AN ADDITION TO CANADA'S INSOLVENCY REGIME: SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*

by

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ABSTRACT

Section 192 of the *Canada Business Corporations Act* allows corporations to apply to a court of competent jurisdiction for arrangement. An arrangement might include a variety of changes to a corporation, including amendments to its articles of incorporation, exchanges of its securities for property, money, or other assets, or even a merger with another corporation. On its face, subsection 192(3) of the statute should bar such restructuring by arrangement in situations of insolvency. However, as scholars and practitioners have noted, section 192 arrangements, with the purpose of restructuring insolvent corporations, have become commonplace in the last decade.

At this juncture it seems appropriate to assess the practical developments, and perhaps new role, of section 192 within the Canadian corporate insolvency system. This thesis analyzes and applies principles of statutory interpretation to help us better understand how the judiciary has the authority to approve insolvent arrangements under section 192. It also involves a recursive legal analysis, tracking the history of jurisprudential evolutions in section 192 interpretation and application. The resulting work is an in-depth study, hopefully useful to legal scholars and practitioners alike, furthering section 192 as part of Canada's corporate insolvency system and helping us better understand how it became the insolvency restructuring provision it now is today.

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INTRODUCTION

The *Canada Business Corporations Act*[1] ("*CBCA*"), ensures the uniformity of business corporation law in Canada and provides for the federal incorporation of companies.[2] With thousands of corporations incorporated under the *CBCA*, it is inevitable that some will experience financial difficulties. Canada's insolvency regime consists of two primary statutes, the *Bankruptcy and Insolvency Act*[3] ("*BIA*") and the *Companies' Creditors Arrangement Act*[4] ("*CCAA*"). Both of these statutes provide a means for insolvent debtors to enter into an arrangement with their creditors in order to avoid bankruptcy. Arrangements involving consumer and smaller corporate debtors are governed by the *BIA* and arrangements involving large corporate debtors are typically conducted under the *CCAA*.

The purpose of the arrangement provisions in the *BIA* and *CCAA* is to allow a corporate debtor to "continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[5] As such, these statutes allow the courts, which typically oversee arrangements, to grant special remedies in order to help ensure an arrangement is successful. For example, a remedy such as a stay of proceedings, preventing creditors from enforcing their debt obligations during the arrangement process, is a crucial component of an insolvent arrangement. Arrangements, however, are not conducted exclusively in situations of insolvency. Solvent corporations may also wish to complete an arrangement, effecting fundamental changes to the corporation. As these solvent arrangements affect stakeholder rights, the arrangement provisions

[1] *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*].
[2] *Ibid*, s 4.
[3] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].
[4] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].
[5] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 15.

of corporate statutes often require court approval, similar to arrangements conducted under the *BIA* and *CCAA*.

The arrangement provision found in the *CBCA* is section 192.[6] Section 192 arrangements are broad in scope as they can include a variety of changes to a corporation including amending the articles of a corporation, exchanging the securities of a corporation for property, money etc., and, amalgamating two corporations into one.[7] The *CBCA* is not technically part of Canada's insolvency regime and it appears that Parliament drafted section 192 in a manner which prevents insolvent corporations from conducting arrangements under section 192. Specifically, subsection 192(3) states "a corporation that is not insolvent … may apply to a court for an order approving an arrangement proposed by the corporation". Subsection 192(2) defines a corporation as insolvent for the purpose of section 192 as "(a) where it is unable to pay its liabilities as they become due; or (b) where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes." Together, these subsections form the "solvency requirement" of section 192. Thus, a plain reading interpretation of section 192 indicates it is not available to insolvent corporations to conduct arrangements under.

Despite this, section 192 has been used by insolvent corporations to complete arrangements since 1982. Although the plain reading interpretation of section 192 is insolvent arrangements are statutorily barred from use in situations of insolvency, judicial interpretation and application of this provision over the past four decades indicates otherwise. In this thesis, an in-depth analysis is undertaken, exploring how the court came to interpret and continues to interpret section 192 as available for use by insolvent corporations. In addition to allowing section 192 to be used by

[6] Provided at Appendix A.
[7] *CBCA*, *supra* note 1, s 192(1).

insolvent corporations, the court has also increasingly granted remedies in insolvent section 192 arrangements which are usually only provided for in Canada's official insolvency statutes. Therefore, this thesis also explores the basis of authority on which the court has granted these remedies and discusses the use of remedies themselves. With the court approving insolvent arrangements and granting insolvency remedies under section 192, this thesis advances the argument that section 192 has in fact become an important part of Canada's insolvency regime.

I. THEORETICAL APPROACH AND METHODS

A. Recursivity of Law

This thesis adopts and adapts a recursivity of law analysis in order to understand how the court came to interpret section 192 as available for use by insolvent corporations and where the court found the authority to grant remedies typically reserved for use under Canada's official insolvency statutes. While Halliday and Carruthers developed recursivity of law[8] to study developments in bankruptcy and insolvency,[9] at its core recursivity of law is a socio-legal analytical framework which can be applied to understand any legal historical phenomenon. Recursivity of law "distinguishes itself from conventional explanations of lawmaking in its particular emphasis on the four [influential powers] at the heart of the law"[10] which leads to an in-depth analysis of legal-historical issues.

Specifically, recursivity of law considers the influence of legal actors, such as lawyers, judges, and politicians; the influence of legal institutions, such as courts, regulatory agencies, enforcement authorities, and professional associations; the influence of legal concepts, often institutionalized in statutes; and the influence of the form of law itself, whether law is implemented via regulation, caselaw, or statute affects the way change is implemented or initiated.[11] Together these four powers influence the development of law. Recursivity of law identifies two types of

[8] See e.g. Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business* (Oxford: Clarendon Press, 1998) [Carruthers & Halliday 1998]; Terence C. Halliday and Bruce G. Carruthers, "The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes" (2007) 112:4 Am J of Sociology 1135 [Halliday & Carruthers 2007]; Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford: Stanford University Press, 2009) [Halliday & Carruthers 2009].
[9] Virginia Torrie, *Corporate Restructuring in the 20th Century: A Socio-Legal History of the Companies' Creditors Arrangement Act* [unpublished book manuscript, cited with permission of the author] at 15.
[10] Halliday & Carruthers 2007, *supra* note 8 at 1142.
[11] *Ibid* at 1142-1143.

law, "law on the books", which refers to statutes, cases, and regulations,[12] and the "law in practice" which refers to the "law as it is actually experienced by those it regulates."[13] Understanding the relationship between the law on the books, also known as "formal law", and the law in practice allows for a comprehensive understanding of how the law developed. Furthermore, according to the recursivity of law theory, legal changes and reforms occur in cycles "between formal law and law in practice. Law in practice concomitantly is an outcome to be explained as well as a further stimulus for lawmaking, just as law on the books must be explained as well as be followed into action."[14]

The recursivity framework has been used by Halliday and Carruthers to track changes in formal international bankruptcy reform.[15] It has also been applied to study the development of the *CCAA*, an important aspect of Canadian insolvency law.[16] There have been many types of recursive cycles identified, ranging from "the relatively simple to the highly complex."[17] The development of section 192 is similar to a complex cycle where "statutes lead to practices and subsequent court decisions that deviate from what legislators intended and thus stimulate legislatures to override the courts".[18] In the development of section 192, interpretation of the provision leads to practices and subsequent court decisions that appear to deviate from what legislators intended. The new interpretation does not result in Parliament overriding the courts instead its legislated agent, the Director of Corporations Canada ("the Director"), publishes policies in response. This thesis validates the utility of the recursivity theory in a new context as

[12] *Ibid* at 1146.
[13] *Ibid*.
[14] *Ibid*.
[15] *Supra*, note 8.
[16] See e.g. *Torrie*, supra note 9.
[17] Halliday & Carruthers 2007, *supra* note 8 at 1144
[18] *Ibid*.

recursive cycles are identified in the relationship between the Director of Corporations Canada and the courts. The recursive theory is applied at a micro level, studying the relationship between a single provision under a single statute which has generated multiple policies by the Director.

The recursive cycles seen in the development of section 192 are unique. While the interpretation of section 192 has been evolving for over three decades, the formal law, section 192 itself has not been amended. The development of section 192 does not evolve in a typical recursive fashion, from statutes to court decisions to amended statutes, rather development occurs through the interplay between court decisions and several policies released by the Director. This is unusual as the Director acknowledges that the policies it publishes are comprised of "policy and practice guidelines" which "do not necessarily have the force of law".[19] Thus, the Director's statements have legal force only to the extent that the courts are prepared to be guided by them and, in the case of section 192, the courts have chosen to give them considerable weight. As such, this thesis defines the Director's policies as "quasi-formal law" as they play the role of formal law yet lack actual legal authority. The focus of this thesis is on the relationship between the quasi-formal law and the law in practice as it is the crux of the recursive cycles and provides insight into how the law developed.

While the recursivity of law theory may not have been utilized in a context where quasi-formal law plays a vital role, similar recursive cycles where legalistic reform occurs through the technical advances negotiated by lawyers and judges rather than through official legislative reform, have been identified by others as a special type recursive cycle known as "endogeneity of law".[20]

[19] Industry Canada, *Policy on arrangements – Canada Business Corporations Act, section 192*, (Ottawa: 8 January 2014), online: *Government of Canada* <www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01073.html> [perma.cc/WTQ3-25L4], s 1.03.
[20] Halliday & Carruthers 2007, *supra* note 8 at 1144 - 1145.

Law in an endogeneity of law cycle is developed as "private attempts to implement the law in practice become institutionalized in case law over time".[21] As the formal law remains the same, identifying the beginning and end of the recursive cycles in the development of section 192 is more difficult than in a simple recursive cycle where statutory amendment may clearly indicate the transition. The theory of recursivity contemplates the fact that each law's development will be distinctive thus, in "recursivity of law, the unit of analysis is not the shift from law on the books to law in action but the entire cycle that locks these two in a dynamic tension."[22] In the development of section 192, several interpretations of the provision are devised. When multiple interpretations of a statute exist, it is up to the courts to develop a consensus around a particular interpretation. When one interpretation is preferred, more will cite back to it, amplifying its influence and indicating the court is "settling" toward that interpretation. Ultimately, the legal uncertainty as to the appropriate interpretation is resolved when the most influential interpretation becomes "settled law". Thus, a recursive cycle ends when a legal interpretation settles indicating a consensus has been reached.[23] Each recursive cycle of change is usually followed by a period of stability as the change is embraced by the legal profession.[24] By identifying what led to the changes in each cycle, a better understanding of how the law operates today can be obtained.

As the development of section 192 occurs in recursive cycles in which Director, through policies, and the courts feed off each other to refine the interpretation of the provision, the principles of statutory interpretation provide a baseline to track the impact that each recursive loop has on the interpretation of section 192.

[21] *Ibid*.
[22] Halliday & Carruthers 2007, *supra* note 8 at 1146.
[23] Halliday & Carruthers 2009, *supra* note 8 at 16.
[24] Halliday & Carruthers 2007, *supra* note 8 at 1148.

B. Principles of Statutory Interpretation

After the *CBCA* was introduced in 1975, courts had their work cut out for them: interpret and apply several hundred brand new provisions which governed an important aspect of Canada's economy. Thus, the principles of statutory interpretation are a valuable tool to understand how the court came to interpret section 192.

When beginning a statutory interpretation analysis, it is best to start with the *Interpretation Act*.[25] Specifically, section 12 of the *Interpretation Act* states every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[26] In *Stubart Investments Ltd. v R*,[27] the Supreme Court of Canada expanded upon section 12 by adopting Elmer Driedger's approach[28] to statutory interpretation:

> [T]here is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[29]

In *Rizzo v Rizzo Shoes Ltd., Re* [30] the Supreme Court utilized both Driedger's approach and Ruth Sullivan's text *Statutory Interpretation*[31] which provides a comprehensive list of the assumptions which the court incorporates into a statutory interpretation analysis.[32] According to Sullivan, the

[25] *Interpretation Act*, R.S.C. 1985, c. I-21.
[26] *Ibid*, s 12.
[27] *Stubart Investments Ltd. v R*, [1984] 1 SCR 536, 10 DLR (4th) 1 [*Stubart*].
[28] Driedger's approach was also adopted by the Supreme Court in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27, [1998] SCJ No 2 [*Rizzo*]; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42.
[29] *Stubart*, *supra* note 27, at 578.
[30] *Rizzo*, *supra* note 28.
[31] While the SCC referenced Ruth Sullivan, *Statutory Interpretation*, (Concord, Ontario: Irwin Law, 1997), this thesis discusses the principles of statutory interpretation discussed in the latest edition, Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) [Sullivan 2016].
[32] Sullivan 2016, *supra* note 31 at 40.

following assumptions about the way legislation is drafted, underlie and are integral to the interpretation of a statute by a court:[33]

1) Linguistic Competence[34]

It is assumed that Parliament, and other legislators, are masters of language and "linguistic conventions through which meaning is communicated to an audience."[35] This means Parliament is assumed to "understand the impact of context on meaning and the significance of word choice and word order" making it a "careful user of language, that it says what it means exactly and therefore means exactly what it has said."[36]

2) Drafting Competence[37]

It is assumed that Parliament, and other legislators, are aware of the rules of statutory interpretation, meaning they will "devise effective legislative schemes and to formulate directives and rules that will provide adequate guidance to those who must implement and obey the law.[38] This includes the ability to choose "the correct way to draft a legislative sentence; what style to use; when to paragraph; and the appropriate use of definitions".[39]

3) Encyclopedic Knowledge[40]

It is assumed Parliament, and other legislators, have knowledge of all laws in all jurisdictions as well as knowledge of all subject matters, akin to an encyclopedia. This knowledge may be "highly

[33] *Ibid* at 44.
[34] *Ibid* at 40.
[35] *Ibid*.
[36] *Ibid* at 41.
[37] *Ibid*.
[38] Sullivan 2016, *supra* note 31 at 41.
[39] *Ibid*.
[40] *Ibid* at 42.

technical and dependent on specialized expertise" or more general knowledge referred to as "'legislative facts' [which] consists of data and studies concerning economic and social conditions, an understanding of history and culture, and an appreciation of the human condition."[41]

4) Straightforward Expression[42]

Statutes are assumed to be "clear, simple, and straightforward" [43], avoiding "metaphor and language that is allusive, convoluted, or indirect."[44] While statutes attempt to be as clear as possible, provisions involving highly technical matters will likely be difficult for a layperson to understand.

5) Orderly Arrangement[45]

It is assumed that each section in a statute is complete and coherent. This means "each subsection of a statute contains a single complete idea" with related ideas grouped together in the same section or series of sections.[46]

6) Coherence[47]

It is assumed that statutes have been carefully drafted to ensure that they do not contradict themselves or contain inconsistent provisions. As a whole, statutes are presumed to be harmonious such that they are "internally consistent and coherent."[48]

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[41] *Ibid*.
[42] *Ibid*.
[43] *Ibid*.
[44] Sullivan 2016, *supra* note 31 at 42. See also *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193 [*Mitchell*].
[45] Sullivan 2016, *supra* note 31 at 42.
[46] Sullivan 2016, *supra* note 31 at 43.
[47] *Ibid*.
[48] *Ibid*.

7) No Tautology (Every Word Must Be Given Meaning)[49]

The Supreme Court has repeatedly articulated that the "legislator does not speak in vain".[50] Thus, the Supreme Court assumes every word in a statute has been deliberately chosen such that a statute will not include unnecessary or meaningless language.[51] Based on this assumption, every word in a statute must be given meaning in an interpretation devised by the court.

8) Consistent Expression[52]

It is assumed that "once the legislature has adopted a particular way of expressing a meaning, it avoids stylistic variation and prefers to express the same meaning in the same way".[53]

As discussed below, the interpretation of section 192 adopted by the court was and continues to be integral to insolvent corporations proposing arrangements under section 192. The court's analysis on the breadth and scope of the solvency requirement relied upon both Dreidger's approach and Sullivan's assumptions. Thus, this thesis employs the principles of statutory interpretation to identify and analyze how the court interpreted section 192.

[49] *Ibid*.
[50] See *Canada (Attorney General) v JTI-Macdonald Corp*., 2007 SCC 30 at 87; *Québec (Procureur général) v Carrières Ste-Thérèse ltée*, [1985] 1 SCR 831 at 838, 20 DLR (4th) 602.
[51] Sullivan 2016, *supra* note 31 at 43.
[52] *Ibid*.
[53] Sullivan 2016, *supra* note 31 at 43. See also *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66 at para 42; *Mitchell*, supra note 44 at 123-24.

II. ORIGIN AND PROCESS OF SECTION 192 ARRANGEMENTS

A. The Origin of *CBCA* Section 192

Corporations are both created and regulated by statute. One of the earliest enactments of general federal corporation legislation in Canada was the *Companies Act*,[54] enacted in 1886. Several revisions were made to the *Companies Act* over the next eighty years[55] including a name change to the *Canada Corporations Act*[56] in 1964. Despite these amendments, Parliament felt the "philosophy, substance, and administration" of corporation law in Canada needed to be reconsidered.[57] In 1967, Parliament set up a "Task Force" to recommend a corporation law which reflected the "best synthesis of substantive and administrative concepts set out in [the] contemporary corporation laws […] of Canada, the United Kingdom, the United States, France and Germany."[58] The law that the Task Force considered was not limited to the *Canada Corporations Act* as Parliament was willing, "if necessary, to [enact] an entirely new statute to abrogate the Canada Corporations Act".[59] Following this mandate, the task force completed its report in 1971. The report was then published under the title "Proposals for a new Business Corporations Law for Canada"[60] and distributed to the public for comment.[61] Based on the report

[54] *Companies Act*, RSC 1886, c C-119.
[55] *Companies Act, 1902*, SC 1902, c C-15; *Companies Act*, RSC 1906, c C-79; *Companies Act Amending Act, 1923*, SC 1923, c C-39; *Companies Act*, RSC 1927, c C-27; *The Companies Act Amending Act, 1930*, SC 1930, c C-9; *An Act to Amend the Companies Act*, SC 1930, c C-26; *Companies Act, 1934*, SC 1934, c C-33; *The Companies Act Amending Act, 1935*, SC 1935, c C-55; *The Statute Law Amendment (Newfoundland) Act*, SC 1949, c C-6, s 31; *The Regulations Act*, SC 1950, c C-50; *Companies Act*, RSC 1952, c 53.
[56] *Canada Corporations Act*, SC 1964-65, c C-52.
[57] Canada, Department of Consumer and Corporate Affairs, *Detailed Background Papers for the Canada Business Corporations Bill* (1974) at 5 [1974 Background Paper].
[58] *Ibid*.
[59] *Ibid*.
[60] Also known as the "Dickerson Report".
[61] 1974 Background Paper, *supra* note 57 at 5.

and comments received, Parliament prepared the *Canada Business Corporations Bill*[62] with the intention of abrogating the *Canada Corporations Act* and replacing it with the *Canada Business Corporations Act*. Parliament was successful in this endeavor and the *Canada Business Corporations Act* came into force on December 15th, 1975.[63] Specifically, the *CBCA* sets out the rules for incorporation, the organization of a corporation, and the control and direction of a corporation.[64] Unlike its predecessor, the *CBCA* provides the judiciary a great deal of deferential power. Twenty-four sections of the *CBCA* allow the court to make "any order it thinks fit" when an application under one of these sections is brought before the court.[65]

Originally the *CBCA* only contained twenty-three sections allowing the court to make "any order it thinks fit". Section 192 plans of arrangement were consciously omitted from the *CBCA* as they were considered "superfluous."[66] Plans of arrangement provisions in federal corporate law (now *CBCA* section 192) originated in the *Companies Act Amending Act*[67] which was enacted in 1923.[68] The *Companies Act Amending Act* added section 112A to the *Companies Act*. This was an arrangement and compromise provision "designed to permit corporations to modify their share capital."[69] When developing the *CBCA*, Parliament assumed a corporation could effect changes by "invoking the discrete fundamental change institutions […] set out in part XIV."[70] In reality,

[62] Bill C-213, *Canada Business Corporations Bill*, 1st Sess, 29th Parl, 1973 (defeated); Bill C-29, *Canada Business Corporations Bill*, 1st Sess, 30th Parl, 1974 (as passed by the House of Commons 24 March 1975).
[63] Canada, Department of Consumer and Corporate Affairs, *Detailed Background Paper for an Act to Amend the Canada Business Corporations Act* (1977) at 5 [1977 Background Paper].
[64] Fasken, *Canada Business Corporations Act & Commentary*, 2018/2019 ed (Toronto: LexisNexis Canada, 2018) at 129.
[65] See *CBCA*, *supra* note 1, ss 14(3), 83(4), 100, 113(2), 188(5)(c), 137(8), 137(9), 145(2), 154(1), 157(3), 165(5), 192(4), 206(18), 211(8), 213(3), 214(2), 217, 230(1), 240, 241(3), 243(3), 244, 246, 247.
[66] 1977 Background Paper, *supra* note 63 at 5.
[67] *Companies Act Amending Act, 1923*, SC 1923, c. 39.
[68] *Re BCE Inc.*, 2008 SCC 69 at para 123 [*BCE*].
[69] *Ibid*.
[70] 1977 Background Paper, *supra* note 63 at 7.

corporations could only use the *CBCA* reorganization provisions in conjunction with an application under another act such as the *Companies Creditors Arrangement Act*[71] which at that time was dead letter law.[72] As the *CBCA* was a brand new Act, Parliament anticipated that issues may arise and instructed the Department of Consumer and Corporate Affairs to provide Parliament with any complaints that were received in order for Parliament to propose amendments which would remedy any issues.[73] From these complaints, Parliament realized an arrangement provision was not superfluous and introduced Bill S-5 to amend the *CBCA* and include an arrangement provision, section 185.1, which would later become the present section 192. When introducing Bill S-5 to the House of Commons on December 8, 1978, the Minister of Corporate and Consumer affairs discussed the concern that an arrangement provision could be used to squeeze out or freeze out minority shareholders. Thus, to ensure maximum protection of minority shareholders, drafters of Bill S-5 gave broad powers to the court to consider and approve arrangements.[74] The Minister of Corporate and Consumer affairs acknowledged an "arrangement provision entails some risks, [but] consonant with the over-all development of the act, the government recommends that it be included in the statute to fulfil a demonstrated need."[75] During the debate, Members of Parliament did not oppose the provision nor did they express any concerns about how much power Parliament was giving the courts.[76] Bill S-5 was passed and section 185.1 was added to the *CBCA* in 1978. Specifically, arrangements were only available to solvent corporations as subsection 3 of section 185.1 stated corporations seeking an arrangement under section 185.1 must be solvent.[77] Yet, the

[71] *CCCA*, supra note 4.
[72] Alexis Teasdale, "Blurred Lines: The Sharpening of the Solvency Requirement and the Bounds of Judicial Power in Section 192 Arrangements under the Canada Business Corporations Act in Connacher" (2015) 11 Ann Rev Insolv L at 3 (WL Can).
[73] "Bill S-5, Measure to amend the Canada Business Corporations Act", *House of Commons Debates*, 30-4, No 2 (11 December 1978) at 1986 (Hon William Allmand).
[74] *Ibid*.
[75] *Ibid.*
[76] *Ibid*, at 1986-88.
[77] *CBCA*, *supra* note 1, s 185.1(3) per the definition found in s 185.1(2) as it appeared in 1978.

reason why section 192 was only made available to solvent corporations is not set out in the materials published by the government of Canada or discussed by the Members of Parliament when they passed Bill S-5. As such, why the solvency limitation was incorporated in the first place remains unclear. Perhaps it was to avoid overlap with insolvency regimes already in place such as the *CCAA*. Alternatively, it could have been awareness that section 192 lacks the explicit creditor protection mechanisms found in the other insolvency regimes. In any event, the fact that there is no reason given for the solvency requirement means the courts, when conducting a statutory interpretive analysis of the provision, have not been able to consider the limitation's original purpose. This has widespread effects on how section 192 develops and leads to unique recursive cycles. The lack of Parliamentary intention leads the development to occur between the quasi-formal law and the law in practice as legal actors, namely the Director and the courts, are left to interpret the provision without guidance. Endogeneity of law cycles develop as the commercial imperative and results-oriented nature of corporate restructuring practice leads insolvency practitioners to push for innovative interpretations.

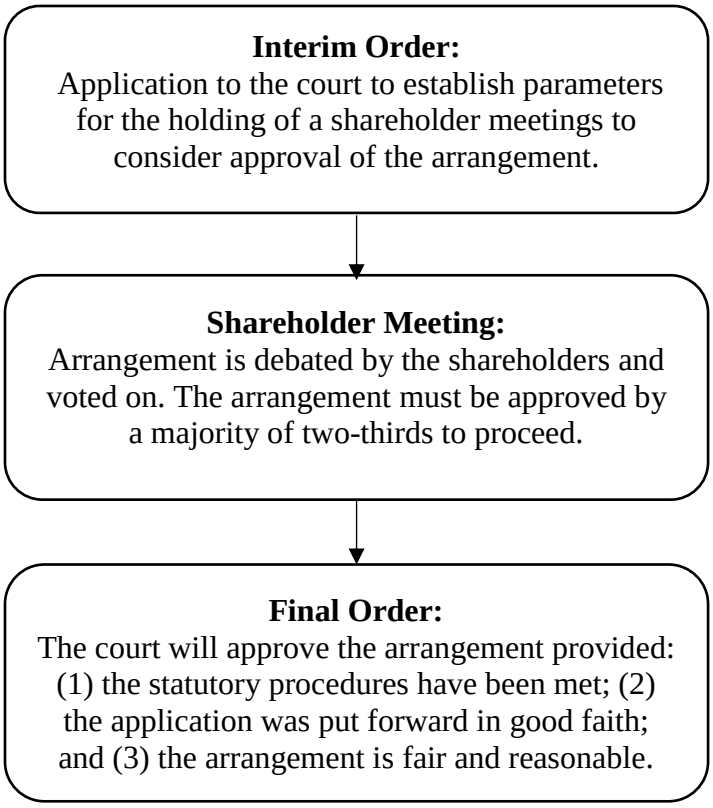
In 1985, section 185.1 was renumbered as section 192 with the wording of the provision remaining the same.[78]

[78] *Canada Business Corporations Act*, RS, 1985, c C-44, s 192.

B. Process for a Section 192 Arrangement

This thesis focuses on how changes in the interpretation of section 192 allowed the provision to be used by insolvent corporations and created a new process for insolvent section 192 arrangements. Therefore, a brief overview[79] of the base process set out in section 192 for an arrangement is found at **Figure 1** and following.

Figure 1: Process for a Section 192 Arrangement



The process begins with the applicant(s) preparing an Information Circular. The Information Circular must provide an outline detailing the terms of the plan of arrangement. The Information Circular most often contains input from the security holder(s) and is reviewed by the

[79] This summary draws from the analysis of Peter Rubin, "Arrangement Provisions of the Canada Business Corporations Act" (16 November 2010), online: *Blakes Bulletin* <www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1241> [perma.cc/ /4BGP-U5V9].

Director of Corporations Canada before it is filed. The applicant(s) then file a notice of application for an interim hearing and accompanying interim order. The interim order is the first of the three-step process for obtaining Court approval of the arrangement.[80] "The application for an interim order usually proceeds ex parte … due to the administrative burden of notifying all shareholders of the application."[81] At the interim hearing, all relevant information must be provided to the court including background facts, details of the plan of arrangement, the Information Circular and, the corporation stakeholder information. The purpose of the interim hearing is "to set the wheels in motion for the application process relating to the arrangement and to establish the parameters for the holding of shareholder meetings to consider approval of the arrangement in accordance with the statute."[82] Thus, the interim court order permits the applicant to call and hold a meeting of its shareholders.[83] "The second step is the meeting of the shareholders, where the arrangement is debated and must be approved by a majority of two-thirds to proceed further. The third step is a further application to the Court under the Act for a final order approving the arrangement. This is referred to as the fairness hearing, and all interested parties receive notice and may appear to contest the final order on the basis of its substantive fairness."[84]

At either the interim or final order hearing, the onus is on the applicant(s) seeking approval of an arrangement to establish: "(1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable."[85]

(1) Statutory Requirements: The *CBCA* requires the Applicant to establish four requirements:

[80] *Pacifica Papers Inc. v Johnstone*, 2001 BCCA 486 at para 4 [*Pacifica*].
[81] *Ibid*, at para 36.
[82] *8440522 Canada Inc. (Re)*, 2013 ONSC 2509 at para 40 [*Mobilicity*].
[83] *Pacifica*, *supra* note 80 at para 4.
[84] *Pacifica*, *supra* note 80 at para 36.
[85] *BCE*, *supra* note 68 para 137.

A. The proposed arrangement constitutes an "arrangement" as defined under subsection 192(1) of the *CBCA*.[86]

The Policy on arrangements – Canada Business Corporations Act, section 192[87] ("*2014 Policy*"), published by the Director of Corporations Canada, discusses what constitutes an arrangement under section 192(1) in paragraph 2.07. Specifically, "the term "arrangement" is not exhaustively defined in subsection 192(1) of the Act and … the use of the arrangement provisions of the Act is not necessarily limited to arrangement transactions involving one or more of the types of transactions provided for under other provisions of Part XV – "Fundamental Changes" of the Act."[88]

B. The applicant is not "insolvent" as defined in subsections 192(2) (a) and (b) of the *CBCA*.[89]

Section 192(3) states "a corporation that is not insolvent … may apply to a court for an order approving an arrangement proposed by the corporation".[90] Section 192(2) defines a corporation as insolvent for the purpose of section 192 as "(a) where it is unable to pay its liabilities as they become due; or (b) where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes."[91] Together, these subsections form the 'solvency requirement' of section 192. Below, this thesis discusses how an in-depth statutory interpretation analysis of section 192 undertaken by the court dispelled the plain reading interpretation that the solvency requirement prohibits insolvent arrangements. This in-depth interpretation of section 192

[86] *Mobilicity*, *supra* note 82 at para 49.
[87] Industry Canada, *Policy on arrangements – Canada Business Corporations Act, section 192*, (Ottawa: 8 January 2014), online: *Government of Canada* <www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01073.html> [perma.cc/WTQ3-25L4] [*2014 Policy*].
[88] *Ibid*, s 2.07.
[89] *Mobilicity*, *supra* note 82 at para 49.
[90] *CBCA*, *supra* note 1, s 192(3).
[91] *CBCA*, *supra* note 1, s 192(2).

resulted in section 192 becoming an important part of Canada's corporate insolvency regime.

C. It is not "practicable" for the applicant to effect a fundamental change in the nature of the proposed plan of arrangement under any other provision of the CBCA.[92]

The impracticality requirement of section 192(3) is interpreted in 2.06 of the *2014 Policy*.[93] 2.06 directs there must "be a proposed fundamental change in the nature of an arrangement to the applicant in order to proceed under section 192[(1)]."[94] However, "[t]he impracticability requirement means something less than "impossible".[95] This means the requirement is satisfied if the applicant can demonstrate "that it would be inconvenient or less advantageous to the corporation to proceed under other provisions of the Act."[96]

D. The applicant gave notice of the application to the Director appointed under section 260 of the CBCA (the "Director").[97]

To satisfy, section 192(5), the *2014 Policy* advises at least five days notice should be given to the Director of Corporations Canada prior to both the interim and final hearings. Notice should be accompanied with affidavits and supporting materials, a non-exhaustive list of which can be found at 3.03 of the *2014 Policy*.[98]

(2) Good Faith

While each plan of arrangement is different, proposed plans which "further a valid business purpose, namely the continuity of the business of [the applicants] and thereby the preservation of

[92] *Mobilicity*, *supra* note 82 at para 49.
[93] *2014 Policy*, *supra* note 87, s 2.06.
[94] *Ibid*.
[95] *Ibid*.
[96] *Ibid*.
[97] *Mobilicity*, *supra* note 82 at para 49.
[98] *2014 Policy*, *supra* note 87, ss 3.03, 3.04.

the jobs of its employees and the continuation of existing relationships with suppliers and subscribers"[99], will generally satisfy the good faith requirement.

(3) Fair and Reasonable

This requirement was first set out in *Re Canadian Pacific Ltd.* (1990).[100] In that case, the court reviewed the jurisprudence on corporate restructurings, back to 1891, in order to identify any additional Common Law rules pertaining to corporate restructuring. From this review the Court held that "[a]lthough s. 192 provides no standard, the jurisprudence has established that for an arrangement to get Court approval, it must not only be not oppressive, but also must be fair and reasonable."[101] Interestingly, the fair and reasonable requirement is also a requirement for restructurings under the *CCAA*. The test for the section 192 fair and reasonable requirement was set out by the Supreme Court of Canada in *Re BCE Inc.*[102] (2008):

> The reviewing court must be satisfied in determining whether the proposed arrangement is fair and reasonable by applying a two-prong test, namely, that (1) the arrangement has a valid business purpose, and (2) the objections of those security holders whose legal rights are affected are being resolved in a fair and balanced way.[103]

Thus, it is important that any corporation, solvent or insolvent, proposing an arrangement under section 192 be able to satisfy the court that: "(1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable."[104]

[99] *Mobilicity*, supra note 82 at para 48.
[100] *Canadian Pacific Ltd. (Re)* (1990), 73 OR (2d) 212, 70 DLR (4th) 349.
[101] *Ibid* at 35.
[102] *BCE*, *supra* note 68.
[103] *Ibid* at para 138.
[104] *Ibid* at para 137.

III. CYCLE 1 (1982-2008) – INTERPRETING THE SOLVENCY REQUIREMENT OF SECTION 192

Section 192 suggests a *prima facie* statutory restriction on the use of the provision by insolvent corporations. The definition of "insolvent" is found in subsection 192(2) and subsection 192(3) states "a corporation that is not insolvent … may apply to a court for an order approving an arrangement proposed by the corporation".[105] This thesis explores how this single provision of the *CBCA*, section 192, came to be interpreted and applied by the courts as a mechanism routinely used by insolvent corporations to restructure. By applying the recursivity of law methodology, to analyze the evolution of the interpretation of the section 192 solvency requirement, two clear recursive cycles can be identified. The first spans from 1982 to 2008 where the initial interpretations of section 192 emerge. The second recursive cycle spans between 2009 and 2018 and is where these interpretations are refined. As the interpretation of the solvency requirement occurred on a case-by-case basis, cases are sorted in a linear order and divided into their appropriate cycle throughout this thesis. Heavily influencing the interpretation of the solvency requirement adopted by cases in both recursive cycles is the *Policy of the Director Concerning Arrangements Under Section 192 of the Canada Business Corporations Act*[106]. Collectively, revisions of the policy will hereinafter be referred to as "*The Policy*". As such, each revision of *The Policy* is included in with the caselaw timeline. **Figure 2** is a list of *The Policy* revisions and cases integral to the development of the solvency requirement interpretation within in the first recursive cycle.

[105] *CBCA*, *supra* note 1, s 192(3).
[106] Renamed in 2014: *The Policy on arrangements – Canada Business Corporations Act, section 192*, *supra* note 87.

Figure 2: Cycle 1 Overview

Cases and Policies	Province/Court	Year
Bell Canada Inc. v Canada (Director, Business Corporations Act)[107]	Quebec (SC)	1982
Re Computel Systems Ltd.[108]	Ontario (SC)	1982
Savage v Amoco Acquisition Company Ltd.[109]	Alberta (CA)	1988
Policy of the Director Concerning Arrangements Under Section 192 of the CBCA[110]		1994
Trizec Corp., (Re)[111]	Alberta (SC)	1994
Policy of the Director Concerning Arrangements Under Section 192 of the CBCA[112]		1998
St. Lawrence & Hudson Railway Co., Re[113]	Ontario (SC)	1998
Proposed Plan of Arrangement of Call-Net Enterprises et al.[114]	Ontario (SC)	2002
Policy of the Director Concerning Arrangements Under Section 192 of the CBCA[115]		2003
Cinar Corp. v. Shareholders of Cinar Corp.[116]	Quebec (SC)	2004
Stelco Inc., Re[117]	Ontario (SC)	2006
Proposed Plan of Arrangement of Tembec Industries Inc. et al.[118]	Ontario (SC)	2008
Proposed Arrangement Involving Ainsworth Lumber Co. Ltd. et al[119]	British Columbia (SC)	2008
Re BCE Inc.[120]	Supreme Court of Canada	2008

Initially, the court only needed to utilize a plain meaning interpretation of the solvency requirement as corporations seeking section 192 arrangements were solvent. As such, the court simply needed to mention the corporation was solvent in its decision and focus on the disputed issues in the arrangement. For instance, in *Bell Canada Inc. v. Canada (Director, Business*

[107] *Bell Canada Inc. v Canada (Director, Business Corporations Act)*, 1982 Carswell-Que 359 (WL Can), 69 CPR (2d) 188 [*Bell*].
[108] *Re Computel Systems Ltd* (30 April 1982), unreported (Ont SC) unreported [*Computel Systems*].
[109] *Savage v Amoco Acquisition Company Ltd.* (1988), 87 AR 321, 59 Alta LR (2d) 260 [*Amoco*]; leave to appeal to SCC refused *Savage v Amoco Acquisition Company Ltd.* (1988), 89 AR 80n, 60 Alta LR (2d) lv [*Amoco SCC*].
[110] Industry Canada, *Policy of the Director Concerning Arrangements Under Section 192 of the Canada Business Corporations Act*, (Ottawa: 28 September 1994) [*1994 Policy*].
[111] *Trizec Corp (Re)*, [1994] 10 WWR 127, 158 AR 33 [*Trizec*].
[112] Industry Canada, *Policy of the Director Concerning Arrangements Under Section 192 of the Canada Business Corporations Act*, (Ottawa: 17 April 1998) [*1998 Policy*].
[113] *St. Lawrence & Hudson Railway Co., Re*, 1998 CarswellOnt 3867 (WL Can), 82 ACWS (3d) 895 [*St. Lawrence*].
[114] *In the Matter of a Proposed Plan of Arrangement Respecting Call-Net Arrangeco Inc. and Call-Net Enterprises Inc.* (20 February 2002), No. 02-CL-4423 (Ont SC) [*Call-Net*].
[115] Industry Canada, *Policy of the Director Concerning Arrangements Under Section 192 of the Canada Business Corporations Act*, (Ottawa: 7 November 2003) [*2003 Policy*].
[116] *Cinar Corp. v Shareholders of Cinar Corp.*, 2004 CarswellQue 3250 (WL Can), 4 CBR (5th) 163 [*Cinar*].
[117] *Stelco Inc., Re*, 2006 CarswellOnt 863 (WL Can), 18 CBR (5th) 173 [*Stelco*].
[118] *In the Matter of a Proposed Plan of Arrangement of Tembec Arrangement Inc., Tembec Industries Inc. and Tembec Enterprises Inc.*, (27 February 2008), No. 08-CL-7367 (Ont SC) [*Tembec*].
[119] *In the Matter of a Proposed Arrangement Involving Ainsworth Lumber Co. Ltd. et al* (June 20, 2008), Vancouver No. S-084425 (BC SC) [*Ainsworth*]
[120] *BCE*, supra note 68.

Corporations Act)[121] the court stated "[T]he court must assure itself that … the corporation is not insolvent within the meaning of s. [192] … It is established and not contested that the petitioner is not insolvent within the meaning of s. [192(2)]"[122]. Soon after this decision, legal actors, specifically, insolvency practitioners, began bringing insolvent section 192 arrangements before the court. Insolvent section 192 arrangements were likely brought before the courts, prompting a statutory interpretive analysis of the provision, for two reason: the first is the legal actors involved in corporate restructuring; and the second is the scope and power section 192 provides to the court.

As insolvent corporate restructuring is a results-oriented and commercially imperative process, the legal actors involved, i.e. insolvency practitioners are more inclined to push the envelope. This includes searching for new ways to restructure their struggling clients which would result in the corporation emerging from insolvency in the best position possible. As such, when insolvency practitioners noticed the potential of section 192, they began to attempt to persuade the court to conduct a thorough analysis of section 192 and conclude it can be used by insolvent corporations.[123] The push by insolvency practitioners for this interpretation lead to the endogeneity of law recursive cycles of section 192 as the cycles are driven by their attempts to alter the law.

The scope and power granted to the court by section 192 is why insolvency practitioners push the court to adopt an innovative interpretation of section 192, allowing for insolvent restructuring. A great deal of deferential power is granted to the court under subsection 192(4) which states, "in connection with an application under this section, the court may make any interim or final order it thinks fit".[124] Practitioners hoped the court could be persuaded to utilize its

[121] *Bell*, *supra* note 107 at paras 12, 13.
[122] *Ibid* at para 12.
[123] See e.g. the discussion in Simon Scott, Timothy Buckley & Andrew Harrison, "THE ARRANGEMENT PROCEDURE UNDER SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT AND THE REORGANIZATION OF DOME PETROLEUM LIMITED" (1990) 16 CBLJ 296 (WL Can).
[124] *CBCA*, *supra* note 1, s 192(4).

authority under 192(4) to make an order which ignores the solvency requirement of 192(3). Additionally, while twenty-four sections of the *CBCA* allow the court to "may make any order it thinks fit", section 192 is unique in scope as it can be used to conduct a variety of arrangements which fundamentally change the structure of a corporation. Other provisions with the deferential clause typically relate to orders which will have minor effects on a corporation such as an order "to omit the proposal from the management proxy circular."[125] The broad scope of section 192, is appealing to insolvent corporations as it provides the flexibility they need to restructure without the stigma associated with restructuring under the *CCAA* or the *BIA*. Specifically, section 192 is particularly appealing to insolvent corporations which have devised a plan[126] to complete a "balance sheet restructuring" which will return them to a solvent state.[127] These corporations understand that they will not be able to pay their debts as they come due, which is the definition of insolvency under 192(2), but have identified a means to return to solvency via an arrangement. A restructuring under an insolvency statute is reported to the Office of the Superintendent of Bankruptcy Canada which maintains a public record of *BIA* and *CCAA* filings.[128] These corporations want to avoid the stigma associated with a restructuring under the *CCAA* or *BIA*[129] as after the arrangement is concluded they do not want the availability of credit to be affected.[130]

[125] *CBCA*, *supra* note 1, s 137(9).
[126] Or as seen in recent cases, are in the process of devising a plan.
[127] Sean Zweig & Preet Bell, "The Expanded Use of the CBCA in Debt Restructurings" (2018) 27 Ann Rev Insolv L at 1191.
[128] Innovation, Science and Economic Development Canada, "About the OSB" (12 October 2018), online: *Office of the Superintendent of Bankruptcy Canada* <www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br01852.html> [perma.cc/CUN4-5A8X].
[129] Zweig & Bell, *supra* note 127 at 1192; Mitch Grossel, "The Clash Between Corporate and Insolvency Law: CBCA Restructurings" IIC-ART Vol 5-7 at 3 (WL Can); Canadian Association of Insolvency and Restructuring Professionals (CAIRP), "Comments on the Public Consultations on the Canada Business Corporations Act", Comment, (2014), online (pdf): CAIRP <cairp.ca/media/43808/3-file_Comments_on_the_Public_Consultations_on_the_CBCA_May_2014.pdf > [perma.cc/H4CY-H8LT].
[130] Grossel, *supra* note 129 at 3.

Additionally, management of these corporations would like to ensure operations are not disrupted. Insolvent section 192 arrangements began being brought before the court at a time when the appointment of a monitor was starting to become a part of the *CCAA* restructuring process.[131] The monitor's role is to supervise management remaining in control of the company and assess the impact of the arrangement on creditor.[132] Management views the appointment of a monitor and corresponding oversight as resulting in the loss some of the flexibility management has to operate the company as they see fit.[133] "Without a monitor management has full control of the planning, negotiation, and timing of the arrangement and is only subject to the interim and final orders of the court."[134] It is also the duty of the corporation undergoing restructuring to pay for the monitor.[135] Loss of flexibility in operations and having to pay for the professional fees associated with a monitor, led insolvency practitioners to attempt to utilize section 192 as an alternative means for insolvent restructuring.

When legal actors brought section 192 applications for the arrangement of insolvent corporations, for the above reasons, courts had the opportunity to exercise the judicial power of statutory interpretation. It is after the court undertakes a thorough analysis of section 192, utilizing the principles of statutory interpretation, that it is evident that this is indeed a special recursive cycle involving endogeneity of law. The law arising from the interpretation of section 192 no longer has the plain reading meaning found in earlier cases but is instead another kind of "law".[136] The emerging law is argued for by insolvency practitioners in response to "market and state

[131] See generally Peter Farkas, "Defining (and refining) the role of the monitor" (2010) 72 CBR 159; David Mann and Neil Narfason, "The Changing Role of the Monitor" (2008) IIC-ART 2008-8 (WL Can).
[132] CAIRP, *supra* note 129 at 11.
[133] Grossel, *supra* note 129 at 3.
[134] *Ibid*.
[135] CAIRP, *supra* note 129 at 12.
[136] Halliday & Carruthers 2007, *supra* note 8 at 1144.

prescriptions" and accepted by the court.[137] Legalistic reform in a recursive cycle involving endogeneity of law occurs through the technical advances negotiated by lawyers and judges rather than through official legislative reform.[138] This phenomenon can first be seen in the court's interpretation of the solvency requirement in the cases of *Re Computel Systems Ltd.*[139] and *Savage v Amoco Acquisition Company Ltd.*[140]. These cases are where insolvency practitioners first persuade the court to allow insolvent corporations to restructure under section 192, marking the start of the first recursive cycle.

A. Inaugural Decisions Allowing Insolvent Restructuring Under Section 192

In the unreported decision of *Re Computel Systems Ltd.*[141] ("*Computel Systems*"), the court approved the restructuring of a corporation which, by all accounts, was insolvent at the time of the interim order. Computel Systems Ltd. ("Computel") applied for an arrangement under section 192, for a merger of Computel and CSG Canada Limited.[142] Computel's shareholders realized the value of Computel's assets was less than the total value of its liabilities, meaning Computel met the definition of insolvent under section 192(2).[143] To remedy this, Computel's shareholders reduced "its stated capital by special resolution so that it could satisfy the net assets solvency test in section 192(2)(b) before the date that the court was asked to make the approval order."[144] As Computel's shareholders were able to ensure Computel was solvent by the time of the final order, the court

[137] *Ibid*.
[138] *Ibid* at 1144 - 1145.
[139] *Computel Systems*, *supra* note 108.
[140] *Amoco*, *supra* note 109.
[141] *Computel Systems*, *supra* note 109.
[142] Scott, Buckley & Harrison, *supra* note 123 at 6.
[143] *Ibid*.
[144] Hilary Clarke & Wayne Gray, "Arrangements and Reorganizations of Insolvent Companies Under the CBCA and Provincial/Territorial Corporate Law" (2013) 29 BFLR 1 at 13 (WL Can).

was satisfied that the solvency requirement of section 192 was satisfied.[145] As *Computel Systems* is an unreported decision, the proposition that the applicant only needs to be solvent for the final order is "adduced from the fact that the arrangement was approved even though affidavit evidence filed with the court demonstrated that prior to the fairness hearing, the applicant, Computel, was clearly insolvent."[146] This interpretation of the solvency requirement, developed in *Computel Systems*, was not considered again until 1994. In the interim, the court developed a second interpretation of the solvency requirement.

In 1988, the Alberta Court of Appeal ruled on *Savage v Amoco Acquisition Company Ltd.*[147] ("*Amoco*"). (While decided in 1988, the initial application for arrangement was made prior to the renumbering of section 185.1 as section 192 thus, in the decision the court still refers to section 185.1.) This case involved an arrangement for the restructuring of Dome Petroleum Limited ("DPL") which was insolvent.[148] Amoco Canada Petroleum Co. Ltd. ("ACP") proposed to acquire all of the outstanding equity of DPL, including the interests of various creditors DPL and its subsidiaries.[149] This involved several billions of dollars worth of secured debts, trade debts and all of the DPL's outstanding shares.[150] To make this acquisition, ACP created the subsidiary Amoco Acquisition, which was to merge with DPL by way of arrangement under section 192 of the *CBCA*.[151] Amoco Acquisition was to be the solvent applicant for the section 192 application.[152]

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[145] Derrik Tay, "Use of Corporate Legislation in Reorganizations: The Triumph of Substance Over Form" (1994) IIC-ART 1994-1 at 6 (WL Can); Marc-André Morin, "CBCA Plans of Arrangement and Insolvent Corporations" (2014) IIC-ART Vol 3-6 at 3 (WL Can); Scott, Buckley & Harrison, *supra* note 123 at 6; Clarke & Gray, *supra* note 144 at 13.
[146] Tay, *supra* note 145 at 6.
[147] *Amoco*, *supra* note 109.
[148] Scott, Buckley & Harrison, *supra* note 123 at 6.
[149] *Ibid* at 7.
[150] Morin, *supra* note 145 at 2.
[151] Scott, Buckley & Harrison, *supra* note 123 at 7.
[152] Morin, *supra* note 145 at 2.

After the merger with Amoco Acquisition, DPL would be a subsidiary of ACP with its debt alleviated.[153] Some shareholders of DPL opposed this arrangement as it forced them to exchange shares for debentures.[154] They appealed Justice Forsyth's decision that Amoco Acquisition was properly before the court as the section 192 applicant, arguing DPL's failure to meet the solvency requirement meant the proposed plan should not be accepted by the court. The Alberta Court of Appeal rejected this argument stating:

> So long as a proposal is not a sham, that section is available. This proposal has been found not to be a sham, and cogent evidence supports that. Similarly, we would not interpret subs. (3) of the section to limit the section to cases where none of the corporations involved is insolvent, which is the effect of the submission of the appellants. Dome may, indeed, be insolvent; but the applicant and others involved are not.[155]

From this passage, it is clear that the Alberta Court of Appeal undertook an in-depth review to determine the correct interpretation of section 192, utilizing the principles of statutory interpretation. While the court did not articulate its analysis, the principles of statutory interpretation can be utilized to understand how the court came to this decision.

Dreidger's approach dictates the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[156] Thus, the meaning of the solvency requirement of section 192 can be determined by analyzing the words in their immediate context and attempting to understand the reasons why the legislature has chosen this combination of words. A logical start to this process is applying Sullivan's assumptions of statutory interpretation to section 192. Parliament is assumed to have "drafting competence" such that it knows when it is appropriate to

[153] *Ibid.*
[154] *Ibid.*
[155] *Amoco*, *supra* note 109 at para 5.
[156] *Stubart*, *supra* note 27 at 578.

include definitions which aid in formulating the legislative scheme it is devising.[157] Thus, it can be assumed Parliament had a specific reason to include the definition of insolvency in section 192 such that it will provide guidance those interpreting and implementing section 192.[158] Applying the "Orderly Arrangement" assumption, the definition of insolvency must be related to the provision as a whole and contribute to ensuring the coherency of section 192.[159] Looking to section 192(3), the solvency requirement is found with the wording of "a corporation that is not insolvent … may apply to a court for an order approving an arrangement".[160] Applying the "Linguistic Competence"[161] assumption, it is assumed that every word in the provision was carefully chosen by Parliament and every word means exactly what it says. This means the words "not insolvent" were deliberately chosen by Parliament and are intended to be interpreted in a straightforward manner.[162] In their interpretation of the provision, a court cannot choose to ignore the words "not insolvent" as the assumption of "No Tautology"[163] prevents this. Parliament would not have included these specific words without intending them to have a specific meaning which contributes to the provision as a whole. Thus, the next step in the analysis is to apply Dreidger's approach to the words "not insolvent". Dreidger's approach specifically says "words of an Act are to be read in their entire context"[164]. Turning to the other words in section 192, it becomes clear that the harmonious interpretation of the provision is that only the applicant in a section 192 arrangement must be solvent:

> Paragraphs 192(1)(b), (c), (e), (f) and (h) expressly contemplate that more than one corporation may be involved in an arrangement. Section 192(3) makes it clear that only one corporation involved in the arrangement need apply for the order

[157] Sullivan 2016, *supra* note 31 at 41.
[158] *CBCA*, *supra* note 1, s 192(2).
[159] Sullivan 2016, *supra* note 31 at 42.
[160] *CBCA*, *supra* note 1, s 192(3).
[161] Sullivan 2016, *supra* note 31 at 40.
[162] *Ibid* at 42.
[163] *Ibid* at 43.
[164] *Stubart*, *supra* note 27 at 578.

> approving the arrangement, and that only the applicant corporation must be solvent. However, the section is silent with respect to the solvency of the other corporations or bodies corporate participating in and affected by the arrangement.
>
> Paragraph 192(4)(c) authorizes the court to require "**a** corporation" (emphasis added) to call, hold and conduct a meeting of holders of its securities. It does not refer to "the corporation" or "the applicant" as do other subsections of s. 192 which refer to the applicant. Thus, the section contemplates meetings of security holders of corporations other than the applicant that are affected by the proposed arrangement.
>
> Finally, para. 192(1)(c) includes within the definition of arrangement, an amalgamation of a "body corporate" with a "corporation". The definition of "body corporate" in the CBCA includes a body corporate wherever incorporated.
> Section 192(3), however, permits only a "corporation", which is a body corporate incorporated or continued under the CBCA, to apply for the order approving the arrangement.[165]

Taking into consideration the words section 192 in their "entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"[166], it becomes clear that Parliament only intended the applicant corporation to be not insolvent for the purpose of this section. Therefore, the correct interpretation of section 192 does not impose the requirement of solvency upon all corporations involved in the arrangement.

As this interpretation of section 192 satisfies both the assumptions of statutory interpretation and Dreidger's approach, it is reasonable to conclude that the Alberta Court of Appeal came to the same conclusion in *Amoco*. Having settled on this interpretation, the court then considered whether arrangement such as this one, alleviating the debt of an insolvent corporation, would be an acceptable type of arrangement under 192(1). It concluded that when considering if an arrangement is appropriate under section 192, "a court should look to the substance, not

[165] Scott, Buckley & Harrison, *supra* note 123 at 8.
[166] *Stubart*, *supra* note 27 at 578.

form"[167] of a proposed arrangement. In considering the arrangement proposed in *Amoco*, the court offered the following analysis:

> [T]he key to the case is this: this arrangement indeed involves what might be called an indirect takeover, but it is more than a mere offer to acquire shares; it involves amalgamation but is more than an amalgamation; it involves the compromise of debt but it is more than that. Its very complexity lifts it out of any of these categories. The category of "arrangement" we think exists primarily to deal with proposals that do not quite fit other categories. We are comforted in this view by the fact that the intervenant Director of Corporations for Canada agrees that this proposal is an arrangement within the scope of the section. To give the words of the section the narrow interpretations suggested would defeat that purpose.[168]

This analysis sets the precedent that complex arrangements which result in the compromise of debt of a corporation can be brought before the court under section 192. An important aspect which led the court to come to this conclusion was the fact that the Director, who under subsection 192(5) has the power to appear and oppose arrangements which are against Parliament's intended use of section 192, agreed this type of arrangement falls within the scope of this section.

Unlike the Ontario Superior Court's ruling in *Computel Systems*, which focused solely on the appropriate time for when the court should ensure a corporation is solvent, the Alberta Court of Appeal conducted a complete statutory interpretation analysis of section 192 and determined that the correct interpretation of section 192 is arrangements are available to insolvent corporations provided the applicant corporation is solvent. Additionally, the court broadly interpreted the meaning of arrangement under section 192(1) and determined complex arrangements which result in the compromise of debt of a corporation can be brought before the court under section 192. Based on this analysis, the court approved the arrangement proposed in *Amoco*. The court's interpretation of the solvency requirement changed the law in practice while the formal law remained the same stating section 192 is only available to corporations which are "not insolvent".

[167] *Amoco*, *supra* note 109 at para 5.
[168] *Ibid.*

Interestingly, it was the nature of insolvent corporate restructuring and the broad scope of section 192 which likely led legal actors to bring these two inaugural cases before the court. The result-driven nature of corporate restructuring combined with the efforts by counsel to have the courts read limitations into the solvency requirement, led to the courts' reasoning being driven by perceived commercial imperatives. As such, the starting point of the first recursive cycle is the law in practice being negotiated by lawyers and judges rather than through official legislative reform, a hallmark of endogeneity of law. Without these factors, the court may never have had the chance to conduct a statutory analysis of section 192 and conclude the solvency requirement of section 192 is satisfied when an insolvent applicant is solvent by the time of the final order or if the applicant in the proposed arrangement is solvent.

B. Developing Interpretations of the Solvency Requirement

The theory of recursivity is the law in practice and the formal law are locked in a "dynamic tension"[169] thus, the changes to the law in practice seen in *Computel Systems* and *Amoco* would elicit a formal law response. Unique to section 192 is the fact that the response to these changes came in the form of quasi-formal law. Section 192 has a built-in safe guard, section 192(5) which provides the Director the power to appear and oppose arrangements which are against Parliament's intended use of section 192.[170] The Director indicated early on that it agreed with the court's interpretation when it intervened in *Amoco* and agreed the proposed arrangement fell within the scope of section 192.[171] However, the Director also used its power under the formal law to release a policy document in response to the changes to the law in practice. First, the Director "published

[169] Halliday & Carruthers 2007, *supra* note 8 at 1146.
[170] See e.g. the Director's opposition in *Yellow Media Inc. (Arrangement relatif à)*, 2012 QCCS 4180.
[171] *Amoco*, *supra* note 109 at para 5.

a draft policy setting out her position concerning the administration of the Canada Business Corporations Act as it applies to [section 192] 'arrangement' transactions."[172] The draft policy was published in the June 1994 Issue of the Ontario Security Securities Commission Bulletin with comments due by July 29, 1994.[173] Specifically, the policy outlined the "permissible use of and appropriate procedural safeguards and substantive requirements applicable to arrangements under section 192 of the [*CBCA*]."[174] After reviewing the comments and making a few minor changes, the Director published the *Policy of the Director Concerning Arrangements Under Section 192 of the Canada Business Corporations Act* ("*1994 Policy*") on September 28, 1994. While the *1994 Policy* is not law, its guidelines are extremely important for any corporation, including an insolvent one. Specifically, Section 1.03 states:

> While such policy and practice guidelines do not have the force of law, the Director believes that the policies and practices outlined represent appropriate conduct on the part of corporations proposing to enter into arrangement transactions. … The Director may appear before the court pursuant to section 192(5) of the Act to oppose the proposed arrangement at an interim or final court hearing if she believes that departures from the following guidelines are not warranted in the particular case.[175]

In terms of recursivity, the *1994 Policy* is not formal law, rather it is quasi-formal law as The Director was willing to use its power under 192(5), the formal law, to oppose any arrangements that did not follow the guidelines laid out in the policy. A brief overview of these guidelines is as follows:

Chapter 2 of the *1994 Policy* lays out the procedural guidelines for corporations to follow when conducting arrangements. This includes the need for, and requirements of, an information

[172] Ontario Securities Commission, Press Release, 17 OSCB 2629, "Canada Business Corporations Act - Draft Policy of the Director as to Arrangement Transactions" (3 June 1994) WL Can [*Draft Policy*].
[173] *Ibid.*
[174] *Draft Policy*, *supra* note 172, s 1.01.
[175] *1994 Policy*, *supra* note 110, s 1.03.

circular, notice to the Director, voting requirements, an interim order, and a final order. Chapter 3 discusses and adds to the fairness requirement set out in *Re Canadian Pacific Ltd.* (1990).[176]

Chapter 4 of the *1994 Policy* sets out the scope of permissible use of section 192. While section 192 arrangements can only be conducted if the applicant is a corporation, a variety of arrangements are available to corporations as section 192 is intended to be "facilitative".[177] While facilitative, section 192 is subject to the limitations laid out in the *1994 Policy* at 4.02:

> These include the requirements that (a) the applicant must not be insolvent (as defined in subsection 192(2) of the Act), (b) any exchange of securities must not constitute a take-over bid as defined in section 194 of the Act, (c) that it not be practicable for the corporation to carry out the arrangement under any other provision of the Act, and (d) the arrangement provisions of the Act may only be utilized by a corporation to effect a fundamental change in the nature of the arrangement.[178]

While the *1994 Policy* goes on to discuss each of these limitations, this thesis will focus on the interpretation(s) of the solvency requirement that the Director accepts. Section 4.03 states the "applicant corporation must not be insolvent within the meaning of subsection 192(2) of the Act."[179] However, the Director is aware of at least two cases where "the arrangement provisions of the Act have been utilized in circumstances where, despite technical compliance, the total business enterprise affected by the arrangement was not solvent."[180] The Director goes on to discuss how the court interpreted the solvency requirement in in *Computel Systems* and *Amoco*. The Director does not state that the solvency requirement was incorrectly interpreted in these cases. Instead, the Director says it may intervene if the solvency limitation is not complied with, but "it is ultimately a matter for the relevant court to determine compliance with the solvency limitation

[176] *Re Canadian Pacific Ltd., supra* note 100.
[177] *1994 Policy, supra* note 110, ss 4.01, 4.02.
[178] *1994 Policy, supra* note 110, s 4.02.
[179] *Ibid*, s 4.03.
[180] *Ibid*.

in the Act."[181] Thus, it would appear the Director is satisfied with the interpretation of solvency requirement found in both *Computel Systems* and Amoco. After the *1994 Policy* was published, there were two possible interpretations an insolvent corporation could reply upon to satisfy the solvency requirement of section 192:

1**.** *Computel Interpretation*

This approach finds its origin in *Computel Systems*. The solvency requirement is met where "the applicant corporation, while insolvent at the interim hearing date"[182] is solvent at the date of the final order. In the case of *Computel Systems*, the court was satisfied the solvency requirement was met when the insolvent corporation made a special resolution reduce its stated capital and be solvent "prior to the date the court was asked to grant final approval of the arrangement."[183] From this interpretation, the test for a solo insolvent applicant emerges: Will the sole applicant be solvent at the final order?

2. *Amoco Interpretation*

This approach finds its origin in *Amoco* where the "applicant corporation was solvent but one of the principal corporate entities involved in the overall arrangement transaction was not solvent."[184] Thus, the second basis which satisfies the solvency requirement is where the applicant for the section 192 arrangement is solvent however, other corporate entities involved in the arrangement are not required to be. From this interpretation, the test for insolvent non-applicants emerges: Is the applicant solvent?

[181] *Ibid*, s 4.04.
[182] *Ibid*, s 4.03.
[183] *1994 Policy*, *supra* note 110, s 4.03.
[184] *Ibid*.

These solvency requirements provided by the *1994 Policy* are ground-breaking as they reflect the acceptance of the change by the profession and of the institutions governing the formal law. Advancements made in the interpretation of section 192 on a case-by-case basis for the law in practice have been endorsed by the Director. While the *CBCA* itself has not been modified, the guidelines in the *1994 Policy* have the backing of the *CBCA*. The *1994 Policy* gives clear direction as to the scope of the solvency requirement, adopting the decisions made in the case law.

Another important aspect in the development of section 192 is the influence of the Supreme Court of Canada. While not technically a safeguard, as it requires an issue to be appealed to it, the Supreme Court has the power to function as one as it has the ability to overrule the lower court's interpretation of section 192 and impose whatever interpretation it devised. If the Supreme Court decided that the plain reading interpretation of the solvency requirement should be strictly enforced, it could revert the law in practice and prevent insolvent corporations from conducting arrangements under section 192. As such, in their continued attempts to solidify the in-depth interpretation of section 192 insolvency practitioners reacted to any indication from Canada's highest court. After the Supreme Court denied leave after the *Amoco* decision of the Alberta Court of Appeal[185], it appears insolvency practitioners saw this as tacit approval of the new interpretation and continued to bring insolvent section 192 restructurings before the courts. The logic behind the insolvency practitioners view was while it is not common for the Supreme Court to grant leave on corporate law decisions, the fact that the lower court had undertaken an in-depth statutory analysis made it more likely for leave to be granted. As the Supreme Court chose not to grant leave on the first decision which devised a new in-depth interpretation for section 192, determining the plain reading statutory interpretation was not correct, it would be unlikely for the Supreme Court to

[185] *Amoco SCC*, *supra* note 109.

grant leave on a similar subsequent case. This combined with the Director's support of the court's interpretation of the solvency requirement, in the *1994 Policy,* led to the amount of cases involving insolvent restructuring under section 192 slowly increasing through the mid-1990s and into the 2000s. Without direction from Canada's highest court, lower courts were left to their own devices to decide how to interpret the solvency requirement and apply their broad authority under section 192(4) when granting the arrangements of insolvent corporations. This resulted in the law in practice being developed on a case-by-case basis. The *1994 Policy* confirmed section 192 was available to insolvent corporations to restructure, but section 192(3), the solvency requirement was not drafted in consideration of the two types of insolvent arrangements now allowed. The *1994 Policy,* and following revisions, compensates for this deficiency and effectively becomes the law with the Director as the de facto lawmaker. As courts continued to interpret and expand the scope of section 192, the Director would respond with updates to its policy.[186] The disparity between the formal law solvency requirement, the quasi-formal law *1994 Policy,* and the broad powers of the court lead to the court continuing to make changes to the law in practice. The decision of the Supreme Court, in *Re BCE Inc*.[187] ("*BCE*"), on a solvent section 192 restructuring is seen by insolvency practitioners as definitive approval of the lower courts' interpretation of the solvency requirement in section 192 which results in the end of the first recursive cycle. The formation of the first recursive cycle can be seen in the collection of cases decided and policies published prior to *BCE*.

Trizec Corp., (Re)[188] ("*Trizec*") was decided in the interim period between the publishing of the draft policy and the *1994 Policy*. The court's decision in *Trizec* is akin to the decisions of

[186] *1994 Policy*, *supra* note 110, s 5.02.
[187] *BCE*, supra note 68.
[188] *Trizec*, *supra* note 111.

Computel Systems and *Amoco* as insolvency practitioners successfully advance another alternative interpretation to section 192 which will eventually be addressed by the quasi-formal law. In its decision, the Alberta Court of Queen's Bench addressed a co-application from Horsham Acquisition Corp. ("Horsham") and Trizec Corporation Ltd. ("Trizec") for an arrangement under section 192. There is no doubt that Trizec was insolvent as Trizec was in default to shareholders owing them over one billion dollars.[189] In fact, the reason Trizec sought to restructure was "for an infusion of capital" which would be used to pay the shareholders and emerge a "debt free company".[190] The infusion of capital was to be provided by Horsham, a separate solvent corporation, which Trizec had entered into a binding agreement in exchange for an equity position in Trizec and control of the board of directors.[191] Horsham and Trizec brought the application for the section 192 restructuring of Trizec after all aspects of the arrangement had been negotiated. The court found that as Horsham, a solvent corporation, brought the application with Trizec the solvency requirement of section 192 had been met.[192] This decision slightly differed from the *Amoco* decision which held the applicant corporation must be solvent. The court in *Trizec* held that as long as one of the applicant corporations to the arrangement is solvent, the solvency requirement is satisfied. This decision adds a new interpretation for an insolvent corporation to satisfy the solvency requirement: Is at least one of the applicants solvent?

Another important development of *Trizec* is that the court granted a stay of proceeding at the interim order. A stay of proceedings is a remedy found in both the *BIA*[193] and *CCAA*[194] and

[189] *Ibid* at para 3.
[190] *Ibid* at para 5.
[191] *Ibid*.
[192] *Trizec*, *supra* note 110 at para 17; *Mega Brands (Arrangement relatif à)*, 2010 QCCS 646 at para 33 [*Mega*].
[193] *BIA*, *supra* note 3, s 69(1).
[194] *CCAA*, *supra* note 4, s 11.02(1).

enables the continuance of the company by preventing "secured and unsecured creditors, [as well as] non-creditors and other parties who could potentially jeopardize the success of the plan", from enforcing their debt obligations.[195] Horsham and Trizec had already negotiated the arrangement which was acceptable to the senior debenture holders at the time of the interim order hearing. While the senior debenture holders had agreed to refrain from exercising their security, the interim order made by the court included a stay of proceedings "whereby the senior debenture holders were restrained from enforcing their security on the basis that the company should be permitted the opportunity to seek the approval of the plan of arrangement by a vote of its stakeholders."[196] The court believed the broad judicial discretion provided to it under 192(4) allowed it to grant a stay of proceedings[197] in order to maintain the "status quo so that the parties affected by the order itself could consider an arrangement to be proposed to them."[198] The granting of the stay marked the beginning of section 192's further development as an insolvency provision.

Trizec's the new interpretation, where at least one applicant for the section 192 arrangement needed to be solvent, began to 'settle' in the years following the decision. Unlike the other two interpretations, found in *Computel Systems* and *Amoco,* the new interpretation did not have the backing of the *1994 Policy* due to *Trizec* being decided shortly before the *1994 Policy* was published. However, this did not stop the *Trizec* interpretation from settling into the law in practice as one of the three interpretations an insolvent corporation could use to satisfy the solvency requirement. The process of settling in this first recursive cycle exemplifies 'endogeneity

[195] *Lehndorff General Partner Ltd., Re,* 1993 CarswellOnt 183 (WL Can) at para 10, 37 ACWS (3d) 84.
[196] William Kaplan, "Stays of Proceedings Under the Canada Business Corporations Act: A Question of Balance" (2011) 6 Ann Rev Insolv L at 7 (WL Can).
[197] *In the Matter of a Plan of Arrangement proposed by Trizec Corporation Ltd* (6 April 1994) (Alta QB) unreported, as cited in *45133541 Canada Inc (Arrangement relatif à),* 2009 QCCS 6444 at para 106 [*Abitibi*].
[198] *Kaplan*, *supra* note 196 at 7.

of law'[199] with decisions in the years following *Trizec* advancingthe implementation of the new, third way to satisfy the solvency requirement, "institutionalizing" it into case law. As discussed below, *St. Lawrence & Hudson Railway Co., Re*[200] (1998) is instrumental in institutionalizing the new interpretation such that it comes to be known as the *St. Lawrence Interpretation*.

On April 17, 1998, the Director released an updated *Policy of the Director Concerning Arrangements Under Section 192 of the Canada Business Corporations Act*[201] ("*1998 Policy*"). The changes made in the*1998 Policy* make it clear that the primary concern of The Policy is addressing insolvent arrangements conducted under section 192. This is exemplified by changes such as switching the order of chapters, bringing the chapter on the scope of permissible use, including solvency limitations, to the beginning of the document. The *1998 Policy* also further developed the solvency requirement's limitations. It is important to note, in the *1998 Policy* the Director continued to endorse the court's interpretation of the solvency requirement in both *Computel Systems* and *Amoco* but, did not include the ruling from *Trizec.* Additionally, in the *1998 Policy*, the Director expresses the belief that a more thorough review is required for "arrangements involving debtholder claims against an insolvent corporation [as well as] arrangements involving debtholder claims against a corporation that, while not insolvent, is near insolvency."[202] Following its mandate under section 192(5) to conduct a review of all arrangements proposed and ensure proper use of section 192, the Director added to the *1998 Policy* the following indicia it looks for which indicate a corporation is near insolvency:

- The arrangement contemplates a compromise of debt.
- A note to the corporation's audited financial statements warning the reader of the potential inappropriateness of the use of generally accepted accounting

[199] Halliday & Carruthers 2007, *supra* note 8 at 1144.
[200] *St. Lawrence*, *supra* note 113.
[201] *1998 Policy*, supra note 112.
[202] *Ibid*, s 2.05.

principles that are applicable to a going concern because there is significant doubt about the appropriateness of the assumption.

- An action by a bond rating service that may indicate a solvency problem. These actions include a rating suspension, a rating downgrade from investment grade to non-investment grade, or a lower rating if the corporation is already in the non-investment grade range, and an issuance of a press release indicating that the corporation is on a credit watch with negative implications or that the rating outlook has changed from stable to negative in cases where a negative outcome may suggest a solvency problem.
- Where the corporation's shares are listed, a trading suspension has been ordered by a stock exchange because the corporation's financial condition does not meet the requirements for continued trading.
- The resignation of all or substantially all of the directors of the corporation within the year immediately preceding a court application for approval of an arrangement.[203]

The Director also placed important limitations on the use of section 192 by insolvent corporations based on whom they are indebted to:

> While "security holder" is not defined in the Act, the term "security" means a share of any class or series of shares or a debt obligation of a corporation. "Debt obligation" is defined to mean a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured. Given these definitions and relying on the *ejusdem generis* principle of interpretation, the Director's position is that the term "security holder" would include debtholders such as debenture and bond holders but not ordinary unsecured creditors.[204]

Based on the Director's interpretation of "security holder" and accompanying limitations, CBCA section 192 cannot be used to restructure the debt of unsecured creditors.[205] However, the use of "security holder" rather than "shareholder" in section 192 "clearly allows courts to entertain proposed arrangement transactions which alter debtholders' rights."[206] This position is in line with the purpose of the *CBCA*, the governance and regulation of corporations rather than that of individuals. Ultimately, the Director expressed the belief that it is up to the "relevant court to determine compliance with the solvency limitation of the Act."[207] Thus, the *1998 Policy* does not

[203] *Ibid*.
[204] *1998 Policy*, *supra* note 112, footnote 1.
[205] *Ibid*, s 2.05.
[206] *Ibid*, s 2.05.
[207] *Ibid*, s 2.04.

bar the court from utilizing section 192 to approve arrangements affecting debtholders. Rather, the Director's opinion is "transactions involving principally the compromise of debtholder claims against insolvent business enterprises may be more appropriately carried out under provisions of applicable insolvency law."[208] Therefore, for an insolvent or near insolvent corporation to potentially be successful in obtaining court approval for a section 192 arrangement, it should primarily be indebted to "security holders" which fall within the scope of the Director's definition found in the *1998 Policy*. When unsecured creditors are involved in the corporation's indebtedness, it is less likely a court will grant an arrangement for reorganization under section 192.[209]

After the quasi-formal *1998 Policy* was published, insolvency practitioners and the courts responded to it's amendments in two cases, which in turn, refined the law in practice. The first is the Ontario Superior Court's 1998 decision, on an insolvent section 192 arrangement, *St. Lawrence & Hudson Railway Co., Re*[210] ("*St. Lawrence*"). The proposed plan of arrangement was for the amalgamation of three applicants: two railway corporations with a third solvent corporation.[211] Interestingly, it was likely the fact that the arrangement involved railway companies that led to the application for arrangement being brought under the *CBCA* rather than the *CCAA* as at the time railway companies were prohibited from using the *CCAA*.[212] Both railway corporations were experiencing financial difficulty and likely insolvent.[213] In its analysis, the court echoed the Director's belief that section 192 is meant to be "facilitative"[214] stating, "[T]he purpose of s. 192, … is to permit flexibility in the development of complex corporate restructurings, subject to

[208] *Ibid*, s 2.05.
[209] *Ibid*.
[210] *St. Lawrence*, *supra* note 113.
[211] Morin, *supra* note 145 at 3.
[212] The definition of "company" in section 2(1) of the *CCAA* specifically precluded railway companies until this restriction was removed by amendment in 2018.
[213] Morin, *supra* note 145 at 3.
[214] *1994 Policy*, *supra* note 110, ss 4.01, 4.02.

fairness and other principles designed to protect the minority."[215] In its analysis the court set out the three requirements which must be satisfied in order for a plan of arrangement to be approved:

> a) that all statutory requirements have been fulfilled;
> b) that the arrangement is put forward in good faith; and,
> c) that the arrangement is fair and reasonable.[216]

Next, the court also laid out the which statutory requirements must be fulfilled at the interim stage:

> (i) that the proposed plan meets the definition of an arrangement under subsection 192(1) of the CBCA;
> (ii) that the corporate applicant — or, at least one of the corporate applicants — is not insolvent as that term is defined in subsection 192(2) of the CBCA; and,
> (iii) that it is not practicable for the applicant, or applicants, to effect a fundamental change in the nature of the arrangement under any other provision of the CBCA.[217]

The court found that the proposed arrangement before it in *St. Lawrence* met (ii), the solvency requirement, "because least one of the applicants is a solvent corporation."[218] Thus, the court followed and adopted the interpretation originating in *Trizec* that the solvency requirement is met provided at least one of the applicants is a solvent corporation. While not endorsed by the Director, the interpretation of the solvency requirement found in *Trizec* had been adopted by the Ontario Superior Court and came to be known as the *St. Lawrence Interpretation*.

In the Matter of a Proposed Plan of Arrangement Respecting Call-Net Arrangeco Inc. and Call-Net Enterprises Inc.[219] ("*Call-Net*"), Call-Net Enterprises Inc. ("Call-Net") was the second case brought before the court post *1998 Policy*, involving a complicated insolvent restructuring arrangement which included aspects of the arrangements in both *Amoco* and *Computel Systems*. Between the years of 1997 and 1999, Call-Net borrowed over $2.0 billion through the issuance of

[215] *St. Lawrence*, supra note 113 at para 38.
[216] *Ibid* at para 12.
[217] *Ibid* at para 13.
[218] *Ibid* at para 15.
[219] *Call-Net*, *supra* note 114.

Existing Notes. By 2001, "Call-Net's liability in respect of the Existing Notes had reached almost $2.6 billion."[220] In the summer of 2001, it became clear that Call-Net could not sustain this level of debt. Similar to the arrangement completed in *Computel Systems*, Call-Net's shareholders sought to return to solvency via a stated capital resolution. A section 192 plan of arrangement was devised to reduce Call-Net's stated capital to $200 million. However, as the majority of Call-Net's debt was owed to Noteholders, the plan of arrangement was much more complex than a shareholder vote on a stated capital resolution.

First, Call-Net incorporated Arrangeco on January 29, 2002 under the *CBCA*. ArrangeCo was formed as a solely wholly-owned subsidiary of Call-Net for the purpose of effecting the Arrangement. It would not carry on any business other than in connection with the arrangement and had no material assets or liabilities.[221] At the end of the arrangement, "ArrangeCo will be wound-up into Call-Net and ArrangeCo will sell, assign and transfer all of its assets to Call-Net in consideration for Call-Net assuming all of ArrangeCo's liabilities and obligations."[222] The plan entailed Call-Net loaning ArrangeCo an amount equal to the Noteholders' Cash Pool less the aggregate Paid Interest Amount. ArrangeCo would then pay each Noteholder a pro rata share of the Noteholders' Cash Pool. The Noteholders Existing Notes were mandatorily exchanged for the consideration of the Noteholders' Cash Pool, New Shares, or Secured Notes. Each Noteholder was also to receive a pro rata share of the Noteholders' Pool of New Shares, in New Common Shares if a Canadian Resident, or New Class B Non-Voting Shares if not a Canadian Resident. After the exchange of Notes for New Shares and Existing Shares for New Shares, the stated capital of the

[220] *Ibid* at 9.
[221] *Ibid*.
[222] *Ibid*.

New Shares was to be reduced to $200,000,000.[223] Following the *St. Lawrence Interpretation*, the court found this plan satisfied the solvency requirement as there was a solvent applicant, ArrangeCo.[224] To ensure the plan's success, the court also granted a stay of proceedings at the interim order.[225] The successful plan resulted in a reduction of Call-Net's debt by over $2 billion. To do so, Call-Net gave the Noteholders an equity stake in Call-Net via the issuance of shares rather than paying them outright.

Following these important judgements from the Ontario Superior Court, the Director released an updated *Policy of the Director Concerning Arrangements Under Section 192 of the Canada Business Corporations Act*[226] on November 7, 2003 ("*2003 Policy*"). Responding to the updates to the law in practice, the Director made numerous changes in this revision of *The Policy*, including many to the "*Solvency Limitations*"[227] portion. First, it is important to note a non-solvency change in the *2003 Policy*. The *2003 Policy* mentions the amendment to section 192, made shortly before the release of the *2003 Policy*, which removed the limitation that any exchange of securities must not constitute a take-over bid.[228] This section 192 requirement had been discussed in previous versions of *The Policy*.

Under the "*Solvency Limitations*"[229] portion, the Director added the definition of "holder" to the section discussing Director's interpretation of "security holder" and accompanying limitations perceived by the Director regarding the use of section 192 by insolvent corporations. Additionally, the Director added the following description to the section describing the

[223] *Ibid* at 189.
[224] Morin, *supra* note 145 at 3.
[225] Kaplan, *supra* note 196 at 7.
[226] *2003 Policy*, supra note 115.
[227] *Ibid*, ss 2.03 to 2.06.
[228] *Ibid*, s 2.02.
[229] *Ibid*, ss 2.03-2.06.

arrangements in of *Computel Systems* and *Amoco* which involved section 192 plans of arrangement including insolvent corporations:

> Such plans have proceeded on two bases. The first is on the basis that the applicant, while insolvent at the interim hearing date, is solvent at the date of the final order. See, for example, *Re Computel Systems Ltd* … Notwithstanding *Computel Systems Ltd* and other precedents for plans proceeding on this basis, the Director is unaware of a court expressly determining that the solvency requirement must only be met at the final order stage. The second basis is where the applicant corporation is solvent but one of the principal corporate entities involved in the overall arrangement transaction is not solvent. This was the case in *Savage v. Amoco Acquisition Co.* … where the court ruled that use of the arrangement provisions of the Act is not limited to cases where none of the corporations involved is insolvent provided that the arrangement, as proposed, is not a sham. More recently, in *Re St. Lawrence & Hudson Railway Co* the court described the solvency requirement in subsection 192(2) of the Act as requiring only that at least one of the corporate applicants under the plan of arrangement must not be insolvent (as defined in subsection 192(2) of the Act).[230]

Several aspects of this extensive new text are important to the evolution of the interpretation of the solvency requirement. When discussing the decision and accompanying interpretation from *Computel Systems*, the Director notes that the court has not made a determination as to whether the solvency requirement must only be met at the final order stage. This appears to be an invitation to the court to further interpret section 192, a unique phenomenon in terms of recursivity as the quasi-formal law is asking the law in practice to determine the law.

Additionally, in the added text, the Director fleshed out that there are indeed several interpretations in which insolvent corporations can abide by to satisfy the solvency requirement. For arrangements involving several corporations, the Director now acknowledges both the *Amoco Interpretation* that all applicants must be solvent and the *St. Lawrence Interpretation* that at least one applicant must be solvent. By acknowledging and apparently agreeing with both interpretations, the Director has set out three ways in which an insolvent corporation can satisfy

[230] *2003 Policy*, supra note 115, s 2.03.

the solvency requirement of section 192. Thus, the corporations involved in a proposed section 192 arrangement must satisfy the solvency requirement in one of three ways outlined in the cases cited by *The Policy*:

1. *Computel Interpretation*: An insolvent solo applicant corporation satisfies the solvency requirement if it is solvent at final order.
2. *Amoco Interpretation*: An arrangement involving an insolvent corporation satisfies the solvency requirement provided the applicant is solvent.
3. *St. Lawrence Interpretation*: Insolvent corporations applying for a section 192 arrangement satisfy the solvency requirement if at least one of the applicants applying for the arrangement is solvent.

In the 2003 version of *The Policy*, the Director gives the court significant deference in how it chooses to interpret the solvency requirement, similar to the deference provided to the court by the formal law s 192(4). This can be seen by the inclusion of three, slightly different, ways to satisfy the solvency requirement as well as in the added line to the *2003 Policy*:

> The Director acknowledges that certain other corporate statutes do not impose a solvency limitation on arrangements, but believes that so long as the Act contains such a limitation, applicants should be prepared to demonstrate compliance with this limitation, **as interpreted by the courts**… [emphasis added][231]

The inclusion of "as interpreted by the courts" makes it clear that the Director does not view its obligation under 192(5) as the need to enforce a plain reading interpretation of the solvency requirement. Rather, the Director appears to be content following the court's interpretation of the solvency requirement even though at this point in time there are three separate interpretations derived from three different cases. The Director's continued reliance on the court to define the

[231] *2003 Policy*, *supra* note 115, s 2.04.

limitations of the solvency requirement indicate the interpretation of the solvency requirement is in a "positive feedback" loop. "Positive feedback" refers to a process by which "[e]ach step along a particular path produces consequences that increase the relative attractiveness of that path for the next round. As such effects begin to accumulate, they generate a powerful cycle of self-reinforcing activity."[232] Initially, the court, in *Amoco* and *Computel Systems*, determined insolvent corporations could utilize section 192. This was affirmed by the Director in the *1994 Policy* and following versions of *The Policy*. As the Director's approval is required for a section 192 arrangement, the courts began following and citing *The Policy* when approving insolvent arrangements. The Director then cites these cases and defers to the court's interpretation, adding *St. Lawrence*, in the next revision of *The Policy*. "[A] powerful cycle of self-reinforcing activity"[233], indicative of a positive feedback loop can be seen as the courts and the Director continuously refer to each other in the interpretation of the solvency requirement.

When analyzing the Director's acceptance of three separate interpretations through a recursivity of law lens, change to the law has occurred through the advocacy of lawyers and decisions of judges. This unusual means of reform, a process uncontrolled by Parliament, shows the hallmark signs of an endogeneity of law recursive cycle.[234] At this point in the cycle, the courts agree that section 192 can be utilized by insolvent corporations notwithstanding the plain reading interpretation of "not insolvent".[235]After the *2003 Policy* was published, courts could continue to choose any of the three insolvency requirement interpretations found in *The Policy* to find a proposed arrangement involving an insolvent corporation satisfied the solvency requirement of

[232] Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton, NJ: Princeton University Press, 2004) at 18.
[233] *Ibid*.
[234] This means of reform is unusual for most areas of law governed by statute, however it appears pervasive in the corporate restructuring context, as seen in the development of the *CCAA*.
[235] *CBCA*, *supra* note 1, s 192(3).

section 192. Having been over a decade since the Supreme Court denied leave from *Amoco*, it appeared the Supreme Court may never weigh in on the solvency requirement of section 192. As such, following the *2003 Policy*, lower court continued refine the law in practice. While three interpretations of the insolvency requirement were available to the courts to utilize, it was likely one would be favoured over the others.

In early 2004, the Superior Court of Quebec rendered its first decision on a proposed section 192 arrangement involving an insolvent corporation in *Cinar Corp. v Shareholders of Cinar Corp.*[236] ("*Cinar*"). The proposed arrangement involved a series of transactions to be executed in sequence, all in the same day. First, the shareholders of Cinar Corp. would reduce the company's stated capital via a Stated Capital Resolution. Second, all Cinar Corp. shares would be purchased by Newco, a wholly owned subsidiary of Mise-en-cause 3918203 Canada Inc..[237] Third, Cinar Corp. and Newco will then amalgamate to form Amalco, completing the section 192 arrangement. At the interim order hearing, the court was satisfied that the proposed arrangement constituted an "arrangement" within the meaning of section 192 as it included both: "(a) an "amalgamation" of [Cinar Corp.] and Newco (s. 192(1)(b)); and (b) an "exchange of securities" of [Cinar Corp.] for "property, money or other securities" of Newco (s. 192(1)(f))."[238] Also included in the interim decision was the court's decision whether this arrangement satisfied the solvency requirement. Under 192(2)(a), Cinar Corp. was solvent as it was able to pay its liabilities as they become due. However, under 192(2)(b), Cinar Corp. was insolvent as its realizable value of assets was less than the aggregate of its liabilities and stated capital. Thus, as in *Computel Systems*, Cinar Corp.'s shareholders needed to reduce the corporation's stated capital via special resolution. The

[236] *Cinar*, *supra* note 116.
[237] "The consideration for each share consists of a cash portion plus an amount calculated in relation to the net proceeds, if any, from certain litigation involving Petitioner Cinar Corp." (*Cinar*, *supra* note 116 at para 15).
[238] *Cinar*, *supra* note 116 at para 15.

court was satisfied that if the Stated Capital Resolution was adopted, Cinar Corp. would be solvent at the time of the final order. The court cited the *2003 Policy* as supporting this decision and *First Choice Capital Fund Ltd. v Saskatchewan (Director of Corporations)*[239] (1999) ("*First Choice*"). After the *CBCA* was introduced in 1975, several provinces updated their corporation legislation, mirroring the *CBCA*'s provisions.[240] Interestingly, in the provinces with a section 192 analogue in their provincial corporations statute, courts had begun allowing insolvent corporations to use the provision to restructure, citing section 192 cases and portions of *The Policy* as justification. *First Choice* involved the proposed arrangement for the amalgamation of three corporations. In *First Choice* it was argued that the solvency requirement was met as at least one of the three co-applicants was solvent, citing *St. Lawrence*.[241] The court agreed with this submission, determined at least one of the applicant corporations was solvent and approved the *First Choice* arrangement. It is unclear why the court chose to cite *First Choice* as in the case at hand, Cinar Corp. satisfied the arrangement via the *Computel Interpretation*. It is interesting to note, however, that the in-depth interpretation of section 192 had spilled into provincial law with similar results.[242] At the final order for Cinar Corp.'s proposed arrangement, the court approved the arrangement, finding Cinar Corp. had satisfied the solvency requirement and other statutory requirements.[243]

In *Re Stelco Inc.*[244] ("*Re Stelco*") (2006), Stelco Inc. ("Stelco") was insolvent and had used the *CCAA* to restructure. The restructuring plan under the *CCAA* involved transferring Stelco's

[239] *First Choice Capital Fund Ltd. v Saskatchewan (Director of Corporations)* (1999), 184 Sask R 267, 1999 CarswellSask 540 [*First Choice*].
[240] 1978 Background paper.
[241] *First Choice*, supra note 239, Appendix "B" at paras 12-16.
[242] Arrangements for the compromise of debt occurring under provincial legislation may be a constitutional issue as insolvency is the dividing line between federal and provincial jurisdiction. However, as these arrangements are occurring under corporate statutes, these arrangements may fall under the shared federal-provincial jurisdiction over corporations.
[243] *Cinar supra note* 116.
[244] *Stelco, supra* note 117.

business to nine solvent general partners in a limited partnership. This plan required an arrangement under section 192 in order to come into effect. Stelco and the nine general partners applied together for a section 192 arrangement. In contrast with the Ontario Superior Court's previous decision in *St. Lawrence*, the court held that all applicants requesting the arrangement must be solvent. The court's reasoning for this decision was based on the court's ruling in the *Amoco* decision which stated, "Dome may, indeed, be insolvent; but the applicant and others involved are not."[245] The court in *Re Stelco* interpreted this to mean that all applicants must be solvent, but not all corporations involved need to be solvent. Instead of dismissing the case, the court temporarily lifted Stelco's *CCAA* stay of proceedings in order for Stelco to switch from applicant to respondent in the *CBCA* arrangement proceedings. The remaining nine applicants were all solvent and the court allowed the section 192 arrangement to proceed. Therefore, the Ontario Superior Court in *Re Stelco* followed the *Amoco Interpretation* of the solvency requirement. As the *2003 Policy* acknowledges the solvency requirement interpretation of both the interpretations of *Amoco* and *St. Lawrence*, this decision followed the Director's guidelines. However, the decision impacted the law in practice by indicating that the Ontario Superior Court, which had decided *St. Lawrence* which resulted in the *St. Lawrence Interpretation*, may be switching to following the *Amoco Interpretation*.

Most of the section 192 insolvent restructurings, discussed above involve a solvent applicant corporation amalgamating with an unaffiliated insolvent corporation. The exception to this is *Call-Net* where the solvent applicant was affiliated with the insolvent corporation as it was a subsidiary created by Call-Net for the sole purpose of conducting the section 192 arrangement to compromise debt. This approach was effectively implemented in two separate unreported cases in 2008.

[245] *Amoco*, *supra* note 109 at para 5.

First, the court was asked to approve the arrangement proposed *In the Matter of a Proposed Plan of Arrangement of Tembec Arrangement Inc., Tembec Industries Inc. and Tembec Enterprises Inc*.[246] ("*Tembec*"). The arrangement was for the conversion of unsecured notes worth $1.2 billion USD into common shares via Tembec Arrangement Inc., which was a solvent, wholly-owned subsidiary formed specifically to be the arrangement applicant.[247] The court found the arrangement satisfied the solvency requirement based on the *St. Lawrence Interpretation*, as at least one of the applicants was solvent. The other two corporations involved in this arrangement were insolvent as the value of the common shares was worth "significantly less than the face amount of the outstanding unsecured notes."[248] As the primary purpose of the restructuring was the compromise of debt, at the interim order the court also granted an extensive the stay of proceedings, restraining all persons from "terminating, accelerating, amending or declaring in default any contract or agreement as a result of the *CBCA* filing or failure to make any payment."[249] After the court approved the arrangement at the final order, a recognition order under Chapter 15 of the *United States Bankruptcy Code*[250] was sought.[251] Chapter 15 authorizes a United States court to:

> (i) recognize a "foreign proceeding," as defined by section 101(23) of the *Bankruptcy Code*, upon the proper commencement of a case under chapter 15 by a "foreign representative," as defined by section 101(24) of the *Bankruptcy Code*; and
> (ii) grant assistance in the United States to such foreign representative in connection with the foreign proceeding, including by granting injunctive and other relief […][252]

[246] *Tembec*, supra note 118.
[247] Clarke & Gray, supra note 144 at 13.
[248] *Ibid*.
[249] Milly Chow & Paul Casey, "A Bridge Too Far? Recent Developments in CBCA Arrangements" (2017) IIC-ART Vol 6-5 (WL Can) at 12.
[250] 11 USC § 1501(a).
[251] Chow & Casey, *supra* note 249 at 11.
[252] *Angiotech Pharmaceuticals Inc., Re*, 2011 BCSC 450 (Memorandum of Law) at 2.

In situations of cross-border insolvency, debtor corporations apply for Chapter 15 protection to prevent creditors from commencing enforcement actions against them in the United States. If the Canadian proceeding is recognized as a "foreign proceeding", the "automatic stay and other provisions of the *U.S. Bankruptcy Code* automatically apply to the debtor company's assets within the United States."[253] Restructurings under Canada's insolvency statutes, the *CCAA* and *BIA*, had already been recognized as "foreign proceedings" under Chapter 15.[254] The *Tembec* arrangement received Chapter 15 recognition on October 31, 2008, meaning *CBCA* arrangements would also be recognized and protected in the United States.[255]

In the Matter of a Proposed Arrangement Involving Ainsworth Lumber Co. Ltd. et al[256] ("*Ainsworth*"), Ainsworth Lumber Co. Ltd. (Ainsworth), a provincially-incorporated company in British Columbia, incorporated a new *CBCA* corporation for the purpose of proposing a section 192 arrangement. The new *CBCA* corporation was to be the solvent applicant for the arrangement as well as the means by which Ainsworth could access section 192. The arrangement was for the conversion of unsecured notes into common shares via the *CBCA* applicant corporation which Ainsworth proposed to amalgamate with and continue as a *CBCA* company.[257] The court found the arrangement met all of the section 192 requirements, including the solvency requirement, and approved the arrangement.

The primary purpose of the arrangements in these two unreported decisions was the compromise of debt via the financial restructuring of insolvent corporations which did not want to conduct a *CCAA* or *BIA* arrangement. In the past, the compromise of debt had been a component

[253] Chow & Casey, *supra* note 249 at 10.
[254] *Ibid*.
[255] *Ibid* at 11.
[256] *Ainsworth*, *supra* note 119.
[257] Chow & Casey, *supra* note 249 at 8.

of the arrangement rather than the sole purpose of the arrangement. In *Tembec* and *Ainsworth*, the sole purpose of the arrangement was the compromise of debt, conducted by exchanging debt of the insolvent corporation for debt of a newly incorporated subsidiary, created for the purpose of implementing the arrangement.[258] By approving these arrangements, the court sent a clear signal to insolvent corporations that section 192 is a viable option for the sole purpose of insolvent restructuring. The acceptance of the *Tembec* arrangement in the United States under Chapter 15 of the *U.S. Bankruptcy Code* made section 192 even more enticing to insolvent corporations.

Another important aspect in the development of section 192 is the influence of the Supreme Court of Canada. While not technically a safeguard, as it requires an issue to be appealed to it, the Supreme Court has the power to function as one as it has the ability to overrule the lower court's interpretation of section 192 and impose whatever interpretation it devised. If the Supreme Court decided that the plain reading interpretation of the solvency requirement should be strictly enforced, it could revert the law in practice and prevent insolvent corporations from conducting arrangements under section 192. As such, in their continued attempts to solidify the in-depth interpretation of section 192 insolvency practitioners reacted to any indication from Canada's highest court. After the Supreme Court denied leave after the *Amoco* decision of the Alberta Court of Appeal[259], it appears insolvency practitioners saw this as tacit approval of the new interpretation and continued to bring insolvent section 192 restructurings before the courts. The logic behind the insolvency practitioners view was while it is not common for the Supreme Court to grant leave on corporate law decisions, the fact that the lower court had undertaken an in-depth statutory analysis made it more likely for leave to be granted. As the Supreme Court chose not to grant leave on the

[258] Clarke & Gray, *supra* note 144 at 10; Teasdale, *supra* note 72 at 7; Chow & Casey, *supra* note 249 at 8.
[259] *Amoco SCC*, *supra* note 109.

first decision which devised a new in-depth interpretation for section 192, determining the plain reading statutory interpretation was not correct, it would be unlikely for the Supreme Court to grant leave on a similar subsequent case. This combined with the Director's support of the court's interpretation of the solvency requirement, in the *1994 Policy*, led to the amount of cases involving insolvent restructuring under section 192 slowly increasing through the mid-1990s and into the 2000s. Without direction from Canada's highest court, lower courts were left to their own devices to decide how to interpret the solvency requirement and apply their broad authority under section 192(4) when granting the arrangements of insolvent corporations. This resulted in the law in practice being developed on a case-by-case basis. The *1994 Policy* confirmed section 192 was available to insolvent corporations to restructure, but section 192(3), the solvency requirement was not drafted in consideration of the two types of insolvent arrangements now allowed. The *1994 Policy*, and following revisions, compensates for this deficiency and effectively becomes the law with the Director as the de facto lawmaker. As courts continued to interpret and expand the scope of section 192, the Director would respond with updates to its policy.[260] The disparity between the formal law solvency requirement, the quasi-formal law *1994 Policy*, and the broad powers of the court lead to the court continuing to make changes to the law in practice. The decision of the Supreme Court, in *Re BCE Inc*.[261], on a solvent section 192 restructuring is seen by insolvency practitioners as resolving this disparity which results in the end of the first recursive cycle. The formation of the first recursive cycle can be seen in the collection of cases decided prior to *BCE*.

The Director, with its authority under section 192(5), is the main legal actor who could, by opposing arrangements and releasing a new policy statement, return to the plain reading interpretation of section 192, preventing insolvent arrangements. Even though the Director, section

[260] *1994 Policy*, *supra* note 110, s 5.02.
[261] *BCE*, supra note 68.

192's official safeguard, supported insolvent arrangements, the frequency that they were brought before the courts was relatively low. This was likely because insolvency practitioners were waiting for section 192's unofficial safeguard, the Supreme Court of Canada to weigh in. While leave to appeal to the Supreme Court of Canada from *Amoco* was denied, the Supreme Court of Canada had yet to render a decision on the interpretation of the solvency requirement of section 192. Then in December 2008, twenty years after *Amoco*, the SCC rendered its decision on *Re BCE Inc.*[262] ("*BCE*"), deciding whether the proposed section 192 arrangement of a solvent corporation was fair and reasonable. The first important aspect of the *BCE* decision to the solvency requirement is that, when assessing the fairness requirement, the Supreme Court followed the guidelines set out in the *2003 Policy* even though they are not formal law. By following the guidelines, the Supreme Court indicated that it approves and agrees with the Director's position on the appropriate use of *The Policy*, including the solvency requirement. Additionally, while the fair and reasonable requirement was the main focus, the Supreme Court undertook a full review of section 192 arrangements and its comments on the purpose and effective use of section 192 reflect upon the solvency requirement.

> 128 The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose lights may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests. […]
>
> 133 The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the rights of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. […]
>
> 146 […] If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on

[262] *BCE*, supra note 68.

> some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.[263]

The above analysis can be applied to help further determine the Supreme Court's position towards the section 192 solvency requirement. The Court is of the view that section 192 requires shareholder and court approval because its arrangements which alter a corporation's structure, in the manner which section 192 permits, have the potential for adversely affecting the rights of parties involved. In assessing an arrangement, the court needs to ensure that the rights of all parties are considered and that a fair balance of rights is achieved. What is unique about the section 192 insolvent arrangements which have been brought before the court is that they usually have been pre-negotiated amongst the parties. Thus, when an arrangement is brought before the court, all affected parties agree with the affect the arrangement will have upon their rights such that the court does not need to be concerned with finding a fair balance. Additionally, the court is more cautious to approve an arrangement when a corporation's financial situation is not a factor in requiring the arrangement. Therefore, the court is of the mind that arrangements brought about by the need to remedy a corporation's financial situation are acceptable in most circumstances. This is a beneficial view for insolvent corporations.

These views coupled with the court referencing several insolvent restructuring cases, *Trizec*, *St. Lawrence*, *Cinar*, and *Re Stelco*, for factors to consider as part of the fair and reasonable test[264] led insolvency practitioners to conclude the Supreme Court agreed with how the solvency requirement had been interpreted and applied. In reality, the solvency requirement was not at issue

[263] *BCE*, supra note 68 at paras 128, 133, 146.
[264] *Ibid* at paras 152, 153.

in the case. As the corporations involved were solvent, the Supreme Court made the determination that the solvency and other statutory requirements were "clearly satisfied in this case."[265] So the decision provides at best indirect support for the approach the lower courts have taken in the interpretation of the insolvency requirement. Regardless, insolvency practitioners appear to see this *per curiam* judgement as definitive acceptance of the new interpretations of the solvency requirement.

Unique to this recursive cycle are the actors involved in the development of a quasi-formal law which changes while the formal law remains static. On one side are the debtor corporations supported by insolvency-related professionals (e.g., lawyers, accountants, insolvency practitioners) who pushed the court to undertake and maintain an in-depth interpretation of the solvency requirement. On the lawmakers' side, where Parliament would usually be involved, the Director has the responsibility of determining the guidelines of use for section 192. During this cycle, Parliament did not make any clarifying changes to section 192. Rather, it was the Director's *Policy … Concerning Arrangements Under Section 192 of the Canada Business Corporations Act* which became the quasi-formal law and the main hurdle for insolvent corporations to satisfy. Section 192's safeguard, the Director, ultimately left up to the courts the extent of the solvency requirement. The courts utilized the broad powers and judicial discretion granted to them by section 192 to continue to develop the law in practice by granting remedies typically reserved for use under Canadian insolvency statutes. In doing so, courts created the possibility for further change to the law in practice. With the perceived support of Canada's highest court and the Director, the number of insolvent restructurings under section 192 has drastically increased since 2008. This is evidenced by the fact there are 7 insolvent section 192 arrangements conducted in

[265] *Ibid* at para 157.

the 27 years of the first recursive cycle and 24 insolvent section 192 arrangements conducted in the 10 years of the second recursive cycle.[266] Thus, the first recursive cycle ends after *BCE,* as insolvency practitioners believe they have consensus from both the Director and the Supreme Court approving how the solvency requirement had been interpreted. This consensus signifies the end of the first recursive cycle for section 192 as practitioners switch from making section 192 into an insolvency provision to persuading the courts to broaden the scope of section 192 arrangements.[267]

[266] To the author's knowledge, see Appendix B.
[267] Halliday & Carruthers 2007, *supra* note 8 at 1147.

IV. CYCLE 2 (2009-2018) - EVOLUTION OF *CBCA* SECTION 192 AS AN INSOLVENCY PROVISION

The second recursive cycle begins where the first one ends. While there are sometimes decades between recursive cycles of reform,[268] the consensus of the Director and the Supreme Court that section 192 can be used by insolvent corporations ended the first recursive cycle but left many unanswered questions as to the scope of the provision in the insolvency context. Thus, the second recursive cycle begins in 2009 as insolvency practitioners continue to bring insolvent arrangements before the court trying to get their interpretation of the law implemented into the law in practice. A key difference between the second cycle and the first is the role of the actors involved. In the first cycle, the Director and the Supreme Court of Canada played an active role in the development of section 192 into an insolvency provision. In the first cycle, the Director released several policies in response to how the law in practice was developing. The Supreme Court denied leave in one instance and released a decision, while was not on the topic of the solvency requirement still commented on the purpose and effective use of section 192. In the second cycle, both actors play a more passive role and rely on the superior courts of each province to keep the law in practice in check. The Director delegated this task to the courts in *The Policy* and the Supreme Court did so in *BCE*. Since first publishing *The Policy*, the Director has maintained *The Policy* sets out the "permissible use of and … substantive requirements applicable to arrangements under section 192"[269] but "it is ultimately a matter for the relevant court to determine compliance with the solvency limitation in the Act."[270] In *BCE*, the Supreme Court did not explicitly address the solvency requirement however, it did provide the following direction:

[268] *Ibid* at 1148.
[269] *1994 Policy*, supra note 110, s 1.01.
[270] *Ibid*, s 4.04.

> In determining whether a plan of arrangement should be approved, the court must focus on the terms and impact of the arrangement itself, rather than on the process by which it was reached.[271] … If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders.[272]

Thus, the direction the Supreme Court provides to the lower courts is if the impact of the arrangement is to ensure the continuation of a corporation, the process by which the arrangement is conducted does not matter. This means courts will likely approve arrangements which are clearly for the compromise of debt as long as the impact of the arrangement is the insolvent corporation involved returns to a solvent state. The implication of this is arrangements like the one proposed in *Tembec*[273], where a new corporation is formed for the sole purpose of being the solvent applicant, will likely receive court approval as the arrangement permits the corporation's continued existence. This approach to section 192 opens the proverbial floodgates. After *BCE*, a dramatic increase can be seen in the number of arrangements involving insolvent corporations as there are more than triple the amount of insolvent restructurings in the second cycle vs the first.[274] As insolvency practitioners found success in getting insolvent arrangements approved, they began to publish articles about successful insolvent arrangements under section 192. This leads to insolvency practitioners across Canada recommending section 192 to their insolvent client corporations and applying for section 192 arrangements.

In the first cycle, from 1982 to 2008, two articles were written by practitioners about insolvent restructuring under section 192.[275] One after the *Amoco* decision and the other after the *Trizec* decision. In the second cycle, from 2009 to 2018, nine articles are written by practitioners

[271] *BCE*, supra note 68 at para 136.
[272] *Ibid* at para 146.
[273] Tembec, supra note 118.
[274] See Appendix B.
[275] See Scott, Buckley & Harrison, *supra* note 123; Tay, *supra* note 145.

about insolvent restructuring under section 192.[276] Thus, insolvency practitioners are the key actors in the second recursive cycle, spreading the word about section 192 insolvent arrangements and continuing to push the envelope by asking the court for remedies typically reserved for use under Canada's official insolvency statutes. **Figure 3** is a list of *The Policy* revisions and cases which aid in the development of the solvency requirement interpretation in the second recursive cycle.

Figure 3: Cases Discussed in Cycle 2

Case	Province/Court	Year
Masonite International Inc., Re[277]	Ontario (SC)	2009
45133541 Canada Inc. (Arrangement relatif à) ("*Abitibi*")[278]	Quebec (SC)	2009
Look Communications Inc. v Look Mobile Corp.[279]	Ontario (SC)	2009
Policy of the Director Concerning Arrangements Under Section 192 of the CBCA[280]		2010
Mega Brands (Arrangement relatif à)[281]	Quebec (SC)	2010
Proposed Plan of Arrangement of Frontera Copper Corp.[282]	Ontario (SC)	2010
Re GT Canada Medical Properties Inc.[283]	Ontario (SC)	2010
Re Compton Petroleum Corp.[284]	Alberta (QB)	2011
Proposed Arrangement Involving Catalyst Paper Corporation[285]	British Columbia (SC)	2012
8440522 Canada Inc. (Re) ("*Mobilicity"*)[286]	Ontario (SC)	2013

[276] See Kaplan, *supra* note 196; McGregor & Casey, "CBCA Section 192 Restructurings: A Streamlined Restructuring Tool or a Statutory Loophole?" (2013) 20 Ann Rev Insolv L (WL Can); Clarke & Gray, *supra* note 144; Morin, *supra* note 145; Teasdale, *supra* note 72, Kevin Zych et al, "Important Restrictions Placed on Use of CBCA for Debt Restructurings" (2015) 31 BFLR 197; Grossel, *supra* note 120; Chow & Casey, *supra* note 245; Zweig & Bell, *supra* note 118. See also an additional two articles written by scholars: Janis Sarra, "Examining the Insolvency Toolkit: Report of the Public Meetings on the Canadian Commercial Insolvency Law System" (July 2012), online: *CAIRP* < https://cairp.ca/media/36354/04-file_Sarra_Examining_the_Insolvency_Toolkit_Report_Submitted.pdf > [perma.cc/NV8R-Y6L3]; Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation*, (Cambridge, Cambridge University Press, 2016) at 340.

[277] *Masonite International Inc., Re*, 2009 Carswell-Ont 4572 (WL Can), 56 CBR (5th) 42 [*Masonite*].

[278] *Abitibi*, *supra* note 197.

[279] *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952 (WL Can), 183 ACWS (3d) 736 [*Look*].

[280] Industry Canada, *Policy of the Director Concerning Arrangements Under Section 192 of the Canada Business Corporations Act*, (Ottawa: 4 January 2010) [*2010 Policy*].

[281] *Mega*, supra note 187.

[282] *In the Matter of a Proposed Plan of Arrangement of Frontera Copper Corporation and 7535457 Canada Ltd* (12 May 2010), Toronto 10-8712-00CL (Ont SCJ) [*Frontera*].

[283] *GT Canada Medical Properties Inc., Re*, 2010 ONSC 6760 [*GT*].

[284] *Re Compton Petroleum Corporation and Compton Petroleum Finance Corporation* (31 June 2011), Calgary 1101-08596 (Alta QB) [*Compton*].

[285] *In the Matter of a Proposed Arrangement Involving Catalyst Paper Corporation and Echelon Paper Corporation* (17 January 2012), Vancouver S-1618016 (BC SC) [*Catalyst 2012*].

[286] *Mobilicity*, *supra* note 82.

Policy on arrangements – Canada Business Corporations Act, section 192[287]		2014
Essar Steel Canada Inc., Re[288]	Ontario (SC)	2014
9171665 Canada Ltd., Re ("*Connacher*")[289]	Alberta (QB)	2015
Proposed Arrangement of Sheritt International Corporation et al[290]	Ontario (SC)	2016
Proposed Arrangement Involving Lightstream Resources Ltd.[291]	Alberta (QB)	2016
Proposed Arrangement in Respect of Trident Exploration Corp.[292]	Alberta (QB)	2016
Proposed Arrangement Involving Catalyst Paper Corporation [293]	British Columbia (SC)	2016
Tervita Corp, Re.[294]	Alberta (QB)	2016
Re Banro Corporation[295]	Ontario (SC)	2017
Arrangement relatif à Pétrolia inc[296]	Quebec (SC)	2017
Concordia (Re)[297]	Ontario (SC)	2017
RGL Reservoir Management Inc. (Re)[298]	Ontario (SC)	2017
NCSG Crane and Heavy Metal Corporation [299]	Alberta (QB)	2018

The second recursive cycle involves two distinct but related developments to section 192. The first is the further refinement of the interpretation of the solvency requirement. The second is the implementation of bankruptcy remedies under 192(4). An interesting aspect of the second recursive cycle is several section 192 insolvent arrangements are conducted but the decisions are not reported. As they are unreported, the interpretation of the solvency requirement the court utilized is unknown, so they do not aid in the analysis of the its development. However, the

[287] *2014 Policy*, *supra* note 87.
[288] *Essar Steel Canada Inc., Re*, 2014 ONSC 4285 [*Essar*].
[289] *9171665 Canada Ltd., Re*, 2015 ABQB 633 [*Connacher*].
[290] *In the Matter of a Proposed Arrangement of Sheritt International Corporation et al* (15 June 2016), Toronto CV-16-11426-00CL (Ont SCJ) [*Sheritt*].
[291] *In the Matter of a Proposed Arrangement Involving Light-stream Resources Ltd. and 9817158 Canada Ltd.* (13 July 2016), Calgary 1601-08725 (Alta QB) [*Lightstream*].
[292] *In the Matter of a Proposed Arrangement in Respect of Trident Exploration Corp.* (20 July 2016), Calgary 1601-09575 (ABQB) [*Trident*].
[293] *In the Matter of a Proposed Arrangement Involving Catalyst Paper Corporation and Echelon Paper Corporation* (31 October 2016), Vancouver S-1618016 (BC SC) [*Catalyst 2016*].
[294] *Tervita Corp., Re*, 2016 ABQB 662 [*Tervita*].
[295] *Re Banro Corporation*, 2017 ONSC 2176 [*Banro*].
[296] *Arrangement relatif à Pétrolia inc.*, 2017 QCCS 2785 [*Petrolia*].
[297] *Concordia (Re)*, 2017 ONSC 6357 [*Concordia Preliminary Interim Order Decision*]; *Concordia International Corp., (Re)*, 2018 ONSC 3034 [*Concordia Interim Order Decision*]; *Concordia International Corp., (Re)*, 2018 ONSC 4165 [*Concordia Final Order Decision*].
[298] *RGL Reservoir Management Inc. (Re)*, 2017 ONSC 7302 [*RGL*].
[299] *In the Matter of NCSG Crane and Heavy Metal Corporation*, (25 May 2018), Calgary 1801-07060 (Alta QB) [*NCSG*].

remedies granted in them, such as stays of proceedings, are known and help to develop section 192 as an insolvency provision.

A. Further Development of the Solvency Requirement

It is not uncommon in case-driven developments for conflicting interpretations to arise. While the *2003 Policy* recognizes both the *Amoco Interpretation and* the *St. Lawrence Interpretation* as ways in which several corporations involved in an arrangement can satisfy the solvency requirement, it was likely courts would favor one of these interpretations over the other. When a consensus develops around a particular interpretation, more cases cite back to this interpretation and amplify its influence. Ultimately, legal uncertainty is resolved when the most influential interpretation becomes "settled law". The Ontario Superior Court initially institutionalized the *St. Lawrence Interpretation* that only one applicant needs to be solvent but, then switched to the *Amoco Interpretation* that all applicants must be solvent in *Re Stelco*. In the second cycle, the favoured interpretation corresponding test is established by the courts. The second cycle begins with the court rendering a decision in a manner similar to those decided prior to *BCE* where one of the three interpretations is cited to find the solvency requirement is satisfied. After the first decision in the second recursive cycle, the court was influenced by insolvency practitioners and the Director to formulate a definitive test to determine if the arrangement satisfied the solvency requirement.

The first case in the second cycle is the 2009 decision of the Ontario Superior Court of *Re Masonite International Inc.*[300] ("*Masonite*"). The Masonite Corporation was insolvent and granted an order to restructure under the *CCAA* as well complete a contemporaneous reorganization under

[300] *Masonite*, *supra* note 277.

Chapter 11 of the *United States Bankruptcy Code*.[301] A stay of proceedings was granted under the *CCAA*. The reorganization plan involved the stay of proceedings being lifted so a new entity, 7158084 Canada Limited ("715"), could be created in order to apply for an arrangement under section 192 of the *CBCA*.[302] The section 192 arrangement was for Masonite Canada and various affiliates "to be amalgamated with the shares of the amalgamated entity acquired by 715 and the Senior debt exchanged for shares in 715."[303] The court approved this arrangement comparing the *CCAA* to the *CBCA*:

> 20 Like the CCAA itself, which has been held to be broadly interpreted, the CBCA section on arrangements has been held to be capable of "flexibility incorporating whatever tools and mechanisms of corporate law the ingenuity of their creators bring to the particular problem at hand."
>
> 21 All of the corporations involved in the Canadian Plan are incorporated or continued under the CBCA. The sole applicant 715, being a newly capitalized entity, is not insolvent. The transaction is certainly not a sham and the form is appropriate for the intended purpose, even though one or more of the companies at the crux of the arrangement is insolvent.
>
> 22 The decision of Blair J. (as he then was) of this Court in *St. Lawrence & Hudson Railway, Re* is oft cited for the proposition that where there is more than one corporate applicant, only one needs to meet the s. 192(3) test.

Aware of the court's decision in *Re Stelco* which enforced the *Amoco Interpretation*, that all applicants must be solvent, it is likely insolvency practitioners intentionally had 715 be the sole solvent applicant to ensure the proposed arrangement was approved. In its decision, the court notes the solvency of 715 as the sole applicant but articulates the *St. Lawrence Interpretation* of the solvency requirement. With the court in *Masonite* citing *St. Lawrence*, it appears the Ontario Superior Court would be returning to the *St. Lawrence Interpretation* that as long as one applicant is solvent the solvency requirement is satisfied.

[301] *Ibid* at para 4.
[302] *Ibid* at para 7.
[303] *Ibid* at para 8.

The second case brought before the court in 2009 was *Re 45133541 Canada Inc.*[304] ("*Abitibi*") where the applicants were seeking an interim order for an ambitious insolvent arrangement. The proposal was for two ArrangeCo corporations and several corporations referred to by the court as "Abitibi" to enter into an "Arrangement Agreement"[305] with AbitibiBowater Inc. and several partner corporations.[306] The arrangement provided for "about US$4 billion of affected secured and unsecured claims to be repaid, restructured or exchanged for a combination of (i) new debt issued by ACI or its successor corporation, as the case may be, and ArrangeCo1, and (ii) equity in ACI′s parent company, AbitibiBowater."[307] The intended effect of the arrangement was for Abitibi to emerge a well-capitalized, solvent entity with a reduction of net debt by almost US$2.4 billion and about US$350 million in new funds to help recapitalize Abitibi.[308] The court determined that this type of arrangement, involving "novel, complex and unique transactions … carried out by way of arrangement [for] the compromise of debt obligations" appropriately falls under the purview of arrangement which can be conducted under section 192.[309] This determination is supported by the Supreme Court's broad interpretation of section 192 in *BCE*.[310] In *BCE*, the Supreme Court held applicants bear the onus of satisfying three requirements in order for their proposed arrangement to be approved:[311]

> (a) the statutory requirements have been fulfilled;
> (b) the Arrangement is put forward in good faith; and
> (c) the Arrangement is fair and reasonable[312]

[304] *Abitibi*, *supra* note 197.
[305] The terms of the arrangement were filed under seal. See *Abitibi*, supra note 197 at para 10.
[306] *Abitibi*, *supra* note 197 at para 9.
[307] *Ibid* at para 12.
[308] *Ibid* at paras 13-15.
[309] *Ibid* at para 62.
[310] *Ibid* at para 12.
[311] *Ibid* at para 51, citing *BCE*, *supra* note 68 at paras 136, 137.
[312] *Ibid*.

As this decision was for an interim order, the court conducted an analysis to determine which of these requirements needs to be met at the interim order. The court determined that the fair and reasonable requirement should be dealt with at the final order. For the purposes of the interim order, the "Court's analysis is limited to (i) the Applicants' good faith and (ii) the Applicants' compliance with the statutory requirements of the *CBCA*."[313] The solvency requirement of section 192 is the second of four statutory requirements which must be met at the interim stage as laid out by the court in *St. Lawrence*:

1) the Arrangement constitutes an "arrangement" as defined under Subsection 192(1) CBCA;
2) they are not "insolvent" as defined in Subsections 192(2) (a) and (b) CBCA;
3) it is not "practicable" for them to effect a fundamental change in the nature of the Arrangement under any other provision of the CBCA; and
4) they gave notice of the Application to the CBCA Director appointed under Section 260.[314]

When discussing whether the arrangement would satisfy the solvency requirement, the court noted the uniqueness of the proposed arrangement due to the type of parties affected by it. Unsecured Noteholders, Secured Noteholders and Lenders would all be affected by the implementation of the arrangement however, Abitibi´s employees, pension plans and trade creditors would not be.[315] In its analysis, the court ensured that each of the entities which would be affected by the arrangement were allowed to be under *The Policy*. First, the court discussed how the Director in *The Policy* contemplates section 192 to be utilized for arrangements aimed at the compromise of secured and unsecured noteholders debt as well as the secured debt obligation to the Lenders:

> By virtue of clauses (e) and (f) of Subsection 192(1) CBCA and the definitions of "security" and "debt obligation" found at Subsection 2(1) CBCA, [unsecured parties such as the Lenders fall under the purview of section 192]. "Security" is defined in Section 2 to include a "debt obligation". In turn, "debt obligation" is

[313] *Abitibi*, supra note 197 at para 53.
[314] *Abitibi*, *supra* note 197 at para 53. See also *St. Lawrence*, *supra* note 113 at para 13.
[315] *Abitibi*, *supra* note 197 at paras 16, 17.

> defined as "a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured". Therefore, … the Lenders, whose debt obligation is evidenced by the Term Loan Facility, can be included in the proposed Arrangement.[316]

This analysis mirrors the process in which the Director defines "security holder" in *The Policy*. It is important to note that the court still undertakes its own analysis to determine whether the parties that would be affected by the arrangement can be under section 192. In *Abitibi*, the court's interpretation of "security" and "debt obligation" conform with the principles of statutory interpretation. Dreidger's approach dictates the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[317] Thus, whether secured and unsecured noteholders, and secured debt obligations fall within the scope of a section 192 arrangement can be determined by analyzing the words in their immediate context and attempting to understand the reasons why the legislature has chosen these words. A logical start to this process is applying Sullivan's assumptions of statutory interpretation. Parliament is assumed to have "drafting competence" such that it knows when it is appropriate to include definitions which aid in formulating a legislative scheme.[318] Thus, it can be assumed Parliament had a specific reason to include the definitions of "security" and "debt obligation" in section 192.[319] Parliament would not have included these specific words without intending them to have a specific meaning which contributes to the provision as a whole. Additionally, Dreidger states "words of an Act are to be read in their entire context"[320]. The above analysis takes into account the wording of section 192 in its entirety to interpret the words "security" and "debt obligation". Based on these assumptions

[316] *Ibid* at paras 67, 68.
[317] *Stubart*, *supra* note 27 at para 61.
[318] Sullivan 2016, *supra* note 31 at 41
[319] *CBCA*, *supra* note 1, s 192(2).
[320] *Stubart*, *supra* note 27 at para 61.

and Dreidger's approach, the intention of Parliament seems clear: that secured noteholders, unsecured noteholders, and secured debt obligations can be affected by an arrangement under section 192.

After determining the proposed arrangement fell within the purview of section 192, the court undertook a review of the cases instrumental in interpreting the solvency requirement. First, the court referenced the infamous quote from *Amoco*, "Dome may, indeed, be insolvent; but the applicant and others involved are not"[321], the court's justification for allowing an insolvent corporation to be involved in a section 192 arrangement. Next, the court discussed the *Trizec* decision, where an insolvent corporation was allowed to be the co-applicant with a solvent corporation. Finally, the court considered *St. Lawrence*, which decided that at least one applicant must be solvent to satisfy the section 192 requirement. Of these three similar but different decisions, the court determined that in the case of *Abitibi* the solvency requirement was met based on the *St. Lawrence Interpretation* as Abitibi was insolvent but applied with at least one solvent applicant.[322]

Finally, the court discussed when the corporations involved in an arrangement must satisfy the court they are solvent. Citing the *2003 Policy*, the court determined that corporations must satisfy the court of their solvency at the date of the final order and can be insolvent at the time of the interim order. This principle, found in *Computel Systems*, is the way in which a solo insolvent corporation can satisfy the solvency requirement. The court in *Abitibi* adopted the principle of the *Computel Interpretation* as the test to determine whether an arrangement involving several

[321] *Abitibi*, *supra* note 197 at para 75.
[322] *Ibid* at para 78.

applicants has satisfied the solvency requirement. Emerging from the *Abitibi* decision is a two-step test to satisfy the solvency requirement:

1. At the interim hearing, does the arrangement satisfy the solvency requirement by meeting the requirements of either the *Amoco Interpretation* or the *St. Lawrence Interpretation*, as found in *The Policy*?
2. At the final hearing, are the corporations involved in the arrangement solvent?

The first step in this test is derived from the fact that the court discussed both the *St. Lawrence Interpretation* and the *Amoco Interpretation* for how an insolvent corporation proposing an arrangement can satisfy the solvency requirement. Under the *Computel Interpretation*, it is acceptable for the corporation in the proposed arrangement to be insolvent at the interim order provided the corporation can show that the arrangement it is undertaking will result in it being solvent at the final order. Therefore, the *Abitibi* test is only intended for arrangements involving several corporations. This is supported by the fact it would be redundant to apply this test to solo insolvent corporations as step two is the basis of the *Computel Interpretation*. The *Abitibi* arrangement never made it to the final order stage as the *CBCA* proceedings were converted to *CCAA* proceedings 34 days after the interim order.[323]

In 2010, the Director published the 2010 version of the *Policy of the Director Concerning Arrangements Under Section 192 of the Canada Business Corporations Act* [324] ("*2010 Policy*"). While the Director changed other aspects of *The Policy*, updating it to reflect the Supreme Court's decision in *BCE*, the Solvency Limitation sections were essentially left untouched.[325] Thus, while there were updates to the law in practice, mainly the new test articulated in *Abitibi*, the Director

[323] CAIRP, *supra* note 129 at 4.
[324] *2010 Policy*, *supra* note 280.
[325] The Director made a few stylistic word choice alterations which did not alter the substantive content.

chose not to update the quasi-formal law in response. The lack of response left insolvency practitioners and the court to continue to develop the law in practice, namely a test to satisfy the solvency requirement, without any guidance.

The next case to develop the solvency requirement test was *Re Mega Brands*[326] ("*Mega Brands*") (2010). Mega Brand Inc ("Mega") was insolvent and applied for a section 192 arrangement to reorganize with two solvent applicants. The Superior Court of Quebec decided that Mega met the solvency test and ensured it would be solvent upon implementation of the arrangement:

> [34] These principles applied to the case at bar allows the court to conclude that the solvency test is complied with:
>
> • At least two applicants are solvent;
>
> • MEGA meets its ongoing obligations and will be solvent once the reorganization is completed. [Translation][327]

The court found the solvency requirement was met based on the *St. Lawrence Interpretation* as Mega was insolvent but applied with at least one solvent applicant. In both *Abitibi* and *Mega Brands*, the court applied the *St. Lawrence Interpretation*. The court also did not follow the *Abitibi* rule that the solvency requirement be met at the final order. Rather, the court altered the two-step test laid out in *Abitibi* to:

1. At the interim hearing, does the arrangement satisfy the solvency requirement by meeting the requirements of either the *Amoco Interpretation* or the *St. Lawrence Interpretation*, as found in *The Policy*?

[326] *Mega*, supra note 192.
[327] *Ibid* at para 34.

2. At the final hearing, will the corporations involved be solvent upon completion of the arrangement?

Thus, the court in *Mega Brands* changed the second step in the solvency test to ensure the solvency of the corporations involved upon the completion of the arrangement. The first step remains the same as while the court does not mention the *Amoco Interpretation*, it is still recognized by *The Policy*.

The first case to consider whether either of the solvency tests laid out in *Abitibi* and *Mega Brands* should be applied to an arrangement involving a solo insolvent applicant was *Re GT Canada Medical Properties Inc.*[328] ("*Re GT*") (2010). GT Canada Medical Properties Inc. ("GT") applied as a solo insolvent applicant for an arrangement under section 192. The court granted the interim order and the directors of GT then passed a resolution to "reduce the stated capital of GT Canada by "the amount necessary to meet the solvency test in subsection 192(2) of the CBCA."".[329] At the time of the final order, GT was no longer insolvent and the arrangement was approved. This confirms the court is still willing to allow solo insolvent applicants to restructure, following the *Computel Systems* precedent outlined in *The Policy*. Additionally, this decision sets out solo insolvent applicants only need to satisfy the court of solvency at the time of the final order and not after the arrangement is implemented. Therefore, neither of the solvency tests laid out in *Abitibi* and *Mega Brands* should be applied when the arrangement is for the restructuring of a solo insolvent applicant.

[328] *GT*, *supra* note 283.
[329] *Ibid* at para 8.

In 2013, the Ontario Superior Court rendered an interim order decision on a unique proposed plan of arrangement in *Re 8440522 Canada Inc.*[330] ("*Mobilicity*"). Mobilicity Group was insolvent and applied for two mutually exclusive plans of arrangement under section 192.[331] The first plan, the "Acquisition Plan", was a "plan of arrangement based on an agreement with a yet to be found third party purchaser for the acquisition of the Mobilicity Group."[332] The second, the "Recapitalization Plan", was a "plan for the recapitalization of the Mobilicity Group based on $75 million in financing"[333] obtained by converting unsecured debt to equity. For both arrangements, the applicant was a private corporation with no material liabilities and wholly-owned subsidiary of a wholly-owned subsidiary of Mobilicity Group.[334] Under each arrangement, the applicant was to be "amalgamated with another member of the Mobilicity Group … and that the amalgamated entity would be the issuer of all of the new securities to be issued under the Recapitalization Plan."[335]

Citing *Abitibi*, the court reiterated that at the interim order hearing the court must consider the applicants' demonstration of good faith and compliance with section 192's statutory requirements.[336] As a corporation's solvency is a statutory requirement, the court then determined whether the solvency requirement was satisfied:

> [50] I do not think it is disputed that, under existing jurisprudence, a plan of arrangement can relate to the compromise of debt. This is also accepted in the Policy Statement of the Director. […]
>
> [52] The Applicant submits that it satisfies the solvency requirement of section 192 in two ways: (1) by virtue of the Applicant's solvency; and (2) on the basis that the Mobilicity Group will be solvent at the time of the final order.

[330] *Mobilicity*, *supra* note 82.
[331] *Ibid* at para 15.
[332] *Ibid*.
[333] *Ibid*.
[334] *Ibid* at para 6.
[335] *Ibid* at para 22.
[336] *Ibid* at para 41.

> [53] In making these submissions, the Applicant relies in part on the statement of Blair J. in para. 15 of *St. Lawrence* to the effect that section 192 requires only that at least one of the corporate applicants under the proposed plan of arrangement not be insolvent as defined under subsection 192(2) of the CBCA. In addition, the Applicant points to *The Policy* Statement of the Director, which recognizes that plans of arrangement may proceed where the applicant is insolvent at the time of the interim order but will be solvent at the time of the final order.[337]

Mobilicity Group submitted it satisfied the solvency requirement based on the test laid out in *Abitibi* and the court agreed, citing *Abitibi* numerous times and following the *Abitibi* testThe court decided that both plans proposed by Mobilicity Group would satisfy the solvency requirement. First, the solvent applicant satisfied the *St. Lawrence Interpretation,* satisfying the first step in the *Abitibi* test. Both plans would result in the corporations involved being solvent at the final hearing thus, satisfying the second step in the *Abitibi* test. Under the Acquisition Plan, all corporations involved would be solvent at the time of the final order based on the court's belief that any third party purchaser would be solvent and have sufficient financing to pay Mobilicity's creditors and ensure and the continuing operations of Mobilicity Group.[338] Under the Recapitalization Plan the court was satisfied that the $75 million in financing included in the plan "would, when implemented, result in a solvent entity, satisfying the solvency requirement on the basis that the applicant could be considered to be solvent at the time of the final order, even if it was insolvent at the time of the interim order."[339] There are two important aspects to take away from the court's decision in *Mobilicity*. First, the Ontario Superior Court once again applied the *St. Lawrence Interpretation,* indicating the law in practice is settling towards this interpretation. Second, when assessing how Mobilicity Group satisfied the solvency requirement for each proposed plan the court considered the solvency of the corporations involved at the final order of each plan.

[337] *Ibid* at paras 50, 52, 53.
[338] *Ibid* at para 56.
[339] *Ibid* paras 58, 59.

Therefore, it would appear the added second step in the test to ensure the solvency of the corporations, from *Abitibi*, at the final order was settling.

In 2014, the Director updated *The Policy* and made it accessible online. The updated web version of *The Policy* was given a new title: *The Policy on arrangements – Canada Business Corporations Act, section 192*[340] ("*2014 Policy*"). A table of contents was also added, which was included in earlier versions of *The Policy*, but had been removed since the *2003 Policy*. Overall, the Director once again updated the quasi-formal law in a superficial manner, leaving the content identical to the *2010 Policy*. This is the last time *The Policy* is updated in the second cycle meaning the changes in the second recursive cycle are only to the law in practice, at the sole discretion of the court and insolvency practitioners.

In *Re Essar Steel Canada Inc.*[341] ("*Essar*") (2014), insolvency practitioners embraced their ability to influence the law in practice and proposed a new test to satisfy the section 192 solvency requirement. Essar Steel Algoma Inc. ("Algoma") had previously completed two restructuring arrangements under the *CCAA*.[342] The decision of Algoma to apply for its third restructuring under the *CBCA* rather than the *CCAA* indicates insolvency practitioners had come to view the *CBCA* as more preferable than the *CCAA*. Algoma owed hundreds of millions of dollars to several creditors and had "elected to use the 30-day grace period for the interest payment due on the Unsecured Notes."[343] Per the definition of insolvency in *CBCA* section 192(2)(a), Algoma was insolvent as it was unable to pays its debts as they come due. Algoma and Essar Steel Algoma Canada Inc. ("Essar Canada") applied to the court for an amalgamation of the two companies into one. The

[340] *2014 Policy*, *supra* note 87.
[341] *Essar*, *supra* note 288.
[342] See Janis Sarra, Creditor Rights and the Public Interest, (Toronto: University of Toronto Press, 2003) at 157.
[343] *Essar*, *supra* note 288 at para 15.

amalgamated companies would continue as Essar Canada, a company incorporated under the *CBCA*. All of Algoma's debt would be assumed by Essar Canada following the amalgamation. This decision is on the interim motion. Citing the *Mobilicity* decision, the court agreed that for interim orders the court must only consider whether the applicant has complied with the statutory requirements and has demonstrated good faith when putting forward the arrangement.[344] Based on these requirements, the court determined whether the applicants satisfied the statutory solvency requirement at the interim stage:

> [37] Counsel to the Applicants submits that the courts have frequently found that the solvency requirement is satisfied when at least one of the following is true:
>
> a. At least one of the applicant companies is solvent; and
> b. The Applicant company or companies will be solvent after the plan of arrangement is implemented, even though it is not solvent at the time that an interim order was sought. (see: *Re St. Lawrence & Hudson Railway Co.* (1998) CarswellOnt 3867, *Mobilicity*, supra and *Abitibi*, supra)
>
> [38] In my view, both of these requirements are satisfied in the application.
>
> [39] Moreover, the Applicants and each of its members will be solvent after the Arrangement is implemented. [345]

The first implication of this decision is that insolvency practitioners, specifically, applicants' counsel, provided a new test to the court to determine if the solvency requirement was satisfied. The court accepted this new iteration of how the solvency requirement is satisfied. The tests from *Abitibi* and *Mega Brands* differ in regard to the second step but they both require both steps to be fulfilled. Rather than relying on precedent, the court in *Essar* relied upon the submissions of the applicant's counsel to inform it of the test which satisfies the solvency requirement. This iteration disregards the solvency requirement tests developed over the last few years. *Essar* represents a monumental shift in the court's approach to the solvency requirement. While decisions such as

[344] *Ibid* at para 26.
[345] *Ibid* at paras 37-39.

Abitibi and *Mega Brands* added steps to satisfy the solvency requirement, this test simplifies how an insolvent corporation can satisfy the solvency requirement.

The *Essar* decision in conjunction with the existing case law and *The Policy*, sets out the test for how to satisfy the section 192 solvency requirement. The *Essar* test finds its standing in the three precedent cases set out in the quasi-formal law of *The Policy*. The precedent *Amoco* sets is articulated by *The Policy* as "use of the arrangement provisions of the Act is not limited to cases where none of the corporations involved is insolvent".[346] This precedent allows for the existence of the *Essar* test. *The Policy* articulates the precedent of St Lawrence as "the solvency requirement in subsection 192(2) of the Act [requires] only that at least one of the corporate applicants under the plan of arrangement must not be insolvent".[347] Option A of the *Essar* test adopts this precedent, finding the solvency requirement is met when "[a]t least one of the applicant companies is solvent".[348] In *The Policy*, *Computel Systems* exemplifies the precedent that the solvency requirement is satisfied when "the applicant, while insolvent at the interim hearing date, is solvent at the date of the final order."[349] Citing *Mobilicity* and *Abitibi*, counsel of the applicants acknowledge recent cases have considered the solvency of the applicants after plan implementation rather than at the final order when an applicant is insolvent at the interim order.[350] While it is true that recent case law switched to assessing solvency after plan implementation, the cases counsel cites are not on point. The court's decision in *Abitibi* was to ensure the solvency of the applicants at the final order. The court in *Mobilicity* discussed how the plan "when implemented, would result in a solvent entity"[351] which meant the court could infer the applicant

[346] *1994 Policy*, *supra* note 110, s 4.03; *1998 Policy*, *supra* note 112, and subsequent versions of *The Policy*, s 2.03.
[347] *2003 Policy*, *supra* note 115, and subsequent versions of *The Policy*, s 2.03.
[348] *Essar*, *supra* note 288 at para 37.
[349] *Supra*, note 346.
[350] *Essar*, *supra* note 288 at para 37.
[351] *Mobilicity*, *supra* note 82 at para 58.

was solvent at the final order. Counsel's iteration of Option B would have been better supported by citing *Mega Brands* nonetheless, the court in *Essar* accepted the test as provided. Thus, Option B of the *Essar* test is "The Applicant company or companies will be solvent after the plan of arrangement is implemented, even though it is not solvent at the time that an interim order was sought."[352] If an insolvent corporation is able to satisfy either of these options, the section 192 solvency requirement is satisfied.

Therefore, *Essar* is the paramount decision in the second recursive cycle. It lays out a definitive test as to how the section 192 solvency requirement can be satisfied by insolvent corporations seeking a section 192 arrangement. The overall effect of the *Essar* test is simplification. Contemplating which of the three interpretations the court would adopt is no longer relevant. For arrangements involving multiple corporations, insolvent corporations no longer need to worry about whether they can be an applicant. The concern of whether the court will adopt the *St. Lawrence Interpretation*, that only one applicant needs to be solvent, or the *Amoco Interpretation*, that all applicants must be solvent, is alleviated. The test is the same regardless of whether the arrangement involves a solo insolvent applicant or multiple applicants. Additionally, it is clear that the *Essar* test follows *The Policy*'s determination that there are "two bases" for insolvent corporations to restructure via section 192 arrangement.[353] The *Essar* test sets out each of these bases and requires the arrangement before the court satisfy at least one of the two. The case law following Essar, with the exception of *Connacher*, is a period of settling where the court repeatedly adopts and applies the Essar test.In the decision of *Re 9171665 Canada Ltd.*[354] ("*Connacher*") (2015), the Alberta Queen's Bench did not follow the *Essar* test. In *Connacher*,

[352] *Essar*, *supra* note 288 at para 37.
[353] *Supra*, note 346.
[354] *Connacher*, *supra* note 289.

Connacher Oil and Gas Limited ("Connacher") owed hundreds of millions of dollars in a "First Lien Credit Agreement" and in "Senior Secured Second Lien Notes."[355] Connacher had liquidity problems and was insolvent based on 192(2)(a) as Connacher admitted it would not be able to pay its debts as they came due. Connacher proposed the arrangement where it and a newly incorporated shell company, Arrangeco, were to amalgamate and emerge as a new company. The arrangement also involved Secured Noteholders exchanging their Notes for common shares, leaving the First Lien debt "unaffected."[356] At the interim order application, the First Lien lenders opposed the arrangement arguing, "there was no reason to grant the order given that the proposed plan of arrangement would not solve Connacher's financial problems, as Connacher admittedly could not pay the accelerated amount under the First Lien Credit Agreement even if the plan was implemented."[357] However, the court granted the interim order and left the solvency determination for the final order.

At the final order application, Connacher sought approval of its plan of arrangement. It also sought a final order with a release provision waiving the default that the First Lien lenders were relying upon for acceleration of the First Lien debt.[358] Connacher was attempting to completely exclude the First Lien lenders from the proceedings so its plan of arrangement would be unopposed. The First Lien lenders opposed the plan and the final order. First Lien lenders had obtained a judgement from New York, as New York law governed their agreement, that they could accelerate the amounts Connacher owed to them. They argued that Connacher "did not qualify as an applicant for a final order because it had not proved that it would not be insolvent even if the

[355] Zych, et al, *supra* note 276 at 198.
[356] *Ibid*.
[357] Zych et al, *supra* note 276 at 199.
[358] *Ibid*.

plan was implemented."[359] This argument is Option B of the *Essar* test, the requirement that a corporation be solvent at the time the plan of arrangement is implemented. Connacher argued "that it was not in default and therefore would be solvent after the plan of arrangement and that even if it was in default, the Court had the jurisdiction to waive that default."[360] The court in other cases, such as *Essar* and *Mobilicity*, had waived default as part of the arrangement process but not in order to find that the solvency requirement was met. The court found "that power given to it under section 192(4) to waive an alleged event of default" was distinct of the issue at hand which was whether it must be satisfied that the emerging entity will be solvent.[361]

In its analysis, the court explained that while cases such as *Mega Brands* and *Essar* held corporations must be solvent upon the plan's implementation, there had never been a case where an emerging entity might not be solvent following plan implementation.[362] Due to the potential acceleration of the First Lien, it was possible that the amalgamated corporation would emerge insolvent as it would not be able to pay the full amount of the First Lien. The court set out this issue as:

> Does the court have the jurisdiction to issue a final order under the CBCA where the entity emerging from the arrangement will or might be insolvent?[363]

The court considered several factors in determining whether a corporation must emerge solvent from a section 192 arrangement. It first considered that "restructurings which compromise debtholder claims against insolvent corporations may be more properly conducted under the provisions of applicable insolvency legislation, as opposed to the CBCA."[364] The court also noted

[359] *Ibid*.
[360] Zych et al, *supra* note 276 at 199. See *Connacher*, *supra* note 289 at para 16.
[361] *Connacher*, *supra* note 289 at paras 20, 21.
[362] Zych et al, *supra* note 276 at 200.
[363] *Connacher*, *supra* note 289 at para 19.
[364] *Ibid* at para 27.

that section 192 allows the restructuring process to remain under the control of the corporation's board and management as opposed to arrangements under insolvency legislation. This makes sense in circumstances of confirmable non-insolvency.[365] Based on these factors the court determined that in order to grant a final order under the *CBCA*, approving a plan of arrangement, the Court must be satisfied that at the final order, and upon emergence, the entities will not be insolvent.[366] However, corporations involved "do not need to establish their solvency on emergence for the purposes of the interim order, the solvency of each applicant at the conclusion of the arrangement is to be considered at the final order stage."[367] Connacher was not able to show its proposed arrangement would result in an emerging solvent corporation. Its application was denied.[368]

While this decision contemplates and confirms Option B of the *Essar* test, that to satisfy the solvency requirement a corporation must emerge solvent, it does not actually apply the *Essar* test as it disregards Option A. Connacher satisfied Option A as it applied with a solvent applicant. Had the court in *Connacher* followed the *Essar* test, it should have approved the arrangement. This exemplifies a potential problem with the *Essar* test, that Option A allows for corporations to emerge from a plan of arrangement insolvent. *Connacher* decided that in order to approve a plan of arrangement at the final order hearing, the court should ensure that the corporations involved are solvent at the final order and will be solvent upon emergence.[369] If followed, the *Connacher* decision sets out several restrictions on section 192 arrangements:

> First, applicants cannot rely on establishing solvency at a single stage in the arrangement. Second, though applicants may continue to utilize shell companies for proving solvency at the interim order stage, they must demonstrate solvency of the enterprise upon emergence from the arrangement. Where applicants are unable

[365] *Ibid.*
[366] Zweig & Bell, *supra* note 127 at 1204.
[367] *Ibid.*
[368] It was also denied on the basis that the proposed plan of arrangement was fair and reasonable.
[369] *Connacher*, *supra* note 289 at para 44.

> to meet the solvency requirements, as characterized in *Connacher*, their debt restructurings are more properly facilitated under an insolvency statute such as the *CCAA*.[370]

Connacher and its accompanying restrictions has not been adopted by the court in future decisions regarding section insolvent 192 arrangements. In terms of the overall recursive cycle, *Connacher* is an outlier yet, shows a problem with the *Essar* test. Section 192 arrangements are intended for solvent corporations or, per *Amoco* and *Computel Systems*, arrangements which result in solvent corporations. The requirement set out in *Connacher* that, for a final order to be granted the court must be satisfied at the final order and upon emergence the emerging entities will not be insolvent, is in the spirit of section 192. However, as legal actors play a large role in developing what is needed to satisfy the section 192 solvency requirement, *Connacher* becomes an outlier. Insolvency professionals want to be able to restructure insolvent corporations with as few hurdles as possible and do not submit the *Connacher* test for the court to consider in the cases following *Connacher*. Rather, they submit the *Essar* test as it is simpler and easier to comply with. As insolvent section 192 arrangements typically come before the court already negotiated with all parties consenting, the court typically accepts the test the applicant submits, especially if there is supporting case law.

In the cases following *Connacher*, the Essar decision is provided to the court by insolvency practitioners, solidifying it as the solvency requirement test. For example, in *Re Tervita Corp.*[371] (2016), Tervita was indebted to several parties and the proposed arrangement was for Tervita to restructure these debts. Tervita was insolvent as it was unable to pays its debts as they came due, electing not to make two of its interest payments.[372] "However, Tervita negotiated waivers from the revolving credit lenders and the term loan lenders and entered into a forbearance agreement

[370] Zweig & Bell, *supra* note 127 at 1204.
[371] *Tervita*, *supra* note 294.
[372] *Ibid* at para 11.

with the subordinated noteholders".[373] Tervita also received support agreements from the unsecured noteholders, subordinated noteholders and shareholders which state they will "support a recapitalization plan and vote their securities and debt in favour of the resolutions necessary to effect the plan."[374] Citing *Essar*, the court concluded the solvency requirement was currently satisfied and would be satisfied upon completion of the arrangement based on the agreements made in anticipation of the proposed *CBCA* arrangement.

In *Re Banro Corp.*[375] (2017) the Ontario Superior Court approved a final order for proposed arrangement. The court expressed some reluctance to approve the proposed order because of the scope of certain arrangement provisions. These provisions were no-default orders which prevented "third parties from enforcing rights based on events of default cured by the arrangement."[376] In its decision the court discussed how this kind of restructuring is likely better done via an insolvency statute such as the CCAA:

> While CBCA arrangements allow debt reorganization at times, there are too few safeguards for creditors and other interested parties to treat a CBCA arrangement as equivalent to a CCAA plan. If a debtor needs to cure a prevailing or threatened insolvency by compromising debt and curing defaults comprehensively, a CCAA plan with service on all parties affected by the compromise and curing provisions is required.[377]

However, the court approved the arrangement for three reasons. First, the court was satisfied the emerging entity would be solvent, satisfying Option B of the *Essar* test. Second, the restructuring was fair and reasonable, and third, it would be inconvenient for the parties to use a different statute to effect the proposed changes. Court approval included the no-default order as the court felt it

[373] *Ibid.*
[374] *Ibid* at para 15.
[375] *Banro*, *supra* note 295.
[376] *Ibid* at para 2.
[377] *Ibid.*

"should be willing to make orders to protect the sanctity of the arrangement that it approves and s. 192 of the CBCA is certainly wide enough to allow for this."[378] This decision helps entrench the *Essar* test. It found the arrangement acceptable even though this kind of restructuring is likely better done under an insolvency statute. Decision like this promote section 192 as an insolvency restructuring provision as insolvent private parties continue to apply to the court for arrangements and the court uses its broad powers to approve them, provided they satisfy the *Essar* test.

Another outlier in the *Essar* test regime is the decision of *Arrangement relatif à Pétrolia inc.*[379] ("*Pétrolia*") (2017) where the proposed arrangement was found to satisfy the solvency requirement based on the *Computel Interpretation*. As the Quebec Superior Court noted, the arrangement was similar to that of *Cinar* where an insolvent applicant reduces its stated capital via shareholder resolution then amalgamates with a second corporation. Pétrolia Inc. and Pieridae applied together for a section 192 arrangement to amalgamate. The proposed arrangement had several steps. First, Pétrolia, by resolution, would transfer its corporate existence from the *Quebec Business Corporations Act*[380] (*QBCA*) to the *CBCA*. The concept of converting a corporation regulated by provincial legislation into one regulated by the *CBCA* was not new. In *Ainsworth*, the court approved a similar arrangement allowing a provincial corporation to amalgamate with a *CBCA* corporation. Next, Pétrolia's shareholders would be asked to adopt a resolution to reduce its stated capital as it was insolvent under 192(2)(b).[381] Finally, Pétrolia and Pieridae would amalgamate into a new corporation. In the case at hand, the court decided the appropriate approach to use when assessing solvency at the interim order was the *Computel Interpretation*, citing *GT*

[378] *Ibid* at para 3.
[379] *Petrolia*, *supra* note 296.
[380] *Quebec Business Corporations Act*, RSQ 1996, c C S-31.1.
[381] *Petrolia*, supra note 296 at para 29.

and *Cinar* as precedent.[382] As the court was satisfied Pétrolia would meet the requirement of the *Computel Interpretation* of being solvent at the final order, it approved the interim order. Effectively, with Pétrolia solvent at the time of the final order, the amalgamation aspect of the arrangement the court would be approving would be that of two solvent corporations, one which is specifically anticipated by section 192. While the court decided to use the *Computel Interpretation* because of the similarity between the restructuring in this case and that of *Cinar*, this decision does not conflict with the *Essar* test. The proposed arrangement would have satisfied Option B of the *Essar* test as the amalgamated emerging corporation would be solvent.

Further solidifying the *Essar* test is the interim order decision of *Re RGL Reservoir Management Inc.*[383] ("*RGL*") (2017) decided by the Ontario Superior Court. RGL Reservoir Management Inc. ("RGL Management") and 10504360 Canada Inc. ("RGL NewCo") made the interim order application for their proposed plan of arrangement. This plan involved a recapitalization transaction where secured debt and existing shares would be exchanged for shares in RGL NewCo. RGL Management was insolvent, RGL NewCo was not. First the court acknowledged that "section 192 of the CBCA is a flexible statutory provision capable of "incorporating whatever tools and mechanisms of corporate law the ingenuity of their creators bring to the particular problem at hand.""[384] It then considered the two requirements of an interim order, that the applicants exercise good faith in bringing the arrangement, and that the statutory requirements are met. When considering the statutory solvency requirement, the court reiterated the *Essar* test stating, "Canadian courts have held that the solvency requirement is satisfied where at least one of the applicant companies is solvent or where the applicant will be solvent after the

[382] *Ibid* at para 31.
[383] *RGL*, *supra* note 298.
[384] *Ibid* at para 26.

arrangement is implemented."[385] The proposed arrangement satisfied Option A of the *Essar* test as RGL NewCo, one of the applicants, was solvent. The court also discussed how RGL Management would be "better capitalized and capable of paying its liabilities as they become due"[386] upon plan emergence so Option B of the *Essar* test was also satisfied.

As of early 2019, the latest reported insolvent section 192 arrangement is the *Concordia*[387] decision consisting of what the court defined as "the *Concordia* Preliminary Interim Order Decision, the *Concordia* Interim Order Decision, and the *Concordia* Final Order Decision."[388] There are several implications arising from this decision, many of which are discussed in Part B of this chapter. In terms of the development of the solvency requirement analysis, the *Essar* test was once again applied by the court. At the *Concordia* Preliminary Interim Order Hearing, in October of 2017, Concordia International Corp. ("CIC") and its subsidiaries brought a motion with Concordia Healthcare (Canada) Limited ("CHCL") before the Ontario Superior Court for an interim order approving a 'Recapitalization Transaction"[389]. The "proposed Recapitalization Transaction [involved] the exchange of the Affected Debt Instruments[, which consisted of Common Shares, Secured Term Notes, Secured Notes, Secured FX Swaps, Unsecured Bridge Loans and Unsecured Notes,] for new debt instruments issued by CIC, other equity securities of CIC or a combination thereof."[390] CHCL was a wholly-owned subsidiary of CIC which did not carry on any operations or have any liabilities. At the time the order was sought, CIC had not made its October 7.00% interest Unsecured Notes Payment and it did not intend to make the October

[385] *Ibid* at para 33.
[386] *Ibid* at para 34.
[387] *Concordia*, *supra* note 297.
[388] *Concordia Final Order Decision*, *supra* note 297 at para 25.
[389] Concordia Preliminary Interim Order Decision, supra note 297 at para 5.
[390] *Ibid* at paras 20-22.

Unsecured Bridge Loan Payments. As such, CHCL was solvent while CIC was not. In its initial interim order decision, the court reiterated the *Essar* test that the solvency requirement is satisfied when "at least one of the applicant companies is solvent or where the applicant will be solvent after the arrangement is implemented."[391] As CHCL was solvent, the court found Option A of the *Essar* test was fulfilled thus, the solvency requirement was satisfied. In the *Concordia* Final Order Decision, the court held that the solvency requirement remained satisfied based on the court's prior determination that Option A of the *Essar* test had been met at the *Concordia* Preliminary Interim Order Decision.[392]

At the start of the second cycle, *The Policy* acknowledged and accepted three interpretations which satisfied the solvency requirement. It was likely a consensus would develop around a particular interpretation, leading more cases to cite back to the favoured interpretation and amplifying its influence. Of the two interpretations of what satisfies the solvency requirement when multiple applicants apply for a section 192 arrangement, originating in *Amoco* and *Trizec*/*St. Lawrence*, the one that is favoured by the courts and private parties is the *St. Lawrence Interpretation* where only one applicant must be solvent. *St. Lawrence* (1998) is cited in *The Policy* for this interpretation, is frequently followed, and ultimately becomes Option A in the *Essar* test. The third interpretation, originating in *Computel Systems*, went through substantial changes after *BCE*. The interpretation that the solvency requirement is satisfied if the applicant is solvent at the final order was adopted for arrangements involving multiple applicants in *Abitibi*. The interpretation was altered in *Mega Brands*, to require the emerging entity be solvent after the completion of the arrangement, and adopted as Option B in the *Essar* test. The *Essar* test also answers the Director's question, found in *The Policy*, as to when the solvency requirement must

[391] *Ibid* at para 34.
[392] *Concordia Final Order Decision*, *supra* note 297 at para 26.

be satisfied. For Option A, the solvency requirement can be met at the interim stage if the court determines one of the applicants is solvent. For Option B, the solvency requirement is satisfied if the company or companies emerging from the arrangement will be solvent after the plan of arrangement is implemented. The result of the second cycle is the amalgamation of three interpretations into one to determine if the solvency requirement is satisfied. While *Connacher* points out the *Essar* test's flaw, in that both Options should be fulfilled in order to ensure an arrangement always results in a solvent corporation, the *Essar* test is clearly preferred. Reported cases in the years following *Connacher* (2015) frequently adopt the *Essar* test, indicating it has settled as the law in practice. As such, the second recursive cycle for the section 192 solvency requirement is complete. The second recursive cycle is unique as the changes to the law come solely from the law in practice with the formal and quasi-formal law remaining silent. It is impossible to determine what will lead to the start of the third cycle, but it may likely a similar case as *Connacher* where the *Essar* test is satisfied but the emerging entities are not solvent. In the interim, it is clear that section 192 arrangements are available to insolvent corporations provided they satisfy the *Essar* test.

B. Implementation of Bankruptcy Remedies under 192(4)

Throughout the years in which section 192 has been used to conduct insolvent arrangements, the court has been utilizing its broad powers under subsection 192(4), to "make any interim or final order it thinks fit", to grant remedies typically only provided under insolvency statutes such as the *BIA* and *CCAA*. While many of these remedies originate in the first recursive cycle, specifically in *Trizec*, their use is far more common in the second recursive cycle. Many of the decisions granting these remedies in the second cycle are not reported. **Table 4** reflects how

proliferated these remedies have become. A brief discussion on the origin and scope of the remedies follows.[393]

Figure 4: Remedies Granted Under s 192(4)[394]

Case	Year	Preliminary Interim Order	Stay of Proceedings	No-Default Order	Conversion of Provincial Act	Appointment of Monitor
Trizec	1994	✓	✓	✓		
Call-Net	2002		✓			
Re Tembec	2008		✓			
Ainsworth	2008				✓	
Look Communications	2009					✓
Abitbi	2009		✓	✓		
Re Mega Brands	2010		✓			
Frontera	2010		✓	✓		
Compton	2011		✓			
Catalyst Paper	2012		✓			
Mobilicity	2013		✓	✓		
Essar	2014	✓	✓	✓		
Re Tervita Corp.	2016	✓	✓			
Catalyst Paper	2016		✓			
Lightstream	2016	✓	✓			
Trident	2016		✓			
Sherritt	2016		✓			
Re Banro Corp	2017			✓		
Pétrolia	2017				✓	
Concordia	2017	✓	✓	✓	✓	
RGL	2017		✓			
NCSG	2018		✓			

i. *Preliminary Interim Orders and Stays of Proceedings*

A unique aspect of section 192 insolvent arrangements brought before the court is that they have usually been pre-negotiated amongst the parties. These pre-negotiated plans of arrangements are brought before the court at the interim order hearing to receive the green light to have the plan voted on and approval to complete further steps set out in the plan. Some corporations have been

[393] For a more comprehensive discussion on remedies found in *CBCA* restructurings see Kaplan, *supra* note 191; Chow & Casey, *supra* note 245; and Zweig & Bell, *supra* note 118.
[394] This case list includes unreported decisions not discussed as their sole significance is the remedy granted.

able to come before the court extremely prepared at the interim order because they first applied to the court for a preliminary interim order. When seeking a preliminary interim order, a corporation typically only has a framework for an arrangement partially negotiated with its major stakeholders.[395] In order to get the arrangement details finalized and all stakeholders on board, corporations apply to the court for a preliminary interim order and request the court grant a stay of proceedings. The issuance of a stay of proceedings at a preliminary interim order finds its origin in *Trizec* where the court found it had the authority to do so under 192(4):

> Subsection 4 of section 192 gives broad power to the court with respect, inter alia, to interim orders. The power to restrain, for example, a secured creditor is not one of the specific powers delineated and if it exists must be found in the general language which states, the Court 'may make any interim or final order it thinks fit'. On consideration of the whole of the section and the purposes of same, I am satisfied that in appropriate circumstances, given that the arrangement might affect the rights of secured creditors, the power to restrain enforcement of security and thus attempt to preserve the status quo pending consideration of the arrangement by parties affected can be found in the broad general language of section 192(4).[396]

While not explicitly set out, the court appears to be deriving the ability to hear and grant preliminary interim orders based on the fact that subsection 192(4) states the court "may make any interim order or final order it thinks fit" which does not limit the court to only make one interim order. Thus, the court finds it has broad power with respect to the issuance of interim orders. *Trizec* is clearly a decision ahead of its time as preliminary interim orders are not utilized again until 2014, twenty years later.[397] *Essar* is where the preliminary interim order made its resurgence.[398] In *Essar*, the court accepted the use of a preliminary order to give the applicants "the time and stability necessary to finish negotiating and drafting, with affected Stakeholders, the definitive

[395] Zweig & Bell, *supra* note 127 at 1198.
[396] *In the Matter of a Plan of Arrangement proposed by Trizec Corporation Ltd* (6 April 1994) (Alta QB) unreported, as cited in *Abitibi*, *supra* note 197 at 106.
[397] Chow & Casey, *supra* note 249 at 16.
[398] *Ibid*.

documentation required to implement the proposed Arrangement and Recapitalization."[399] The court then determined that the two part test for an interim order –compliance with the statutory requirements and good faith requirement - applies to preliminary interim orders.[400] In *Concordia*, the court broadened the scope of preliminary interim orders. Previous preliminary interim orders approved by the court had been for the parties to finish developing a plan of arrangement with the major stakeholders already on board.[401] In *Concordia*, the court approved the preliminary interim order even though there was no framework or partial agreement in place with the major stakeholders for a plan of arrangement. Thus, after *Concordia*, preliminary interim orders including a stay of proceedings can be granted by the court regardless of whether any semblance of a plan of arrangement has been negotiated. Preliminary interim orders are therefore, very important to corporations seeking to develop a section 192 plan of arrangement but require a stay of proceedings in order to ensure they have the time they need to develop the plan. While the preliminary interim order is not provided for in section 192 or *The Policy*, its use has not been disputed by the court or the Director, indicating they agree with the *Trizec* decision that the power of the court to grant them is derived from subsection 192(4).

A stay of proceedings is a remedy only found in insolvency statutes. Specifically, when a court issues a stay of proceedings, "no creditor has any remedy against the debtor or the debtor's property, or shall commence of continue any action, execution or other proceedings, for recovery of a claim".[402] Under other insolvency statutes, such as the *BIA*, stays of proceedings have been interpreted broadly by the court,[403] a sentiment which has also been adopted in *CBCA*

[399] *Essar*, *supra* note 288 at para 44.
[400] Zweig & Bell, *supra* note 127 at 1207.
[401] *Ibid* at 1198.
[402] *BIA*, *supra* note 3, s 69.3(1).
[403] *Vachon v Canada (Employment & Immigration Commission)*, [1985] 2 SCR 417 at 424, 23 DLR (4th) 641.

proceedings.[404] After *Trizec*, stay of proceedings issued at interim orders slowly became more popular in proposed insolvent section 192 arrangements. The first case after *Trizec* requesting a stay of proceedings, *Re Enron Canada Corp.*[405] ("*Enron*"), as noted in *The Policy* ultimately became one of the few section 192 insolvent arrangements denied by the courts.[406] However, the arrangement was dismissed by the court in *Enron* because the stay sought was for derivative contracts. The court determined that "type of stay would not be available under federal insolvency statutes and therefore not appropriate to grant under the *CBCA*."[407] This analysis suggests the court is comfortable granting stays of proceedings under the *CBCA* provided they are typically available under federal insolvency statutes, effectively treating section 192 like a federal insolvency statute. As evidenced in Table 4, starting around the time of *BCE* and increasingly after, stays of proceedings have become prevalent in insolvent section 192 arrangements. One year after *BCE*, the court took it upon itself to review how subsection 192(4) provides the court the broad power to issue stays of proceedings at interim orders in *Abitibi*:

> [104] In statutory interpretation, it is well known that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament in relation to the Act.
>
> [105] From that perspective, the words used by Parliament at Subsection 192(4) not only suggest a large discretion for the Court, but also one that should be reasonably exercise in furtherance of the object of the provision. Namely, to facilitate an arrangement and, at the very least, to allow for it to be subject to a meaningful approval process.
>
> [106] In *Trizec*, Forsyth J. made the following observations on these broad powers under Subsection 192(4) and their exercise in respect of the rights enjoyed by secured creditors […]

[404] Kaplan, *supra* note 196 at 7.
[405] *Re Enron Canada Corp.* (2001), 310 AR 386, 31 CBR (4th) 15.
[406] *2014 Policy*, *supra* note 87, s 2.05.
[407] Zweig & Bell, *supra* note 127 at 1193.

> [107] In that case, Subsection 192(4) was interpreted as allowing the Court to restrain creditors' rights by issuing, in addition to a no-default order, a stay of proceedings similar to the stay order requested from this Court.

Thus, the court in *Abitibi* agreed with the analysis undertaken in *Trizec* which found issuing a stay of proceedings is well within the power granted to the court under subsection 192(4). Additionally, the court found the *Trizec* analysis was strengthened by the Supreme Court's ruling in *BCE*. Specifically, the court underlined the Supreme Court's determination "[i]f the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders."[408]

While stays of proceedings help section 192 insolvent arrangements to have a high success rate, there have been a few cases where the court has granted a stay of proceedings, but the section 192 arrangements are ultimately unsuccessful. The first is *Abitibi* where a broad stay of proceedings was granted but the *CBCA* proceedings were converted to *CCAA* proceedings after only 34 days. The second instance is the unreported 2012 *Catalyst Paper*[409] case where the proposed CBCA arrangement was converted to a CCAA proceeding 14 days after the interim order was granted.[410] Uniquely, in that case the stay of proceedings was not respected by those it affected as evidenced by an affidavit registered with the court in connection with the *CCAA* filing. In the affidavit, a Vice President of Catalyst stated:

> Notwithstanding a stay of proceedings order under the CBCA proceedings, the Company received numerous calls and communications from numerous suppliers refusing continued supply without cash or advance cash payments. The stay order under the CBCA is not a familiar order to the Company's suppliers and it has not proven to be effective in dealing with supplier issues, despite the fact that the Company has paid supplier accounts on existing credit terms.[411]

[408] *BCE*, *supra* note 68 at para 146 as cited in *Abitibi*, *supra* note 197 at para 112.
[409] *Catalyst 2012*, *supra* note 284.
[410] CAIRP, *supra* note 129 at 4.
[411] *Ibid*.

Disregard for stay of proceedings appears to be limited to this one case. Since then, numerous stays of proceedings have been granted and arrangements successfully completed. With preliminary orders becoming more common place, it is likely an increase in preliminary orders granting stays of proceedings will become prevalent in years to come.

ii. *No-Default Orders*

In addition to a stay of proceedings, the court also granted a no-default order in *Trizec*. No-default orders are very similar to stays of proceedings in that they both restrain creditors' rights. A section 192 proposal made to creditors may trigger an event of default against the company.[412] A no-default order prohibits creditors from declaring "in default any contract or other agreement to which [the company] is a party due to … being a party to the proceeding or having made an application to the Court pursuant to section 192 of the *CBCA*."[413] A no-default order was also requested and granted in *Abitibi* with the court finding *Trizec*'s interpretation that subsection 192(4) allows for the issuance of no-default orders is supported by *BCE*.[414] After the court's supportive analysis of no-default orders in *Abitbi*, no-default orders were granted in cases where existing defaults, not those arising solely by virtue of a section 192 arrangement proposal.[415] However, the court in *Connacher* restricted when no-default orders should be granted:

> Exercise of the power in section 192(4) to issue a no-default order should be limited to circumstances involving corporations which do not, at that point in time, require the order to assert non-insolvency in reference to alleged events of default which may have already taken place.
>
> While a stay or no-default order may be issued to maintain the status quo, the status quo should not easily extend to circumstances in which a claim has been advanced based on an alleged existing default.[416]

[412] Grossel, *supra* note 129 at 3.
[413] *Abitibi*, *supra* note 197 at para 108.
[414] *Ibid* at para 113.
[415] *Connacher*, *supra* note 289 at para 16.
[416] *Ibid* at para 27.

As *Connacher*'s approach to the solvency requirement was not adopted in subsequent decisions, it is unclear whether this restriction on the issuance of no-default orders will be followed in the future. The court has continued to issue no-default orders. For example, in *Re Banro Corp*., at the final order the court granted a no-default order, which prevented "third parties from enforcing rights based on events of default cured by the arrangement"[417], and in *Corcordia* a no-default order was ultimately granted.

iii. *Conversion from a Provincial Corporations Act to the CBCA*

Unique to insolvent *CBCA* restructurings is the court allowing a corporation incorporated under provincial law to be converted to a corporation under the *CBCA* or merge with a *CBCA* corporation as part of an arrangement. This has occurred in three cases, *Ainsworth*, *Pétrolia*, and *Concordia*. In *Ainsworth*, Ainsworth, a provincially-incorporated company in British Columbia, created a new *CBCA* corporation to access section 192. The new *CBCA* corporation was the solvent applicant for the arrangement so Ainsworth could access section 192. The plan of arrangement, for Ainsworth and its newly incorporated subsidiary ArrangeCo to merge and emerge a solvent *CBCA* corporation, was approved by the court.

In *Pétrolia*, due to the complexity of the proposed restructuring, "the petitioners opted to proceed through the mechanism of arrangement prescribed by section 192 of the *CBCA*."[418] At the interim hearing, Pétrolia sought court authorization to call a meeting of its shareholders and by resolution transfer its corporate existence from the *QBCA* to the *CBCA*. The difference between this plan of arrangement and the one found in *Ainsworth* is that *Pétrolia* would convert to a *CBCA* corporation before merging with another *CBCA* corporation and emerging a solvent *CBCA*

[417] *Banro*, *supra* note 295 at para 2.
[418] *Petrolia*, *supra* note 296 at para 6.

corporation. In *Pétrolia*, the court considered whether the Quebec securities regulator, *AMF*, should have been notified prior to interim order approval.[419] It determined that as the emerging corporation would be the result of the merger between two *CBCA* corporations, Pétrolia and Peridae, it was not necessary. This decision was based on the fact that Pétrolia would be converting to a CBCA corporation prior to merging with Peridae thus, the new corporation would not be originating from a provision of the *QBCA*. Therefore, as the arrangement satisfied all of the section 192 interim order requirements, the court approved the interim order and held the *AMF* did not need to be notified. It did require the Quebec registrar be informed once the continuance resolution was adopted.[420]

In *Concordia*, the insolvent corporation seeking restructuring, CIC was formed under the *Ontario Business Corporations Act* (*OBCA*). Similar to *Ainsworth*, CIC incorporated a subsidiary, CHCL under the CBCA with which it applied under the CBCA for a section 192 arrangement. However, similar to the plan of arrangement in *Pétrolia*, the *Concordia* plan of arrangement was for CIC to convert to a CBCA corporation before a final order was sought. At the preliminary interim order hearing, the court was satisfied the interim order requirements had been met and approved the interim order.

Based on these three cases, it is clear the court is willing for a corporation incorporated under provincial law to be converted into a *CBCA* corporation or merge with a *CBCA* corporation as part of an arrangement. While the court has not discussed where it derives its authority to approve corporate conversions, if one were to challenge the court's authority to do so, the court

[419] *Ibid* at para 36.
[420] *Ibid*.

would likely find it has the authority to under subsection 192(4). This is supported by the court's analysis of 192(4) in *Abitibi*:

> The words used by Parliament at Subsection 192(4) not only suggest a large discretion for the Court, but also one that should be reasonably exercise in furtherance of the object of the provision. Namely, to facilitate an arrangement and, at the very least, to allow for it to be subject to a meaningful approval process.[421]

With this analysis of subsection 192(4) it is easy to see how the court would find the conversion of a provincial corporation to a *CBCA* corporation as part of an arrangement necessary to facilitate the arrangement.

iv. *Appointment of a Monitor*

While *Concordia* included most of the bankruptcy remedies a court has granted under section 192, it did not include the appointment of a monitor. Unlike the remedies provided for in *Concordia*, a monitor has never been appointed in relation to an insolvent section 192 arrangement. A monitor is the agent of the court who owes a fiduciary duty to all parties and an obligation to act independently to ensure that one creditor is not given an advantage over other creditors.[422] The *Canadian Association of Insolvency and Restructuring Professionals* explains how the history and role of a monitor originated in the *CCAA*:

> The practice of appointing a monitor in CCAA proceedings began in the 1980s and 1990s, and was codified in the 1997 amendments to the CCAA. The role of the first monitor was to monitor the management of the debtor and report any untoward activity to the court and the secured creditor. Since that time, the scope of the monitor's mandate has included assisting the debtor in the development of a plan, acting as watchdog for creditors and reporting financial and other relevant information to the court and creditors. The monitor's role has become an essential feature in the protection of stakeholder interests in CCAA restructurings.[423]

[421] *Abitibi*, *supra* note 197 at para 105.
[422] CED 4th (online), *Companies' Creditors Arrangement Act*, "Role of Monitor" (IX.1) at §476.
[423] CAIRP, *supra* note 129 at footnote 22.

The primary purpose of the *CCAA* "is to facilitate an arrangement to permit the debtor company to continue in business and to hold off the creditors long enough for a restructuring plan to be prepared and submitted for approval."[424] The purpose of the *CCAA* appears the same as insolvent arrangements conducted under section 192 of the *CBCA*. As the appointment of a monitor is mandatory when the court grants *CCAA* relief,[425] several have argued monitors should be appointed for insolvent section 192 arrangements.[426] They argue monitors will ensure "supervision over the impact of the arrangement on stakeholders, including any impact on ordinary unsecured creditors."[427] Arguments against monitors being appointed in *CBCA* proceedings are that management has the flexibility to operate the company as it sees fit, without the monitor overseeing its affairs.[428] Under the *CCAA*, the monitor must "perform the duties set out in subsection 23(1) of the *CCAA*, and the debtor company is to provide any necessary assistance in the performance of the monitor's duties."[429] Additionally, a monitor increases the professional fees associated with a section 192 restructuring.[430] Neither side of the monitor debate argues that it is not within the court's power to appoint a monitor under section 192. This is because a monitor was appointed as part of a solvent section 192 arrangement in *Look Communications Inc. v Look Mobile Corp.*[431] ("*Look Communications*"). The section 192 plan of arrangement was for the sale of all or substantially all of Look Communication's assets. While solvency was not an issue in the case, the court appointed a monitor under the authority of subsection 192(4). In that case, the monitor was appointed to manage and conduct the sales process rather than the monitor's purpose under the

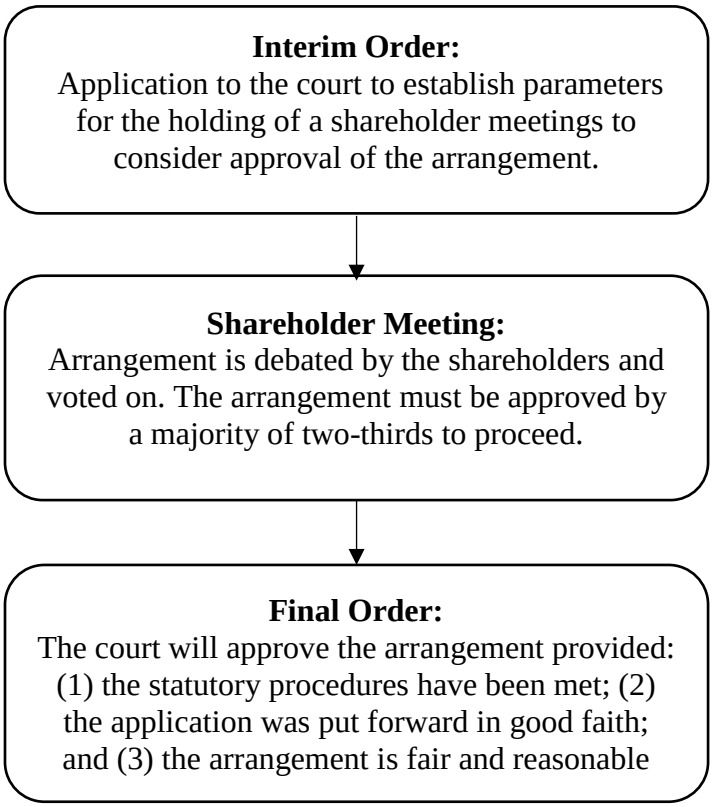
[424] *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146 at para 28.
[425] *Ibid*.
[426] CAIRP, *supra* note 129 at 11; Sarra, *supra* note 276 at 68-72.
[427] CAIRP, *supra* note 129 at 11.
[428] Grossel, *supra* note 129 at 3.
[429] *Ibid*.
[430] CAIRP, *supra* note 129 at 12.
[431] *Look*, supra note 279.

CCAA, to monitor the management of the debtor company, allowing it to continue in business, and report any untoward activity to the court and the secured creditor. Therefore, while *Look Communications* is precedent that monitors can be appointed under subsection 192(4), it is not precedent for a monitor to be appointed to oversee a section 192 insolvent arrangement.

CONCLUSION

Over the past several decades, the evolution of the interpretation of *CBCA* section 192, specifically that of the solvency requirement, has resulted in the law in practice undergoing dramatic changes. These changes, to the law in practice, were made possible by the rulings of the court in two recursive cycles. At the beginning of the first recursive cycle, with the court applying a plain reading interpretation, the section 192 process operated the same as today's solvent section 192 process as shown at **Figure 5**.

Figure 5: Solvent *CBCA* Section 192 Arrangement Process

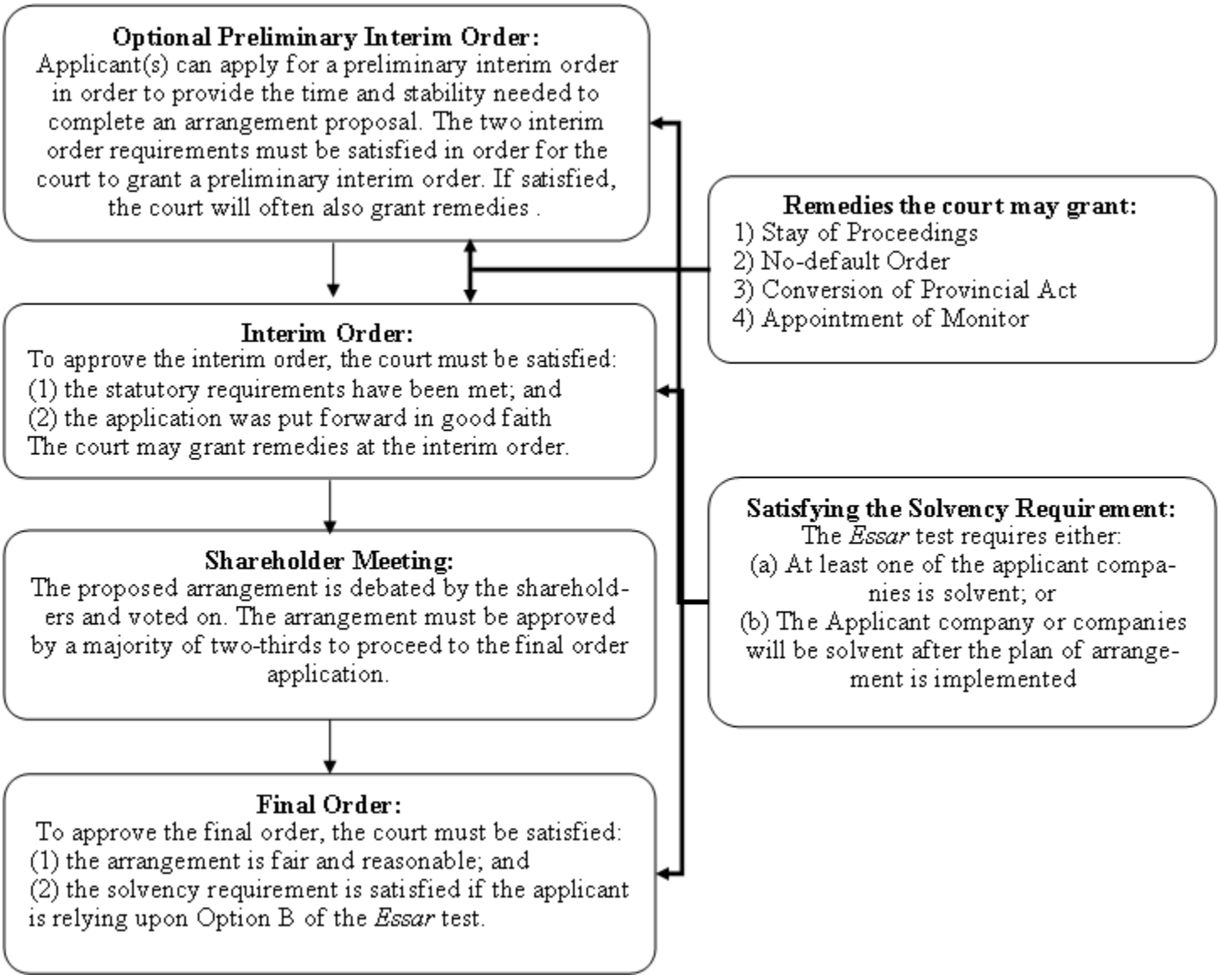


After the court undertook a statutory interpretation analysis of section 192 in *Computel Systems* and *Amoco*, which determined section 192 was available to insolvent corporations, the process for an insolvent arrangement slowly evolved. These decisions were spurred on by

insolvency practitioners, practicing in a results-oriented and commercially imperative environment, who were searching for new ways to restructure which would result in the corporation emerging from insolvency in the best position possible. This led to their successful attempts to persuade the court to conduct a thorough analysis of section 192 and conclude it can be used by insolvent corporations. In the first recursive cycle, following the Director's agreement that section 192 was available to insolvent corporations, the interpretation of section 192 continued to develop on a case-by-case basis. Each case brought before the court was unique, resulting in the court expanding on the interpretation of the solvency requirement and granting novel remedies under subsection 192(4). Refinements to the law in practice would then be addressed by the quasi-formal law of *The Policy*, rather than by amendment to the formal law, a phenomenon unique to the development of section 192. Thus, the law in practice continued to develop as the court refined the process for section 192 insolvent arrangements and the Director updated *The Policy*. The first recursive cycle ended after *BCE* as insolvency practitioners interpreted this decision as signifying consensus from both Canada's highest court and the Director. However, the court needed to further refine the test to satisfy the solvency requirement and establish the scope of remedies available to insolvent corporations. This resulted in the second recursive cycle, closely following the first, where these aspects are determined. In the second recursive cycle, the process for section 192 insolvent arrangements is developed via both reported and unreported decisions. The second cycle sees a definitive test emerge, the *Essar* test, which sets out what satisfies the solvency requirement in response to the interpretation that section 192 is available to insolvent corporations. Also established in the second recursive cycle is which remedies, specifically those reserved for use under insolvency statutes, are available to insolvent corporations in a section 192 arrangement.

Resulting from the developments to the section 192 law in practice seen in both recursive cycles, is the process for insolvent section 192 arrangements which can be found below at **Figure 6**.

Figure 6: Insolvent *CBCA* Section 192 Arrangement Process



When one compares **Figure 5** to **Figure 6**, it is obvious that the law in practice for section 192 insolvent arrangements has significantly evolved, while the law on the books has remained the same. The effect of both recursive cycles is a robust process for section 192 insolvent arrangements with substantive requirements and substantial remedies. Section 192 has become

popular for insolvent corporations to restructure because (1) the court's interpretation of the provision is that it is available for use by insolvent corporations; (2) it is a single provision which provides a limited framework for restructuring supplemented with a great deal of judicial discretion; and (3) the court has utilized its judicial discretion to grant remedies typically only available under Canada's official insolvency statutes. Since the inception of the *CBCA*, the words "not insolvent" found in *CBCA* section 192(3), have not been changed or removed. Yet, decades of advancement in the interpretation of what these words mean has made it clear that *CBCA* section 192 can be utilized by insolvent corporations to conduct arrangements for the compromise of debt. Thus, *CBCA* section 192 has become an important addition to Canada's insolvency regime.

Astoundingly, a single provision, *CBCA* section 192, has come to play an important role in Canada's insolvency regime. In an age where schemes of arrangement are vital to maintaining a healthy economy and employment rate, section 192 provides a flexible but structured means of restructuring. Complementing the *CCAA*, section 192 provides a viable alternative to corporations which can not utilize the *CCAA*[432] or which have worked out an arrangement with creditors and do not require the additional structure the *CCAA* provides. The interpretation of the section 192 solvency requirement also exemplifies the role of courts relative to legislatures, and proper approaches to statutory interpretation. Insolvent corporations conducting arrangements rely on the court's interpretation of the solvency requirement to both access the section 192 provision as well as for the requirements that must be satisfied for their proposed arrangement to be approved. Now and into the future, *CBCA* section 192 will be defined and governed by the court, making it a truly unique Canadian law.

[432] See e.g. *St. Lawrence*, *supra* note 113.

APPENDIX A: *CBCA* SECTION 192

Definition of *arrangement*

192 (1) In this section, ***arrangement*** includes

(a) an amendment to the articles of a corporation;

(b) an amalgamation of two or more corporations;

(c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act;

(d) a division of the business carried on by a corporation;

(e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate;

(f) an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate;

(f.1) a going-private transaction or a squeeze-out transaction in relation to a corporation;

(g) a liquidation and dissolution of a corporation; and

(h) any combination of the foregoing.

Where corporation insolvent

(2) For the purposes of this section, a corporation is insolvent

(a) where it is unable to pay its liabilities as they become due; or

(b) where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes.

Application to court for approval of arrangement

(3) Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

Powers of court

(4) 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 determining the notice to be given to any interested person or dispensing with notice to any person other than the Director;

(b) an order appointing counsel, at the expense of the corporation, to represent the interests of the shareholders;

(c) an order requiring a corporation to call, hold and conduct a meeting of holders of securities or options

or rights to acquire securities in such manner as the court directs;

(d) an order permitting a shareholder to dissent under section 190; and

(e) an order approving an arrangement as proposed by the corporation or as amended in any manner the court may direct.

Notice to Director

(5) An applicant for any interim or final order under this section shall give the Director notice of the application

and the Director is entitled to appear and be heard in person or by counsel.

Articles of arrangement

(6) After an order referred to in paragraph (4)(e) has been made, articles of arrangement in the form that the

Director fixes shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

Certificate of arrangement

(7) On receipt of articles of arrangement, the Director shall issue a certificate of arrangement in accordance with section 262.

Effect of certificate

(8) An arrangement becomes effective on the date shown in the certificate of arrangement.

APPENDIX B: CHRONOLOGY OF *CBCA* SECTION 192[433]

Case	Province/Court	Year
Bell Canada Inc. v Canada (Director, Business Corporations Act)	Quebec (SC)	1982
Re Computel Systems Ltd.	Ontario (SC)	1982
Savage v Amoco Acquisition Company Ltd.	Alberta (CA)	1988
Policy of the Director Concerning Arrangements Under Section 192 of the CBCA		1994
Trizec Corp., (Re)	Alberta (SC)	1994
St. Lawrence & Hudson Railway Co., Re	Ontario (SC)	1998
Policy of the Director Concerning Arrangements Under Section 192 of the CBCA		1998
Proposed Plan of Arrangement of Call-Net Enterprises et al.	Ontario (SC)	2002
Policy of the Director Concerning Arrangements Under Section 192 of the CBCA		2003
Cinar Corp. v. Shareholders of Cinar Corp.	Quebec (SC)	2004
Stelco Inc., Re	Ontario (SC)	2006
Proposed Plan of Arrangement of Tembec Industries Inc. et al.	Ontario (SC)	2008
Proposed Arrangement Involving Ainsworth Lumber Co. Ltd. et al	British Columbia (SC)	2008
Re BCE Inc.	Supreme Court of Canada	2008
Switch from Cycle 1 to Cycle 2		
Masonite International Inc., Re	Ontario (SC)	2009
45133541 Canada Inc. (Arrangement relatif à) ("*Abitibi*")	Quebec (SC)	2009
Look Communications Inc. v Look Mobile Corp.	Ontario (SC)	2009
Policy of the Director Concerning Arrangements Under Section 192 of the CBCA		2010
Mega Brands (Arrangement relatif à)	Quebec (SC)	2010
Proposed Plan of Arrangement of Frontera Copper Corp	Ontario (SC)	2010
Re GT Canada Medical Properties Inc.	Ontario (SC)	2010
Re 7588674 Canada Inc., Gateway Casinos et al[434]	British Columbia (SC)	2010
Re Compton Petroleum Corp	Alberta (QB)	2011
Proposed Arrangement Catalyst Paper Corporation	British Columbia (SC)	2012
Yellow Media Inc. (Arrangement relatif à)	Quebec (SC)	2012
8440522 Canada Inc. (Re) ("*Mobilicity*")	Ontario (SC)	2013
The Policy on arrangements – Canada Business Corporations Act, section 192		2014
Essar Steel Canada Inc, Re	Ontario (SC)	2014
Proposed Arrangement Involving Aurcana Corporation[435]	Ontario (SC)	2015
9171665 Canada Ltd., Re ("*Connacher*")	Alberta (QB)	2015
Proposed Arrangement of Sheritt International Corporation et al	Ontario (SC)	2016
Proposed Arrangement Involving Lightstream Resources Ltd.	Alberta (QB)	2016
Proposed Arrangement in Respect of Trident Exploration Corp.	Alberta (QB)	2016
Proposed Arrangement Involving Catalyst Paper Corporation	British Columbia (SC)	2016
Tervita Corp., Re	Alberta (QB)	2016
Re Banro Corportation	Ontario (SC)	2017
Arrangement relatif à Pétrolia inc	Quebec (SC)	2017
Concordia (Re)	Ontario (SC)	2017
RGL Reservoir Management Inc. (Re)	Ontario (SC)	2017
NCSG Crane and Heavy Metal Corporation	Alberta (QB)	2018

[433] This chronology contains all the revisions of *The Policy* and cases involving an insolvent section 192 arrangement that the author is aware of.

[434] *7588674 Canada Inc., Gateway Casinos & Entertainment Inc. and Gateway Casinos & Entertainment Limited, Re* (August 16, 2010), S-105095 (BC SC) (Final Order).

[435] *In the Matter of a Proposed Arrangement Involving Aurcana Corporation* (13 November 2015), Toronto CV-15-11157-00CL (Ont SCJ)

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