an obvious direct response to those situations, major legislative reform was introduced in the United States. However, that legislation also has enormous practical implications in Canada.

Sarbanes-Oxley Act 2002

The Sarbanes-Oxley Act of 2002 was enacted in the United States on 30 July 2002. While parts of the Act amend the Securities Exchange

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25 R.S.C. 1985, c. B-3, as amended.

26 It is a common lament of insolvency professionals that usually they do not get called into a situation until it is "too late" to save the maximum value from a troubled business.

27 Queen's Annual Business Law Symposium materials (1995) Carswell 239, at p. 241.

Act of 1934 with immediate effect, many of the provisions do not take effect prior to the adoption of rules by the Securities and Exchange Commission (SEC). The principal initiatives in the Sarbanes-Oxley legislation are as follows:

(1) The centerpiece of the Sarbanes-Oxley Act of 2002 is the creation of the Public Company Accounting Oversight Board (PCAOB), a non-profit company *independent of the United* States Federal Government, which is responsible for overseeing the mandatory registration of public accounting firms and for establishing auditing, quality control, ethics and independence standards relating to the preparation of audit reports for issuers;

(2) The legislation addresses the issue of auditor independence by providing that, among other things:
   (a) auditors may no longer provide non-auditing services, including accounting and consulting functions, unless such services are pre-approved by the audit committee and disclosed to the shareholders;
   (b) audit partners may no longer audit or review the audits for more than five consecutive years;
   (c) auditors must report all accounting policies and practices and "alternative treatments of financial information"; and
   (d) auditors will be disqualified if a senior employee or official of the issuer was employed with the firm in the year preceding the audit; and

(3) The legislation addresses the issue of corporate governance, in part, as follows:
   (a) the auditing committee shall be responsible for the appointment, *compensation and oversight of the auditors* — each member must be a director of the company but must be otherwise independent, and shall not receive any remuneration from the company[28] other than that received in his role as director or committee member;
   (b) the CEO and chief financial officer (CFO) must personally certify the issuer's financial reports and state that the

28 Prior to the Sarbanes-Oxley Act, audit committee members were often compensated with company benefits, including stock options. As Eric Reguly points out in his article "Past Present" in the *Report on Business Magazine* (April 2003) at p. 19, Section 171 of the Canada Business Corporations Act has long provided that an audit committee must be "composed of not less than three directors . . . a majority of whom are not officers or employees of the corporation".

reports do not contain any "untrue statement of material fact or omit to state a material fact" and that they "fairly present in all material respects the financial condition and result of the operations of the issuer" — the CEO and CFO must design internal controls to ensure that they are made aware of all material information and must periodically review such controls and comment upon any deficiencies in such controls;

(c) the CEO and CFO may be required to reimburse the issuer for any bonuses or equity-based compensation received in a twelve-month period after the filing of a financial document which becomes the subject of an accounting restatement due to the non-compliance of the issuer with its reporting requirements;

(d) no director or executive officer may trade shares in a company during a pension blackout period;[29]

(e) the SEC shall, by rule, set out minimum standards of professional conduct by attorneys, including the requirement for an attorney to report violations of securities laws to the *chief legal counsel*, CEO *or auditing committee*;[30] and

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29 Generally speaking, a pension blackout period is a period during which employees are restricted from selling their employers' shares out of their retirement savings plans. This requirement is not applicable to the Canadian system: speech of David Brown, Chair, Ontario Securities Commission, "The Need for Balance: Why Regulators Must Pursue a Fair Market for both Investors and Issuers", 2 October 2002.

30 Sarbanes-Oxley ultimately contemplates that in certain circumstances where a corporation violates securities law and the corporation's directors refuse to act on a report of the corporation's lawyer in this regard, the lawyer must make disclosure of the situation to the Securities and Exchange Commission. The Canadian Bar Association (and other organizations) have taken the position that this provision is too much of an intrusion into the doctrine of solicitor-client confidentiality, and they have lobbied the United States Congress in that regard. For reference, part of Rule 2 of Ontario's Law Society of Upper Canada Rules of Professional Conduct currently addresses the subject of "whistle blowing" in these terms: "A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he becomes aware that the organization may commit a dishonest, fraudulent, criminal or illegal act". This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his employer or client. Although the Rules of Professional Conduct make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime or illegal conduct (Rule 2.02(5)), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the (footnote will continue on next page)

(f) there are new prohibitions against companies extending credit to its officers and directors.

Sarbanes-Oxley also provides for enhanced financial disclosure:[31]

(1) Financial statements shall reflect all material correcting adjustments and all material off-balance sheet transactions, and pro forma financial statements shall not be presented in a manner that is misleading;
(2) Loans to any director or executive officer are prohibited;
(3) Insider trades must be disclosed within two business days (com*pared to ten previously);*
(4) The corporation must disclose annually whether it has adopted a code of ethics for its principal senior officers;
(5) The corporation must disclose annually whether it has at least one "audit committee financial expert" on its audit committee; and
(6) Issuers must disclose material financial information to the public on a "rapid and current basis".

Sarbanes-Oxley also requires the SEC to adopt rules which address conflicts of interest arising in the context of analyst recommendations of public company equities. As to the subject of corporate and criminal fraud accountability, Sarbanes-Oxley provides that:

(1) Anyone knowingly tampering with or destroying evidence may be fined or imprisoned for up to twenty years;
(2) Auditors must maintain audit records for five years;

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lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognize that his duties are owed to the organization and not to the officers, employees or agents of the organization. The lawyer should, therefore, ask that the matter be reconsidered, and the lawyer should, if necessary, bring the proposed misconduct to the attention of a higher (and, ultimately, the highest) authority in the organization despite any directions from anyone in the organization to the contrary. If these measures fail, it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation (Rule 2.09).

31 Interestingly, the Sarbanes-Oxley legislation did not address the controversial subject of requiring stock options to be treated as an operating expense; nor did it abolish the practice of combining the positions of chief executive officer and Chairman of the Board of Directors.

(3) Debts incurred in violation of federal or state securities laws are not dischargeable in bankruptcy; and
(4) "Whistleblowers" have a private right of action against a company for any prejudice suffered as a result of providing incriminating information.

Sarbanes-Oxley also provides for white collar crime penalty enhancements as follows:
(1) Possible jail sentences for mail fraud and wire fraud are increased from five to twenty years, respectively, and sentences and penalties for violations of ERISA are also increased; and
(2) Penalties for willfully certifying incorrect periodic financial reports carry a maximum fine of Cdn $5,000,000 and a maximum prison term of twenty years — corporations now face fines of up to Cdn $25,000,000 with effect from 19 January 2003.

Impact of Sarbanes-Oxley in Canada

The introduction of the Sarbanes-Oxley legislation in the United States has had two major repercussions in Canada. Firstly, a vigorous debate has commenced in Canada about what should be done there. On one side are those that argue that Canada should not rush to copy the United States approach.[32] In essence, this school of thought supports the proposition that the Canadian history of corporate governance has been relatively solid and that that kind of approach — supported by new and tougher "guidelines" as to certain corporate

32 Barbara Stymiest of the Toronto Stock Exchange has been very outspoken in this regard. Paul Reilly, the chief executive officer of Korn/Ferry International, a global executive search firm, has stated that Canada should not follow Sarbanes-Oxley because, in part, Canada's corporate sector is fundamentally different from that of the United States, in that a large proportion of companies in Canada have a majority shareholder, whereas few large United States companies have controlling shareholders: McFarland, Janet, "Sarbanes-Oxley Wouldn't Work in Canada, Says CEO The Toronto Globe & Mail", *Report on Business*, 27 February 2003. In her article, "Corporate Governance: Unbridled Ambition, Shameless Greed", *Lexpert Magazine*, Volume 4, Issue 4, February 2003, Marzena Czarnecka questions whether a "small [Canadian] oil and gas company, which is paying its directors in stock options", can afford to comply with all of the provisions of a Sarbanes-Oxley type of statute?

governance issues — should continue. On the other side, many have argued that Canada must adopt Sarbanes-Oxley — type measures.[33]

Secondly, however, as that debate goes on, Sarbanes-Oxley is already making its effect felt in very real terms in Canada in terms of day-to-day corporate governance situations and insolvency, and restructuring professionals who work with Canadian companies have to be aware of that development. For example, suppose that a Canadian company is listed on both the Toronto Stock Exchange and the NASDAQ National Market Security Index in the United States and that a senior partner of a law firm who does a significant amount of work for the company has historically also served on that company's audit committee. After the introduction of the Sarbanes-Oxley legislation, these arrangements are no longer permissible because Sarbanes-Oxley applies to Canadian companies that are either listed in the United States or are required to file annual and other periodic reports with the SEC.

Another example of the practical applicability of Sarbanes-Oxley in Canada is the extent to which CFOs and CEOs in the United States need to undertake "due investigations" in order to be able to sign off (as now required) on corporate financial statements. In practice, due investigation may mean that the CEO and CFO of a Canadian company (although not itself listed on any United States stock exchange) will be asked to sign a certificate as to its financial statements if it is owned by a United States company which is subject to Sarbanes-Oxley.

Insolvency and Restructuring Professionals and Corporate Governance

Canadian insolvency and restructuring professionals can become involved with a troubled company in different ways. Traditionally, insolvency practitioners have become involved with corporations in

33 Speech of David Brown, Chair, Ontario Securities Commission, "The Need for Balance: Why Regulators Must Pursue a Fair Market for both Investors and Issuers", 2 October 2002. In Marzena Czarnecka's article, "Corporate Governance: Unbridled Ambition, Shameless Greed", *Lexpert Magazine*, Volume 4, Issue 4, February 2003, Maureen Sabia of Toronto — a lawyer and corporate director — comments, "I don't think Canada can afford to be very far behind the U.S. in terms of its regulatory environment".

advisory capacities. Of course, these "roles" have a way of mutating and evolving such that an insolvency practitioner may end up being asked to wear different or additional "hats" as the job goes on. Such developments may give rise to serious ethical and corporate governance issues in a particular situation. The Insolvency Practitioners Association in the United Kingdom gives a good example of that type of situation in one of its recent Ethical Helpline Publications as follows:

> "A corporate finance partner in an accountancy firm was requested by one of his firm's audit clients to undertake due diligence work on a target company, for which this client had made an agreed takeover bid. During this work, the corporate finance partner decided that the target company was insolvent and introduced this company to one of his partners, an insolvency practitioner. The practitioner went on to accept an appointment as administrator of the company. As administrator, the practitioner sold, apparently at market value, the majority of assets to the audit client, who had requested the due diligence. The practitioner subsequently accepted the office of liquidator of the target company."[34]

The United Kingdom Insolvency Practitioners' Association characterized the ethical questions raised by the situation as follows:

(1) Should the insolvency practitioner have accepted the appointment as administrator of the target company?
(2) Should the practitioner, as administrator, have sold assets to the audit client? and
(3) Should the insolvency practitioner have accepted the appointment as liquidator of the target company?

Because the United Kingdom Insolvency Practitioners' Association publication is something which might not be available to many Canadian readers, it is worth reproducing its discussion of these questions in its entirety as follows:

> "1. In considering whether to accept the appointment as administrator, the insolvency practitioner should have considered the target company creditors' interests, ignoring the interests of his firm's audit client.

34 Insolvency Practitioners Association, www.insolvency-practitioners.org.uk.

"The real issue here is the perceived conflict of interest. This is so great that no partner in the firm should have accepted the appointment as administrator under these circumstances without evidencing on file that the issues and potential risks to creditors had been fully considered, including steps that would have been taken to minimize such risks. In this context, a reference by the insolvency practitioner to the appropriate Recognized Professional Body might have been helpful (it is appreciated that this may have taken place).

"At minimum, the insolvency practitioner's firm should immediately disclose the situation to the audit client and cease to act for it in relation to the potential acquisition. Safeguards should be implemented to ensure that commercially sensitive information does not pass to what is now only an audit client of the firm. In the absence of such measures, there would be a real conflict as the firm would in effect be wearing 'two hats'.

"Reasons for the perceived conflict:

"- There would be a perception that the administration was convenient for the audit client, which could buy the assets at a much lower price than if purchased from an impartial party.

"- The insolvency practitioner should have known that the audit client would be perceived as eager to buy the assets.

"Against this has to be set the following:

"- As a result of the due diligence exercise, the insolvency practitioner's firm may well have had relevant knowledge putting the practitioner in a better position than anyone else to conduct the administration — a procedure that can depend on speed.

"- Given the proposed takeover's history, it was likely that the firm's audit client was the obvious and best potential purchaser of the assets, to the creditor's advantage.

"Nevertheless, the insolvency practitioner should have foreseen the potential for criticism and taken the protective steps outlined above.

"2. Once in office, an administrator has a duty to maximize returns to creditors of the company, whether that be through maximizing realizations, minimizing liabilities or a combination of both.

"The use of the words "apparently at the market rate" implies that the price achieved was appropriate in the circumstances and hence is not in issue.

"If the administrator took appropriate steps to market the assets and the highest offer was that received from his firm's audit client, he would be under a duty to accept and complete that offer.

"The administrator would, of course, be required to maintain 'Chinese walls' between his actions as administrator and the firm's potential (or perceived) role in advising the audit client. We would expect the firm to refuse to advise the audit client in relation to the transaction from the point of administration, and for the administrator to take steps to ensure that no commercially sensitive information became available to the audit client in any way.

"The fact that an appointment has been accepted when a conflict of interest is present cannot affect a sale, as purchasers are protected under s14(6) of the Insolvency Act 1986, as long as they act in good faith and for value.

"Disclosure to and the approval of the creditors' committee would be desirable, if there is one. We do not believe that the court would be either willing or an appropriate forum to approve such a sale; it is the administrator's job to exercise appropriate commercial judgement.

"3. Following on from the analysis above, the insolvency practitioner should probably not have taken the appointment as liquidator in these circumstances.

"This is because the liquidation would be the last point of check on the actions of the recent organs of the company, whether these are directors or administrators.

"In our view, in these circumstances, there would consequently be a real conflict of interest for the insolvency practitioner partner to accept the appointment as liquidator.

"The existence of a joint appointment, which is mentioned in the statement of facts, does not resolve the conflict. The IPA ethical guide specifically states that when a practitioner is examining a joint appointment, he should be guided by similar principals as when considering a sole appointment.

"Conclusions

"- The insolvency practitioner should have considered all areas of potential risk to creditors of the target company and ways in which these could be properly minimized, when balanced against potential benefits, before accepting the appointment as administrator. Ethical guidance from the practitioner's RPB would be useful. These considerations should be evidenced.

"- Once he was in office, the administrator's duties were set.

"- The administrator should not have accepted the appointment as liquidator."

Chief Restructuring Officers

One of the less "traditional" roles that insolvency practitioners in Canada have taken on is that of CRO. However, it is a role which has a much longer history in the United States and is becoming more and more common in Canada.[35] One definition of a CRO that has been put forward is that he is the "person who has primary responsibility for

35 Some prominent Canadian cases where CROs have been used are Laidlaw Transportation, Saskatchewan Wheat Pool, General Publishing, Med-Chem Health Care Ltd. and Algoma Steel. *See* the articles: Reyes, Tony and Forte, Mario, "The Recognition and Roles of the Chief Restructuring Officer in Canadian Insolvency Proceedings" (Infonex Conference materials — Corporate Recovery and Restructuring — 25 and 26 April 2002) and Murray, David and Thornton, Robert, "Keeping the Wolves at Bay: Lessons Learned from General Publishing" (The Canadian Institute Conference materials — Insolvency Law and Practice — 16 and 17 January 2003).

the restructuring of the company's balance sheet".[36] Of course, experienced insolvency and restructuring professionals understand just how much hard work is encompassed by these relatively simple words. The CRO does not always also act as the CEO.[37]

Ideally, a CRO will bring fresh credibility to the company in its dealings with its secured lenders and its other stakeholders. More than once, a lender has been heard to comment that a borrower has a good core business, but that the lender no longer believes in the management.[38] In such situations, a fresh person who is knowledgeable in turnaround situations can be invaluable. Of course, when an insolvency practitioner takes on the role of a CRO, he becomes part of the corporate governance structure of the company in question. Typically, a CRO will report to the board of directors. In many cases, the person will be retained before any kind of formal court-based insolvency proceeding has been initiated — but will remain in place during such an effort. Therefore, in those kind of situations, the definition of the person's role and responsibilities may evolve from being based in a private employment agreement to being enshrined in a court order, such as an initial stay order under the Companies' Creditors Arrangement Act[39] or an order appointing an interim receiver under the Bankruptcy and Insolvency Act.

In the case of a Companies' Creditors Arrangement Act filing, the CRO will typically continue to report to the board, but will also report to the court-appointed monitor. In their article with respect to the *General Publishing* case, David Murray and Robert Thornton[40] argue that although "the CRO's loyalty is to the restructuring of the debtor" and that "the CRO is an advocate for the plan of restructuring and

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36 Peter Cheston of Alvares & Marsal, quoted in Lewis, Mark, "CRO is Newest Acronym in Corporate Lexicon" (2002) Forbes.com.

37 In Murray, David and Thornton, Robert, "Keeping the Wolves at Bay: Lessons Learned from General Publishing" (The Canadian Institute Conference materials — Insolvency Law and Practice — 16 and 17 January 2003), it was noted that the existing chief executive officer in that situation (Jack Stoddart) "was willing to work with the CRO and defer to the CRO for certain decisions, while continuing to provide the . . . [group of companies] with industry-specific experience".

38 It may be that the lender thinks the management is just no longer up to the challenges facing them or, worse, the lender may actively distrust the management.

39 R.S.C. 1985, c.C-36, as amended.

40 Murray, David and Thornton, Robert, "Keeping the Wolves at Bay: Lessons Learned from General Publishing" (The Canadian Institute Conference materials — Insolvency Law and Practice — 16 and 17 January 2003) at pp. 29 and 30.

should not be called upon to provide a Bankruptcy and Insolvency Act assessment of it", he should also be called upon (under the relevant court order) to "report factually to the court" and should "conduct himself as an officer of the court in that integrity and credibility are mandatory".

Statutory Liability of Directors

Most insolvency practitioners in Canada are quite familiar with the fact that directors may be liable for a long list of statutory obligations arising as a result of their status as directors. Often, insolvency practitioners are confronted with questions in this regard. There are literally hundreds of statutes that can impose liability on directors and officers. The two main sources of liability are:

(1) Offences, for which fines and penalties (such as imprisonment) are imposed and which may be specifically set forth, or there may be a general offence for a breach of provisions of the legislation; and
(2) Pecuniary or monetary obligations imposed on a director or officer, for example, the Business Corporations Act provides that directors who approve certain transactions contrary to the legislation, such as providing financial assistance to a shareholder without a prescribed solvency test being met, are jointly and severally liable to repay amounts lost by the corporation as a result of such actions being taken, whereby directors may be personally liable for up to six months' wages of employees.

It is also important to note that much of the legislation that imposes liability also sets forth detailed conditions subject to which a director or officer may be relieved from liability and that, in most cases, a "due diligence defense" is available. In short, at the end of the day, it is always necessary to consider carefully the specific facts of a particular case.

There have been a number of charts and lists of these types of liabilities prepared over the years. The following is a brief summary of some of the major pieces of Canadian and Ontario provincial legislation which imposes liabilities on directors and the sources of liability provided for:

(1) Environmental Protection Act:
    (a) failure to take reasonable care to prevent discharge of contaminants, even if there has been no discharge; and

(b) failure to report discharge of contaminants;

(2) Ontario Water Resources Act:

(a) failure to take reasonable care to prevent the discharge of material into water that may impair the quality of the water;

(b) failure to report a discharge of material that may impair water quality; and

(c) consuming water in excess of prescribed amounts without a permit;

(3) Pesticides Act:

(a) failure to take reasonable care to prevent harmful effects of pesticides on the environment; and

(b) Discharging a pesticide that causes or is likely to cause harm to the environment;

(4) Ontario Mining Act — failure to take reasonable care to ensure compliance with requirements of the legislation concerning mine rehabilitation and closure;

(5) Canadian Environmental Protection Act — breach of the legislation, including manufacturing or importing of prohibited substances, and failure to report or take measures to notify the public as required in certain circumstances;

(6) Dangerous Goods Transportation Act — transportation of dangerous goods without applicable prescribed safety requirements and safety marks;

(7) Transportation of Dangerous Goods Act 1992 — handling, transporting or importing dangerous goods without applicable prescribed safety requirements;

(8) Fisheries Act — harmful alteration, disruption or destruction of fish habitat;

(9) Canada Business Corporations Act:

(a) improper purchase, redemption or acquisition of shares, payment of a commission, payment of a dividend, giving of financial assistance, payment of an indemnity or payment to a shareholder;

(b) issuance of shares for less than fair money equivalent;

(c) insider trading;

(d) liability to employees for wages;

(e) breach of duty of care; and

(f) breach of the legislation;

(10) Ontario Business Corporations Act:
   (a) improper purchase, redemption or acquisition of shares, payment of a commission, payment of a dividend, giving of financial assistance, payment of an indemnity or payment to a shareholder;
   (b) issuance of shares for less than fair money equivalent;
   (c) *insider trading*;
   (d) liability to employees for wages;
   (e) breach of duty of care; and
   (f) breach of the legislation;
(11) Securities Act:
   (a) misrepresentation in document filed with the Commission or distributed to the public;
   (b) insider trading and tipping; and
   (c) OSC Policy 9.1 may create a source of liability if not complied with;
(12) Bankruptcy and Insolvency Act:
   (a) breach of provisions of the legislation; and
   (b) payment of dividends or redemption of shares within the twelve-month period preceding bankruptcy if the corporation was insolvent or became insolvent;
(13) Corporations Returns Act — failure to file returns or comply with the legislation;
(14) Investment Canada Act — non-compliance with the legislation;
(15) Competition Act:
   (a) commission of certain offences by the corporation, including failure to comply with order of Competition Tribunal, and with respect to restricted trade practices; and
   (b) failure to comply with other provisions of legislation;
(16) Construction Lien Act — breach of trust by the corporation;
(17) Business Names Act — breach of the legislation, such as business name registration requirements;
(18) Corporations Information Act — breach of the legislation, including filing of notices;
(19) Canada Business Corporations Act — possible liability for six months' wages of employees, including vacation pay and bonuses;
(20) Ontario Business Corporations Act possible liability for six months' wages of employees, including vacation pay and bonuses;

(21) Corporations Act — possible liability for six months' wages of employees, including vacation pay and bonuses;
(22) Canada Corporations Act — possible liability for six months' wages of employees, including vacation pay and bonuses;
(23) Employment Standards Act — possible liability for six months' wages of employees, including vacation pay and bonuses;
(24) Occupational Health and Safety Act — liability for breach of the legislation;
(25) Hazardous Products Act — liability for breach of the legislation;
(26) Human Rights Code — infringement of the Human Rights Code;
(27) Canadian Human Rights Act — engaging in discriminatory practices contrary to the legislation;
(28) Pay Equity Act — contravening certain sections of the legislation, such as intimidating or discriminating against a person who makes disclosure or exercises a right under the legislation;
(29) Labor Relations Act — liability for breach of the legislation;
(30) Canada Labor Code — liability for breach of the legislation;
(31) Pension Benefits Standards Act 1985 — liability for breach of the legislation, including failure to remit amounts required to be remitted to a pension fund;
(32) Pension Benefits Act — liability for breach of the legislation, including failure to remit amounts required to be remitted to a pension fund;
(33) Canada Pension Plan — failure to deduct and remit appropriate amounts;
(34) Employment Insurance Act — failure to deduct and remit appropriate amounts;
(35) Income Tax Act, Excise Tax Act and Retail Sales Tax Act — failure to deduct and remit appropriate amounts, and failure to pay taxes;
(36) Corporations Act:
   (a) liability for employee wages; and
   (b) breaches of other provisions of the legislation;
(37) Canada Corporations Act:
   (a) liability for employee wages; and
   (b) breaches of other provisions of the legislation; and

(38) Bank Act, Trust and Loan Companies Act and Insurance Act:
   (a) issuance of shares or subordinated indebtedness for improper consideration;
   (b) improper purchase or redemption of shares, reduction of capital, payment of a dividend, payment of an indemnity or related party transaction;
   (c) liability to employees for wages;
   (d) breach of duty of care; and
   (e) breach of the legislation.

Effective Date of Director Resignations

One situation that may arise is where an individual director (who is being pursued for a statutory director's liability debt) takes the position that he resigned on an earlier date but that the resignation was inadvertently not made the subject of a filing with the governmental authorities at that time. In other words, the situation is such that a current corporate search will show that the person is still a director, although the person steadfastly asserts that he actually resigned, say, twelve months earlier and that it was an oversight that no resignation was filed with the governmental authorities.

The law on this point seems to support the view that the resignation is effective as at the earlier date, although the individual facts of each case (including the language in the specific statute which provides for director liability) need to be looked at carefully. In this regard, Section 121(2) of the Ontario Business Corporations Act provides simply that a resignation of a director becomes effective at the time a written resignation is received by the corporation or at the time specified in the resignation, whichever is later. In other words, the statutory provisions do not stipulate that a resignation only becomes effective when it is filed with the corporate ministry.[41]

41 *Stewart* v. *Canadian Broadcasting Corp.* [1997] O.J. 2271 and [1997] O.J. 4077; *Trustee of Property of J.T. Richards & Co. Ltd.* v. *Coulson* [1937] O.R. 456 ("no fresh or new liability could arise after his resignation was in the hands of the company"); *Vopni* v. *Groenewald* [1991] O.J. 3577; *Azoulay* v. *Levy* (1978) O.J. 321; *Sherwood Design Services Inc. et al.* v. *873935 Ontario Limited et al.* (1998) 39 O.R. (3d) 576; *McKinlay Transport Limited* v. *Motor Transport Industrial Relations Bureau of Ontario (inc.)* [1996] O.R. 461; *Laprise* v. *Julio's Pizza & Spaghetti Parlour* (1986) O.J. 2649; *Bruce Freeman Real Estate Services Inc.* v. *Brad Burn* (1990) O.J. 687; *767504 Ontario Limited* v. *Peitchinis* (1993) O.J. 3878; *Giglio* v. *R.* (1999) 2 C.T.C. 2591; *Bozzo* v. *R.* (2001) D.T.C. 68; *Weisman* v. *R.* (2002) 3 C.T.C. 2245.

Claims against Directors in Reorganization Proceedings

There has been much discussion and even some action in recent years on the subject of providing protection for directors[42] of insolvent companies in order to encourage people to remain in place rather than resign[43] when their company encounters difficulty. The "action" is largely represented by a series of amendments enacted in the mid-1990s with respect to the Companies' Creditors Arrangement Act and the Bankruptcy and Insolvency Act, which are the two Canadian statutes used to reorganize insolvent corporations formally. As others have commented,[44] these statutory amendments were relatively mild in scope. Also, these amendments were aimed at protecting officers as opposed to directors.

In essence, the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act now provide that:

(1) Certain actions against directors are[45] or may be[46] stayed during the protective period within which a company is attempting a reorganization; and

(2) Certain claims against directors which "relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations" may be compromised in either a Bankruptcy and Insolvency Act proposal[47] or a Companies' Creditors Arrangement Act plan.[48]

In other words, these Sections are limited to claims which are grounded in the long list of federal and provincial statutes which deem directors to be liable for certain obligations of their corporations. Also, both the Bankruptcy and Insolvency Act and the

42 This section of the chapter is adopted from Carhart, Jeffrey, "Limiting Compromises of Director and Senior Officer Liability in CCAA Proceedings: *NBD, Bank Canada* v. *Dofasco Inc.*" (2000) *National Insolvency Review*, Volume 17, Number 4, at p. 38.

43 Although, it should be queried, of course, how "effective" such a resignation will prove to be in circumstances where certain director liability items may already have arisen.

44 For example, McElcheran, Kevin, "Directors' Liabilities — The Effect of Proposed Amendments to the Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act", presented to The Canadian Institute Seminar on the Bankruptcy and Insolvency Act . . . Amended (1 April 1996).

45 Bankruptcy and Insolvency Act, Section 69.31.

46 Companies' Creditors Arrangement Act, Section 11.5.

47 Bankruptcy and Insolvency Act, Section 50(13).

48 Companies' Creditors Arrangement Act, Section 5.1(1). The Section uses the word "company" instead of "corporation".

Companies' Creditors Arrangement Act provide[49] that the court has a residual power to declare that "a claim against directors shall not be compromised if [the court] is satisfied that the compromise would not be fair and reasonable in the circumstances".

In that regard, both the Bankruptcy and Insolvency Act[50] and Companies' Creditors Arrangement Act[51] also provide that claims "based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors" cannot be included in a provision in a Bankruptcy and Insolvency Act proposal or Companies' Creditors Arrangement Act plan dealing with a compromise of claims. In this context, the 2001 decision of the Ontario Court of Appeal in *NBD Bank, Canada* v. *Dofasco Inc.*[52] is interesting. Although the formal name of the case refers to Dofasco, the case was concerned with the insolvency of Dofasco's subsidiary, Algoma Steel Corporation Limited, and related to events which took place in the early 1990s, before the amendments to the Bankruptcy and Insolvency

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49 Bankruptcy and Insolvency Act, Section 50(15); Companies' Creditors Arrangement Act, Section 5.1(3). These provisions were considered in the *Bluestar Battey Systems* case (2002), Ontario Superior Court of Justice File Number 00-CL-3860. In that case, Mr. Justice Farley rejected an application by Revenue Canada at the time of the confirmation hearing with respect to the plan to prevent the Bluestar directors from being released from responsibility for GST liabilities of the company pursuant to Section 5.1(3) of the Companies' Creditors Arrangement Act. Derrick Tay — who acted for Bluestar in that case — co-authored an interesting article on the case with Shawna Flynn ("CCAA Fairness Hearings: A New Standard?", 2001 Canadian Bar Association, Ontario Annual Institute materials) in which it is argued that the court should only engage in an evaluation under Section 5.1(3) of the Companies' Creditors Arrangement Act with respect to statutory director liabilities which, by their terms, are "independent of the company's performance" (page 11) and not with respect to statutory director liabilities which are wholly "dependent upon the company having failed [in] and continuing to be in default of certain obligations" (page 11). That is, Derrick Tay's point is that, in effect, if the (director) claim is with respect to a (corporate) liability which is "satisfied" (albeit at less than 100 cents on the dollar) through the Companies' Creditors Arrangement Act proceeding, then, at the late stage of the court approval hearing, it should not be open to the governmental authorities to argue, under Section 5.1(3), that the directors should not also be absolved of liability (that is, because the "underlying" liability itself is "gone").

50 Bankruptcy and Insolvency Act, Section 50(14).

51 Companies' Creditors Arrangement Act, Section 5.1(2).

52 *NBD Bank, Canada* v. *Dofasco Inc.* (Ontario Court of Appeal) 2000 1 B.L.R. (3d) 1 and 15 C.B.R. (4th) 67. Leave to appeal refused by the Supreme Court of Canada (6 April 2000), Document 27754.

Act and Companies' Creditors Arrangement Act discussed above were introduced. The relevant facts were as follows.

Algoma Steel had an unsecured credit facility with NBD Bank. Generally, the account was used to fund certain of Algoma Steel's obligations in the United States On a mechanical level, the operation of the account contemplated that a representative of Algoma Steel would notify NBD Bank of Algoma Steel's borrowing requirements, at which time, among other things, the interest rate on the borrowings would be set. In other words, the personal communications between Algoma Steel and NBD Bank were critical to the day-to-day functioning of the credit facility.

As has been well documented, Algoma encountered a number of financial difficulties in the early 1990s, including a lengthy strike, a general downturn in the steel industry and a resulting strain on its cashflow resources. Over a period of a few days in early January 1991, James Melville of Algoma and Jeremy Hynes of NBD Bank engaged in a series of discussions concerning a request for a draw of US $4 million on the credit facility. Mr. Melville was Vice-President (Finance), Secretary and Treasurer of Algoma. It does not appear that he was also a director. In essence, the trial judge held that, among other things:

> " - Mr. Hynes was knowledgeable of, and concerned about, Algoma's financial difficulties at the time that the draw was requested.
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> " - Accordingly, Mr. Hynes sought, and received, specific assurances from Mr. Melville concerning the status of Algoma's receivables, the status of Algoma's banking relationship with its other banks, the status of the potential sale of certain of Algoma's U.S. coal industry assets, the severity of the problems that Algoma was encountering in the 'ramping up' period after its strike and the availability of certain financial statements. Mr. Melville made 'misrepresentations' to Mr. Hynes about each of these matters. In reliance on those misrepresentations, Mr. Hynes authorized the release of the funds."

Shortly after the funds were advanced, Algoma filed for protection under the Companies' Creditors Arrangement Act. Eventually, a court-approved restructuring plan was completed pursuant to the

Companies' Creditors Arrangement Act. However, as a result, NBD Bank suffered a net loss of approximately US $2-million. NBD Bank sued, among other people, Mr. Melville. Mr. Melville's defense included the fact that Algoma's Companies' Creditors Arrangement Act plan contained the following term:

> "6.03 Releases
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> "From and after the Effective Date, each Creditor and Shareholder of Algoma prior to the Effective Date (other than Dofasco) will be deemed to forever release Algoma from any and all suits, claims and causes of action that it may have had against Algoma or its directors, officers, employees and advisors."

It is easy to think of similar or related fact situations. For example, suppose that a senior officer of a troubled company makes specific representations to and/or agreements with a supplier who is concerned about the solvency of the officer's company in order to induce that supplier to ship (badly needed) product. The "thirty-day goods" remedy is not available after the customer seeks the protection of either the Bankruptcy and Insolvency Act or the Companies' Creditors Arrangement Act.[53] The "thirty-day goods remedy", which is available in bankruptcies and receiverships, is provided for in Section 81.1 of the Bankruptcy and Insolvency Act, during which time the product may be sold and/or transformed, rendering the thirty-day goods remedy similarly unavailable when the stay is lifted, regardless of whether the reorganization effort turns out to be successful.

These shortcomings in the "thirty-day goods" remedy are now fairly well known. Suppose, therefore, that the supplier makes clear to the officer that the supplier knows that the officer's company is in financial difficulty and asks for some kind of guarantee that the supplier will be paid. Suppose that the officer of the troubled company makes a statement to the effect that he has authority to speak for the solvent parent company of the troubled company and that both he

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53 Under the Companies' Creditors Arrangement Act, the protection must be sought from the court (and there is now a significant amount of case law dealing with when the court may be expected to grant such "initial stay orders". Under the Bankruptcy and Insolvency Act, protection is automatically conferred on the filing of a "notice of intention to make a proposal" in the prescribed form and with the requisite additional material.

(the officer) and the parent company will make sure that the account gets paid "no matter what".

Suppose that the purchasing company obtains the product and files for protection under the Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act a few days later. Finally, suppose that the purchasing company then tables a Bankruptcy and Insolvency Act proposal or a Companies' Creditors Arrangement Act plan which contains a provision (like Section 6.03 of the Algoma plan) to the effect that (without specifically naming it) the supplier is not only barred from bringing an action against the company, but is also barred from bringing an action against the senior officer who made the representations upon which the supplier relied in shipping the product.

In practice, the dispute usually gets resolved through the kind of legitimate "horse trading" which is always part of the process leading up to the finalization of a Bankruptcy and Insolvency Act plan or Companies' Creditors Arrangement Act proposal for voting by the creditors. However, in the *NBD Bank, Canada* case, no such consensual resolution was available, and the matter went to court. Among other things, NBD Bank, Canada challenged the enforceability of Section 6.03 of the Algoma Steel Companies' Creditors Arrangement Act plan.

The decision of the Court of Appeal in the *NBD Bank, Canada* case is lengthy. Among other things, it provides a thorough consideration of the components of a negligent misrepresentation action, including the issue of when the necessary duty of care arises. However, in the course of its judgment, the Court of Appeal turned its attention to the enforceability of Section 6.03 of the Algoma Steel Companies' Creditors Arrangement Act plan. In this regard, Mr. Justice Rosenberg of the Court of Appeal held as follows:

> ". . . Mr. Melville argues that permitting the respondent to pursue the . . . cause of action against Mr. Melville personally would subvert the Companies' Creditors Arrangement Act process. He argues by analogy with the holding in *London Drugs Ltd.* v. *Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.). In that case, the defendants, employees of a warehouse company, badly damaged a transformer that the plaintiff had stored with the warehouse company. Under the contract between the plaintiff and the warehouse company, the "warehouseman's" liability was limited to Cdn $40. It was held that the defendant employees

were entitled to take advantage of the limitation of liability clause in the contract of storage between their employer and the plaintiff notwithstanding that there was no privity of contract between the employees and the plaintiff. The court held that privity of contract should be relaxed having regard to the particular circumstances of the case, especially the wording of the limitation of liability in the contract. Writing for the majority of the court, Iacobucci, J. found that there were sound policy reasons for relaxing the doctrine of privity. In particular, he was concerned that otherwise the plaintiff would be allowed to circumvent or escape the limitation of liability clause to which it had expressly consented. He referred with approval at pp. 441 to 442 to an excerpt from the reasons of Le Dain J. in *Central & Eastern Trust Co.* v. *Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at p. 206:

> "A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contact exists, the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence."

In going on to distinguish the *London Drugs* case, Mr. Justice Rosenberg considered the underlying purpose of the Companies' Creditors Arrangement Act:

> "In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the [Companies' Creditors Arrangement Act]. As this court noted in *Nova Metal Products Inc.* v. *Comiskey* (*Trustee of*) (1990), 1 O.R. (3d) 289 (Ont. C.A.) at p. 297, the Companies' Creditors Arrangement Act is remedial legislation 'intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both'. It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a

creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the [Companies' Creditors Arrangement Act]."

In this regard, Mr. Justice Rosenberg considered the amendments introduced into the Companies' Creditors Arrangement Act and the Bankruptcy and Insolvency Act (after the events at issue in the *NBD Bank, Canada* case) dealing with directors:

"In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the Companies' Creditors Arrangement Act and the [Bankruptcy and Insolvency Act]. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that 'are based on allegations of misrepresentations made by directors' [Section 51(2) of the Companies' Creditors Arrangement Act and Section 50(14) of the Bankruptcy and Insolvency Act]. L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.

"Finally, I agree with counsel for the respondent that the analogy to *London Drugs* is flawed. In that case, upholding a strict application of the doctrine of privity of contract would

> have allowed the plaintiff to circumvent or escape the limitation of liability clause to which it had expressly consented. On 10 and 11 January, when the respondent decided to extend credit because of Mr. Melville's misrepresentations, the respondent could not reasonably have contemplated any future limitation on its rights through a Companies' Creditors Arrangement Act process. To the contrary, because of those misrepresentations, it did not contemplate any reorganization through such a process. As far as it was concerned, based on the statements made by Mr. Melville, Algoma was experiencing short-term cash flow problems due to the ramping up."

There has always been a need for some meaningful level of protection in Canada for corporate directors of troubled companies. A primary concern in this regard has always been to encourage people (that is, maybe such as a person who was not on the board at the time at which certain liabilities were incurred) with the talent necessary to manage those situations (and perhaps ultimately to save jobs and communities) to at least make the effort as opposed to declining out of fear of personal exposure. In other words, concerns have been expressed about the kinds of issues which Messrs. Houlden and Morawetz (as quoted in the *NBD Bank, Canada* case) have identified as motivating the modest protection for directors which has been introduced to the Companies' Creditors Arrangement Act and Bankruptcy and Insolvency Act.

However, certainly there have to be sensible limits on any such protection and, as Mr. Justice Rosenberg points out, there is no legitimate purpose under Canada's reorganization legislation in extending such protection to the point where a creditor who gets "out voted" on a reorganization plan or proposal loses a right which it (perhaps alone) may have had to sue an officer or director of the reorganizing company for a specific misrepresentation which that officer (or director) may have made.

Advising the Directors of a Troubled Company

In his book on the failure of Confederation Life,[54] Rod McQueen quotes Ernest Hemingway from *The Sun Also Rises*: "How did you go bankrupt?" Bill asked. "Two ways", Mike said. "Gradually then suddenly."

Certainly, it often seems that things move very quickly for companies when insolvency hits. At the same time, the situation may be very fluid in that the directors may feel, quite legitimately, that there is a way out — perhaps through a sale of the business or from the infusion of fresh capital.

In those circumstances, advising the board can be very challenging. (As referred to above, it may be that someone with a fresh perspective should be introduced into the management team as a CRO.) In his article "Dealing with Clashes Between Securities, Corporate, Commercial and Insolvency Law",[55] Andrew Kent provided this statement of some classic advice typically given to a board of directors and management where a corporation has encumbered financial difficulty but still has some liquidity:

> "(1) Do not take any action either directly or indirectly to incur new obligations (other than those arising by the mere passage of time) unless there are reasonable grounds for believing that the corporation will be able to meet those obligations when they fall due;
>
> "(2) Be careful in discussions with suppliers not to misrepresent the financial position of the corporation; and
>
> "(3) Avoid increasing the aggregate amount of trade debt and other short-term liabilities."[56]

Of course, as Andrew Kent goes on to discuss in his article, it is also necessary to go beyond those kinds of considerations to grapple with devising a broader strategy to "maximize value". In this regard,

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54 McQueen, Rod, *Who Killed Confederation Life*? (McClelland & Stewart Inc., Toronto, 1986) at p. 138.

55 Queen's Annual Business Law Symposium materials (Carswell, 1995) at p. 291.

56 This type of advice is obviously influenced to a significant extent by a sensitivity to trying to avoid personal claims against directors based on allegations of misrepresentation or oppression, as discussed earlier.

among other things, the directors should take the steps necessary to make an informed comparison between the "true" liquidation value of the company's assets and the going concern value.

Practically speaking, if the company is in default with its bank (or other major lender), an immediate task at hand may be to negotiate a forbearance agreement. These agreements can contain any number of provisions, although some provisions are usually pretty standard.[57] However, the cornerstone of such an agreement must be some kind of mutually accepted business plan. Some of the most important work which insolvency and restructuring professionals do can be in developing such plans. In turn, of course, realistically, the bank may also require that the debtor agree to pay for an independent financial advisor for the bank. However, ideally, the company's advisor and the bank's advisor can work together to produce a plan that is as good as possible in the circumstances.[58]

Protecting Directors with Insurance

Many companies will have some kind of director and officer insurance coverage. However, it is essential to "read the fine print" in the policies to see the extent of the coverage. Ultimately, there may be some gray areas in that regard. In the *Enron* case,[59] there was protracted litigation over whether the proceeds of a director and officer policy properly belonged to the company or the directors themselves.

Protecting Directors with Indemnity Trusts

It may be possible to protect a corporation's directors by transferring some of the corporation's funds into a trust to be used to satisfy liabilities which would otherwise be something that individual directors would have to satisfy. The practical issue often comes down to one of timing.

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57 Examples of the standard provisions include: an admission by the debtor of its default and the fact that, accordingly, the bank is in a position to enforce its security; some kind of forbearance fee to compensate the bank for the increased time it must devote to the file; and a detailed set of covenants (including detailed reporting requirements) and events of default (culminating in a "material adverse change" event of default) which the borrower needs to adhere to.

58 The forbearance agreement will typically provide for default if the results called for under the plan are not achieved.

59 Discussed in Gale Rubenstein's article "Keeping the Board on Board" (The Canadian Institute Conference materials — Insolvency Law and Practice — 16 and 17 January 2003).

An attempt to establish such a trust was not successful in the case of *Central Guaranty Trust Company and 646649 Ontario Limited* v. *775843 Ontario Limited.*[60] In that case, a company called Sound Insight received a substantial income tax refund at a time when it was insolvent and on the eve of bankruptcy. The funds were placed into a trust which was intended to reduce the potential personal liability of Sound Insight's directors for items such as unpaid employee wages. Mr. Justice O'Driscoll (of what was then the Ontario Court of Justice) found that the establishment of the trust in those circumstances constituted an unjust preference and was, therefore, void. In the circumstances, the funds were made available to the general pool of creditors.

However, there are situations where such trusts have been respected or, indeed, have been sanctioned by the courts in reorganization proceedings under the Companies' Creditors Arrangement Act. As always, it is necessary to look at the specific facts of each case. In simple terms, in the *Sound Insight* case, the bankruptcy happened too quickly after the trust was established.

Protecting Directors with Court Ordered Charges

When a company finally actually files for protection under the Companies' Creditors Arrangement Act, it is common to see a provision in the initial order conferring some kind of charge in favor of the directors. For example, Section 52 of the initial order in the proceedings by Teleglobe Inc. and some affiliated companies (collectively the "applicants")[61] read, in part, as follows:

> "52. THIS COURT ORDERS that each Applicant shall and does hereby indemnify each present or future director and officer of each of the Applicants from (i) all claims, liabilities and obligations of any nature whatsoever (including, without limitation, legal fees on a solicitor and own client basis) which may hereafter arise from their respective involvement with the Applicants, save and except as may arise from the willful misconduct or gross negligence of such director or officer, and (ii) liabilities arising due to the Applicants' failure to pay the Crown Priorities. The directors

60 (1994) 6 P.P.S.A.C. (2d) 121.

61 The order was made on 15 May 2002 by Mr. Justice Farley of the Ontario Superior Court under File Number 02-CL-4528.

and officers of such of the Applicants shall be entitled to the benefit of and are hereby granted a priority hypotec, security interest, fixed charge, mortgage and lien . . . upon the present and future Property of the Applicants (the "Directors' Charge") to secure such indemnification. The directors and officers of each of the Applicants shall not be required to file, register, record or perfect the Directors' Charge."

In contrast, the same subject was dealt with in more complex terms in the initial stay order made in the Companies' Creditors Arrangement Act proceedings instituted by the Royal Oak Mines Inc. group of companies in February 1999.[62] In that order, which also made use of the term "applicants", Section 36 provided, in part, as follows:

"36. THIS COURT ORDERS that without prejudice to the directors' right to reapply for a variation of this Section 36, the following directors of the Applicants shall be entitled to the benefit of and are hereby granted the following charges . . . upon the following Property of the Applicants (the "Directors' Charge") to secure and indemnify the directors against the future liabilities of the Applicants for which the directors of the Applicants bear personal liability in respect of such liabilities, in each case to the extent actually paid by such directors less any amount received by such directors pursuant to any insurance policies (the "Liabilities"):

"(1) The directors of Royal Oak shall be entitled to the Directors' Charge against the right, title and interest of Royal Oak in the real property known as the Kemess South Mine and the properties known as the Pamour/Nighthawk Mines only for the following Liabilities:

"(a) all Liabilities for unpaid employee vacation pay owed to employees of Royal Oak to a maximum aggregate amount of $1,750,000;

"(b) all Liabilities for unpaid wages (excluding any amounts on account of termination pay, severance pay and damages for failing to give notice of termination of employment) and

62 That order was made by Mr. Justice Blair of the (then) Ontario Court (General Division) under Court File Number 99-CL-3278.

for unpaid statutory deemed trust amounts in favor of the Crown in right of Canada or any province thereof which are required to be deducted from the wages of employees of Royal Oak, compromising amounts in respect of employment insurance, Canada Pension Plan and employee income taxes, owed to employees of Royal Oak, to a maximum aggregate amount of $3,250,000;

"(2) The directors of Royal Oak shall be entitled to the Directors' Charge against the right, title and interest of Royal Oak in the real property known as the Kemess South Mine only for the following Liabilities:

"(a) all Liabilities for the costs of remedying any environmental condition or environmental damage affecting the Kemess South Mine to a maximum aggregate amount equal to the lesser of:

"(i) the sum of $2,000,000; and

"(ii) the amount of such Liabilities which would, pursuant to Section 14.07 of the BIA or Section 11.8(8) of the CCAA, (the "Sections") have been a claim by Her Majesty in right of Canada or a province (the "Authority") which would be secured by a charge on the Kemess South Mine ranking senior in priority to the security in favor of Trilon and Northgate pursuant to the Series A Debenture and the Series B Debenture had the Authority expended such amounts with respect to such Liabilities less any amounts actually paid by Royal Oak to, or claimed by, such Authority pursuant to the Sections.

"(3) The directors of Royal Oak shall be entitled to the Directors' Charge against the right, title and interest of Royal Oak in the real properties known as the Pamour/Nighthawk Mines only for the following Liabilities:

"(a) all Liabilities for the costs of remedying any environmental condition or environmental damage affecting the Pamour/Nighthawk Mines to a maximum aggregate amount equal to the lesser of:

"(i) the sum of $1,000,000; and

"(iii) the amount of such Liabilities which would, pursuant to the Sections, have been a claim by the Authority which would be secured by a charge on the Pamour/Nighthawk Mines ranking senior in priority to any claim or security interest in favor of Trilon and Northgate pursuant to the Series A Debenture and the Series B Debenture had the Authority expended such amounts with respect to such Liabilities less any amounts actually paid by Royal Oak to, or claimed by, such Authority pursuant to the Sections.

"(4) The directors of the Applicants shall be entitled to the Directors' Charge against the right, title and interest of Royal Oak in the real property known as the Giant Mine only for the following Liabilities:

"(a) all Liabilities for the costs of remedying any environmental condition or environmental damage affecting the Giant Mine to a maximum aggregate amount equal to the lesser of:

"(i) the sum of $12,500,000; and

"(ii) the amount of such Liabilities which would, pursuant to the Sections, have been a claim by the Authority which would be secured by a charge on the Giant Mine ranking senior in priority to any claim or security interest in favor of Trilon and Northgate pursuant to the Series A Debenture and the Series B Debenture had the Authority expended such amounts with respect to such Liabilities less any amounts actually paid by the Applicants to, or claimed by, such Authority pursuant to the Sections.

"(5) The directors of the Applicants shall be entitled to the Directors' Charge against the right, title and interest of Royal Oak in all other exploration properties and dormant mining operations of the Applicants only for the following Liabilities:

"(a) all Liabilities for the costs of remedying any environmental condition or environmental damage affecting such other exploration properties and dormant mining operations to a maximum aggregate amount equal to the lesser of:

"(i) the sum of $3,500,000; and

"(ii) the amount of such Liabilities which would, pursuant to the Sections, have been a claim by the Authority which would be secured by a charge on such other exploration properties ranking senior in priority to any claim or security interest in favor of Trilon and Northgate pursuant to the Series A Debenture and the Series B Debenture had the Authority expended such amounts with respect to such Liabilities less any amounts actually paid by the Applicants to, or claimed by, such Authority pursuant to the Sections."

Conclusion

At this time, corporate directors are under burdens of an unprecedented degree. The situation becomes even more challenging for directors when their company has to fight for its survival. Hopefully, this chapter will be of some assistance to both actual directors and the insolvency and restructuring professions who advise and work with such directors on a day-to-day basis.

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