Court File No. 31-2084381
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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
DANIER LEATHER INC.

FACTUM OF THE TRUSTEE RE: SHAREHOLDER DISTRIBUTION

(Returnable March 1, 2018)

February 2, 2018

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PART I: OVERVIEW

1. KSV Kofman Inc. ("**KSV**"), in its capacity as the trustee in bankruptcy for Danier Leather Inc., brings this motion for directions under section 34 of the *Bankruptcy and Insolvency Act*.[1] The Trustee seeks an order, among other things, approving the proposed Shareholder Distribution Process (as defined below) to allow it to make one or more distributions to Danier's shareholders of the surplus remaining in Danier's estate.

2. All creditors' claims have been paid in full – including with statutorily mandated interest – leaving a surplus of approximately $14.85 million. Notwithstanding the Danier shareholders' ultimate entitlement to the surplus funds, Danier no longer has a board of directors or any officers, and thus cannot comply with the procedural corporate and securities law formalities ordinarily applicable to public company distributions to shareholders, whether by way of a reduction of stated capital or declaration of a dividend, under the *Business Corporations Act* (Ontario).[2] Relief is accordingly sought from these requirements in order to allow the trustee in bankruptcy to make the distribution to shareholders. Any other potentially available methods of distributing the surplus to shareholders (for example, through a winding-up process under the *OBCA* or through the existing receivership proceedings) would be more costly and time-consuming, thus decreasing the funds available for distribution and unduly delaying any distribution of the surplus funds and administration of Danier's estate without any practical benefit.

3. The Court has the jurisdiction, under the *BIA* and pursuant to its inherent jurisdiction, to approve the Shareholder Distribution Process. That jurisdiction should be exercised in this case on the basis that a "functional gap" exists within the *BIA* and the *OBCA*; neither statute contemplates how a bankrupt corporation with a surplus after paying all creditors in full is to distribute the

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[1] R.S.C 1985, c. B-3, as am. ("***BIA***").
[2] R.S.O 1990, c B. 16, as am. ("***OBCA***").

surplus to its shareholders where it no longer has any directors or officers. The Shareholder Distribution Process is a pragmatic solution to this functional gap, and will allow for the efficient, timely and cost-effective distribution of the surplus to Danier's shareholders. The Shareholder Distribution Process will realize significant benefit for Danier's shareholders (by maximizing each shareholder's individual recovery), and will not result in any prejudice to their interests. Approving the Shareholder Distribution Process is also consistent with the objectives of the *BIA* and the role of the Court in implementing practical solutions in insolvency proceedings.

PART II: FACTS

Background

4. Danier Leather Inc. ("**Danier**" or the "**Company**") is incorporated under the *OBCA* and is a reporting issuer under Ontario securities laws.[3] Danier was a designer, manufacturer, and retailer of leather and suede apparel and accessories. The Company's merchandise was predominantly marketed under the "Danier" brand name at 76 leased stores across Canada at the time it commenced the insolvency proceedings described below.

5. On February 4, 2016, Danier filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to subsection 50.4(1) of the *BIA*. KSV was appointed proposal trustee (the "**Proposal Trustee**").[4]

6. Pursuant to an Order of Mr. Justice Penny, dated February 8, 2016, the Proposal Trustee carried out a sales and investor solicitation process ("**SISP**").[5] The SISP did not generate any viable going concern bids. Danier subsequently entered into an agreement to engage a liquidator to sell

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[3] Sixth Report to the Court of KSV Kofman Inc., as Trustee in Bankruptcy of Danier Leather Inc. ("**Sixth Report**") at 3, Trustee's Motion Record ("**MR**"), Tab 2.
[4] Sixth Report at 1, MR, Tab 2.
[5] Order of Mr. Justice Penny, dated February 8, 2016, MR Tab 3.

the Company's inventory, furniture and equipment at its leased store locations. The Court approved the agreement on March 7, 2016 and the liquidation was completed on May 9, 2016.[6]

7. On March 17, 2016, the board of directors of Danier (the "**Board**") passed a resolution directing the Company to make an assignment into bankruptcy. At the same time, all members of the Board tendered their resignations, with those resignations becoming effective on the date of bankruptcy.[7]

8. On March 21, 2016, Danier made an assignment into bankruptcy and KSV was appointed as the trustee in bankruptcy (the "**Trustee**"). KSV was also appointed receiver (the "**Receiver**") of the Company's property, assets and undertakings under section 101 of the *Courts of Justice Act* pursuant to an Order made on March 21, 2016.[8]

9. Since KSV's appointment as Trustee and Receiver, it has undertaken a number of steps to administer Danier's estate, including:

(a) The Receiver completed the sale of certain of the Company's intellectual property (and related assets) and the assignment of three of the Company's leasehold interests.[9]

(b) The Trustee ran a process to solicit, determine and resolve claims against the Company's former directors and officers (the "**D&O Claims**"), pursuant to an Order of Mr. Justice Newbould, dated August 11, 2016.[10] No D&O Claims were filed.

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[6] Sixth Report at 5-6, MR, Tab 2.
[7] Sixth Report, at 1, 3, MR, Tab 2.
[8] R.S.O 190, c. C. 43 as am; Sixth Report, at 1, MR, Tab 2.
[9] Sixth Report, at 5, MR, Tab 2; Second Report to the Court of KSV Kofman Inc., as Receiver of Danier Leather Inc. ("**Second Report**") at 4, MR Tab 4.
[10] Order of Mr. Justice Newbould, dated August 11, 2016, MR, Tab 5.

(c) The Trustee, in consultation with Koskie Minsky LLP, the Court-appointed representative counsel to the former Danier employees, developed an employee claims methodology to calculate the claims of the employees as a result of the termination of their employment. The employee claims methodology was approved by Order of Mr. Justice Penny, dated November 8, 2016.[11] All employee claims have been paid in full.[12]

There are no remaining creditors

10. At this stage in the bankruptcy proceedings, there are no remaining known creditors.[13] The Receiver has completed the realization process for the Company's business and assets, and paid all funds generated from this process to the Trustee.

11. The Trustee has applied the funds to satisfy in full all proven creditors' claims, including with statutory interest of 5% per annum (as mandated under s. 143 of the *BIA*) and the superintendent's levy (as required by s. 147 of the *BIA*).[14] There are no outstanding disputed claims.

12. Having fully satisfied all proven creditors' claims, a surplus (the "**Surplus**") of approximately $14.85 million remains in Danier's estate.[15] Under section 144 of the *BIA,* a bankrupt is entitled to any surplus remaining after payment in full of creditors with interest and of the costs, charges and expenses of the bankruptcy proceedings. Danier has no remaining business operations or assets and, as a result, there is no other possible recipient of the Surplus other than

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[11] Order of Mr. Justice Penny, dated November 8, 2016, MR Tab 6.
[12] Sixth Report, at 6, MR, Tab 2.
[13] Sixth Report, at 6, MR, Tab 2.
[14] Sixth Report, at 6, MR Tab 2.
[15] Sixth Report, at 6-7, MR Tab 2. This figure represents the Surplus remaining after deduction for the expenses of the Trustee and Receiver.

the shareholders of the Company, who are ultimately legally entitled to it (under s. 22 of the OBCA).[16]

The Shareholders

13. Immediately prior to the Company's bankruptcy, Danier had 3,854,168 issued and outstanding shares comprised of:

(a) 2,629,839 subordinate voting shares ("**SV Shares**"). The SV Shares are widely held and were, prior to Danier's bankruptcy, listed and posted for trading on the Toronto Stock Exchange; and

(b) 1,224,329 multiple voting shares ("**MV Shares**"). The MV Shares were held exclusively by Jeffrey Wortsman, the Company's former President and CEO, and automatically converted to SV Shares upon his resignation from Danier on the date of bankruptcy.[17]

14. On the date of the NOI, the Investment Industry Regulatory Organization of Canada issued a cease trade order in respect of the SV Shares and, subsequently, following the filing of the NOI, Danier's shares were cease-traded by the Ontario Securities Commission ("**OSC**"), and certain other securities regulatory bodies.[18] With the exception of a transfer of the SV Shares held by Mr. Wortsman to a personal wholly-owned holding company pursuant to exemptive relief granted by the OSC on March 22, 2017, there has been no change in the registered ownership of the SV Shares since the filing of the NOI.[19]

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[16] Sixth Report, at 8, MR Tab 2.
[17] Sixth Report, at 3, MR, Tab 2.
[18] Sixth Report, at 3, MR, Tab 2.
[19] Sixth Report, at 3, MR, Tab 2.

15. As a result, Danier currently has issued and outstanding a total of 3,854,168 SV Shares (each a "**Share**" and the beneficial holder of each a "**Shareholder**") and no outstanding MV Shares. If the Surplus is distributed to the Shareholders, each Shareholder would be entitled to receive $3.85 per Share held.

16. Danier is not in a position to distribute the Surplus to its Shareholders, who are entitled to it, should the Surplus be turned over to Danier pursuant to section 144 of the *BIA*. Danier is a reporting issuer, currently without any officers or directors.[20] Without directors, Danier cannot comply with the corporate formalities under the *OBCA* (or the corresponding formalities under applicable securities laws) necessary to distribute the Surplus to the Shareholders in the ordinary course. There is also no legal representative of Danier to whom the Trustee can distribute the Surplus.[21]

The Proposed Shareholder Distribution Process

17. It is proposed that the distribution of the Surplus be done as a reduction and distribution of stated capital in the amount of $11,218,973 (being the paid-up capital of the SV Shares) and the payment of a dividend to Shareholders for the balance of the Surplus (approximately $3,627,303).[22] The distribution would occur substantially in the form of the draft Order at Tab 7 of the Trustee's Motion Record, which would authorize the Trustee to make the distributions to the Shareholders (the "**Shareholder Distribution Process**").

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[20] Sixth Report, at 7, MR, Tab 2.
[21] Sixth Report, at 7, MR, Tab 2.
[22] Sixth Report, at 9, MR, Tab 2.

18. In particular, under the terms of the proposed Shareholder Distribution Process and draft Order:

(a) The Trustee is authorized to distribute to the registered holders of SV Shares, as reflected in the share registry of Danier as at 5:00 p.m. (Toronto Time) on March 2, 2018 or such other date as the Trustee may fix in advance (the "**Record Date**"): (i)$ 2.91 per Share, deemed to be a reduction and distribution of stated capital for the purposes of section 34(1)(b) of the *OBCA*; and (ii) $0.94 per Share, deemed to be a dividend payment for the purposes of section 38(1) of the *OBCA* (the "**Distributions**").

(b) The Trustee is authorized to make the Distributions to the registered holders of SV Shares, as at the Record Date, rateably on one or more payment dates ("**Payment Date(s)**"), as determined by the Trustee in its reasonable discretion.

(c) The Trustee is authorized to make the Distributions without requiring the Trustee or Danier to comply with any of the statutory or regulatory requirements ordinarily applicable to a reduction of stated capital or a dividend payment. The Trustee is further authorized to take all steps necessary to effect the Distributions.

(d) In order to effect the Distributions, the Trustee has entered into a Paying Agent Agreement, dated November 27, 2017 (the "**Paying Agent Agreement**"), with Computershare Investor Services Inc. ("**Computershare**").[23] The Paying Agent Agreement was approved by Order of Mr. Justice Hainey, dated December 8,

[23] A copy of the Paying Agent Agreement is included at MR, Tab 2, Appendix F.

2017.[24] Pursuant to the Paying Agent Agreement, Computershare will: (i) provide notice of the Distributions to registered Shareholders; and (ii) effect payment of the Distributions to the Shareholders. CDS & Co, the Canadian Depository for Securities ("**CDS**") remains the registered shareholder in respect of a significant number of Shares, and will facilitate the further payment of the Distributions to the beneficial holders of the Shares. It is expected to be more cost and time efficient to distribute the Surplus in this manner.

(e) If, within 12 months of the Payment Date(s), any of the registered or beneficial holders of SV Shares as of the Record Date are unknown or cannot be located or any portion of the amounts distributed to the registered or beneficial holders of SV Shares is unclaimed or returned, the Trustee, Computershare or CDS, as applicable, is authorized to convey those funds to the Office of the Public Guardian and Trustee in the Province of Ontario to be held in trust for such Shareholder(s) as contemplated in wind-up proceedings under section 238(4) of the *OBCA*.

(f) The Trustee and its agents are released from any liability in connection with the Distributions, save and except for gross negligence, willful misconduct or fraud on its part, as determined by a court of competent jurisdiction. In particular, the terms of the draft Order release the Trustee from any liability to a government agency for failing to withhold or remit any amount owed by the Shareholders in taxes related to the Distributions.

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[24] MR, Tab 2, Appendix G.

19. The draft Order also authorizes the Trustee to withhold a reasonable portion of the Surplus in order to fund all fees, costs and contingencies necessary to complete the administration of Danier's bankruptcy and receivership proceedings. The Trustee is also authorized, prior to its discharge, to make a further distribution to Shareholders by way of dividend of any remaining funds at that time.

20. The draft Order also authorizes the Trustee to apply to this Court for further advice and directions in the discharge of its powers and duties under the Order.

PART III: ISSUES

21. The only issue is whether this Court should approve the proposed Shareholder Distribution Process.

PART IV: LAW & ARGUMENT

22. This section sets out the following:

(a) The authority pursuant to which the Trustee brings this motion;

(b) The Court's jurisdiction to grant the Order approving the proposed Shareholder Distribution Process;

(c) When the Court should exercise such jurisdiction; and

(d) Why the facts and circumstances before the Court justify the granting of such relief, namely:

(i) The Shareholder Distribution Process addresses a functional gap within the *BIA* and applicable corporate and securities laws; and

(ii) The benefits of approving the Shareholder Distribution Process outweigh any potential prejudice.

A. Authority for the motion

23. Subsection 34(1) of the *BIA* provides:

> 34 (1) A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

24. As is sought in these proceedings, this provision has been used to authorize a trustee to take certain actions within a bankruptcy, and Ontario courts have specifically provided directions on distributions in respect of an estate under subsection 34(1).[25]

25. The Trustee in this case seeks directions, in the form of the proposed Order, in respect of the distribution of the Surplus to the Shareholders.

B. The Court's jurisdiction to grant the proposed Order

26. Section 183 of the *BIA,* combined with the inherent jurisdiction of the Court, gives this Court the jurisdiction to grant the relief sought.

27. As a superior court of general jurisdiction, this Court has all the powers necessary to approve the Shareholder Distribution Process: "except where provided specifically to the contrary,

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[25] See e.g. *Can Corp Financial Services Ltd.* 1991 CarswellOnt 193 (Ont Sup Ct), Trustee's Book of Authorities ("**BOA**"), Tab 1: the trustee in bankruptcy brought a motion for advice and directions with respect to a "proposed distribution plan" approved by the investors of a failed mortgage broker. In particular, the trustee sought directions as to whether a "pooled distribution" or "specific distribution" was more appropriate in the circumstances. Certain individual investors brought a cross-motion for a declaration that they had trust claims against the mortgage brokerage (which would have the effect of reducing the assets available for distribution). The Court authorized the trustee to proceed with the distribution plan approved by the investors; *Century 21 Morehouse Realty Inc*, 1994 CarswellOnt 4773 (Ont Sup Ct), BOA Tab 2: the trustee brought a motion for directions as to the disposition of trust funds in the estate; *Confederation Financial Services (Canada) Ltd v. Confederation Treasury Services*, [2003] OJ No 1259 (Sup Ct), BOA Tab 3: the trustee in bankruptcy (also acting as the administrator of a plan of compromise under the CCAA) brought a motion under, *inter alia*, section 34 of the *BIA* for advice and directions with respect to a proposed distribution to holders of "Residue Certificates" of the surplus remaining after satisfaction in full of all claims in the CCAA and bankruptcy proceedings. By cross-motion, the Ontario Public Guardian and Trustee challenged a previous Court-order that directed that funds unclaimed by any Residue Certificate holder could be paid *pari passu* to the other Residue Certificate holders. The Court approved the proposed distribution to the Residue Certificates holders and also ordered that additional compensation should be paid to certain professional advisors out of the remaining surplus.

the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters."[26] The *BIA* expressly continues the Court's general and inherent jurisdiction, and confers "such jurisdiction at law and in equity as will enable [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings."[27] The Court's inherent jurisdiction, preserved by the *BIA*, refers to the "reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just and equitable to do so."[28]

28. In bankruptcy proceedings, inherent jurisdiction has been invoked to provide relief not expressly contemplated by the *BIA* or related legislation, when necessary to promote the objectives of the *BIA* and accomplish what justice and practicality require.[29] For example, the Court has invoked its inherent jurisdiction to avoid a meeting of creditors being invalidated by procedural irregularities,[30] to authorize the Trustee to be paid out of disputed trust funds,[31] to approve a settlement and release between a bankrupt and third party,[32] and to "sanction acts required to be done by a trustee for the due administration and protection of the bankrupt estate, even though

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[26] *Re Nortel Networks*, 2015 ONSC 2987 at para. 206, BOA Tab 4; citing *80 Wellesley St. East Ltd v. Fundy Bay Builders Ltd*, [1972] 2 OR 280 (CA), at para 9, BOA Tab 5.

[27] *BIA*, s. 183; *Residential Warranty Co of Canada Inc. Re,* 2006 ABQB 236 at para 26, BOA Tab 6 [***Residential Warranty (Queen's Bench)***], aff'd 2006 ABCA 293, BOA Tab 7 [***Residential Warranty (Court of Appeal)***]; *Residential Warranty (Court of Appeal)*, at para 19, BOA Tab 7; *Cheerio Toys & Games Ltd. Re*, [1971] OR 721 at para 16 (Ont Sup Ct), per Mr. Justice Holden, varied in part [1972] 2 OR 845 (CA), BOA Tab 8. In *Cheerio Toys*, the Ontario Supreme Court invoked its inherent jurisdiction to provide relief from the quorum requirements applicable to a meeting of creditors under the *BIA*. The Court of Appeal dismissed the bankrupt's appeal and held the lower Court had properly invoked its inherent jurisdiction in the circumstances. The Court of Appeal varied the lower Court's order only to provide additional directions as to the conduct of an upcoming meeting of creditors.

[28] *Portus Alternative Asset Management Inc. Re*, 88 OR (3d) 313 at para 25 (Ont Sup Ct), BOA Tab 9; *Canada (Minister of Indian Affairs & Norther Development) v. Curragh Inc*, [1994] OJ No 953 at para 21 (Ont Gen Div), per Mr. Justice Farley, BOA Tab 10; *Stelco Inc, Re*, [2005] OJ No 1171 (CA) at para 34, BOA Tab 11.

[29] See e.g. *Residential Warranty (Court of Appeal)*, at para 21, BOA Tab 7; *Re Cheerio Toys & Games Limited (No 2)*, [1971] 2 OR 721 (Ont Sup Ct), at para 16-17, varied in part [1972] 2 OR 845 (CA), BOA Tab 8; *City Construction Co. Re*, [1961] 29 DLR (2d) 568 (BCCA), at paras 12-13, BOA Tab 12; and, while in CCAA proceedings, *Re Nortel Networks*, 2015 ONSC 2987, at para 206, BOA Tab 4.

[30] *Re Cheerio Toys & Games Limited (No 2)*, [1971] 2 OR 721 (Ont Sup Ct), varied in part [1972] 2 OR 845 (CA), BOA Tab 8.

[31] *Residential Warranty (Queen's Bench)*, BOA Tab 6.

[32] *Samji Re*, 2013 BCSC 2101, BOA Tab 13.

there is no specific provision in the Act [expressly authorizing that conduct]."[33] As section 183 of the *BIA* confers jurisdiction over any matter "incidental" to the bankruptcy proceedings, the Court can also grant relief in respect of a bankrupt corporation not expressly contemplated by its governing corporate statute when necessary to further the substantive goals of the bankruptcy proceedings.[34]

C. When a Court should exercise its inherent jurisdiction

29. In order to exercise its inherent jurisdiction to provide relief not expressly contemplated by the *BIA* and applicable corporate and securities laws, the Court should be satisfied that:

(a) *A "functional gap" or "vacuum" exists within the governing statutory regime.* A functional gap will exist if the governing legislation is "silent on a point or [has not] dealt with a matter exhaustively."[35] If a functional gap exists, the Court can exercise its discretion to engage in "judicial gap-filling" and do what is necessary to make the legislation work in practice.[36] Inherent jurisdiction cannot be invoked, however, to "negate the unambiguous expression of legislative will."[37]

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[33] *Re Tlustie* (1923), 23 OWN 622, at para 5 (Ont Sup Ct), BOA Tab 14; *Re Cheerio Toys & Games Limited (No 2)*, [1971] 2 OR 721, at para 17 (Ont Sup Ct), varied in part [1972] 2 OR 845 (CA), BOA Tab 8.

[34] *BIA*, s. 183; see *Re Cheerio Toys & Games Limited (No 2)*, [1971] 2 OR 721 at para 18 (Ont Sup Ct), varied in part [1972] 2 OR 845 (CA), BOA Tab 8; *Fiber Connections Inc v. SVCM Capital Ltd,* [2005] OJ No 3899 (Ont Sup Ct) (in obiter), leave to appeal allowed [2005] OJ No 1845 (CA) (appeal not taken up), BOA Tab 15; see also *In the Matter of the Bankruptcy of Areopostale Canada Corp.*, Order of Madam Justice Conway, dated July 7, 2017 BOA, Tab 16, in which the Court authorized the trustee in bankruptcy to effect a return of stated capital to the shareholders of a private company, without requiring the trustee or the company to comply with the corporate formalities ordinarily applicable to such a distribution.

[35] *Residential Warranty (Queens Bench),*at para 26, BOA Tab 6; *Portus Alternative Asset Management Inc. Re*, 88 OR (3d) 313 at para 21-23 (Ont Sup Ct), BOA Tab 9.

[36] *Portus Alternative Asset Management Inc. Re*, 88 OR (3d) 313 at para 22 (Ont Sup Ct), per Mr. Justice Campbell, BOA Tab 9, citing Madam Justice Jackson and Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" *Annual Review of Insolvency Law* (2007), BOA Tab 17.

[37] *Residential Warranty (Court of Appeal)*, at para 20, BOA Tab 7; see also *Stelco Inc, Re*, [2005] OJ No 1171 (CA) at para 35, BOA Tab 11.

(b) *The benefit of granting relief must outweigh the relative prejudice to those affected by it.* Before exercising its inherent jurisdiction, the Court should be satisfied that the relief will provide an "efficient and effective means of resolving the issue to the benefit of all stakeholders."[38] Inherent jurisdiction should be exercised sparingly and only in a clear case.[39]

30. In this vein, the Court's inherent jurisdiction should be invoked in a manner consistent with the substantive objectives of the *BIA* and in a manner attentive to practical considerations.[40] By its nature, inherent jurisdiction will be invoked to address novel and practical issues in bankruptcy proceedings. In addressing these issues, the Court is to avoid a "strictly legalistic" approach, in favour of a pragmatic and flexible approach. [41] As noted by Mr. Justice Chadwick in *JP Capital Corp*, a Court sitting in carriage of bankruptcy proceedings must be attentive to practical considerations:[42]

> There is also the consideration that in Bankruptcy matters the Court exercises an equitable as well as a legal jurisdiction, and that practicality is always the order of the day. It is frequently said in the jurisprudence that the Act is a "businessman's law" and that practical business considerations should not be disregarded, as they sometimes are in other domains where a strict interpretation of the law must be followed and observed. [Emphasis added.]

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[38] *Residential Warranty (Court of Appeal)*, at para 37, BOA Tab 7.
[39] *Residential Warranty (Court of Appeal)*, at para 20, BOA Tab 7.
[40] *Residential Warranty (Queens Bench),* at para 26-27, BOA Tab 6, citing *Re Tlustie* (1923), 23 OWN 622, at para 5 (Ont Sup Ct), BOA Tab 14; and *A&F Baillargeon Express Inc, Re*, 1993 CarswellQue 49 at para 23 (Que Sup Ct), BOA Tab 18.
[41] *Residential (Queen's Bench*), at paras 25-27, BOA Tab 6; citing *A Marquette & Fils Inc v. Mercure*, [1977] 1 SCR 547 at para 16, BOA Tab 19; see also *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc*, [1994] OJ No 953 at para 22 (Ont Gen Div), per Mr. Justice Farley, BOA Tab 10.
[42] *JP Capital Corp, Re,* 1995 CarswellOnt 53 at para 10 (Gen Div), BOA Tab 20; citing *A&F Baillargeon Express Inc, Re*, 1993 CarswellQue 49 at para 23 (Que Sup Ct), BOA Tab 18; see also *Residential Warranty (Queen's Bench),* at para 27: "What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis"; and *A Marquette & Fils Inc v. Mercure*, [1977] 1 SCR 547 at para 16, BOA Tab 19: "[...] the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it."

31. Having regard to the principles outlined above, and for the reasons set out below, it is just and appropriate for this Court to approve the proposed Order.

D. This case warrants the exercise of inherent jurisdiction

1. A functional gap exists in the *BIA* and applicable corporate and securities laws

32. As a company incorporated under the OBCA, Danier is subject to certain procedural corporate formalities in respect of declaring a dividend or making a distribution of stated capital. However, without a board of directors or any officers, it cannot comply with the statutory formalities. The BIA indicates that a bankrupt is entitled to any surplus, but does not contemplate how a bankrupt corporation is to distribute such surplus to its shareholders where all directors and officers of the corporation have resigned. To elect a new board of directors and comply with all corporate formalities would not be practicable in Danier's current state, requiring the calling of a shareholders' meeting to elect directors, and would be both time consuming and costly, resulting in less funds available for distribution with no corresponding benefit or advantage to any stakeholder. As a result, approving the Shareholder Distribution Process is consistent with the Court's discretion to engage in "judicial gap-filling" and do what is necessary to make the statutes "work" in practice.

The Shareholders are ultimately entitled to the Surplus

33. Under the *BIA,* having paid all proven creditors' claims (with interest), Danier is entitled to receive the Surplus.[43] Since Danier has no remaining business operations or assets, the only appropriate recipients of the Surplus are the Shareholders. Under Danier's articles and clause 22(3)(b) of the OBCA, the Shareholders are entitled to receive the remaining property of Danier

[43] Sixth Report, at 6, MR, Tab 2, *BIA*, ss. 143, 144, 169(4).

on its dissolution. Given that only a single class of shares are issued and outstanding, each Shareholder is equally entitled to receive $3.85 per Share held.

The corporate formalities applicable to a distribution of stated capital and dividend payment

34. Section 34 of the *OBCA* contemplates that a corporation may, subject to certain restrictions,[44] reduce its stated capital and make a distribution to shareholders, in an amount not exceeding the stated capital of the class, by "special resolution" passed at a special meeting of shareholders.[45] Danier cannot hold a special meeting to authorize the distribution of stated capital without a board of directors because the *OBCA* requires the directors to:

- call the meeting of shareholders;[46]
- fix a record date for the meeting;[47]
- provide notice of meeting to the shareholders, accompanied by the text of the special resolution authorizing the reduction and distribution of stated capital;[48]
- solicit proxies from shareholders;[49] and
- prepare, provide and certify a management information circular to shareholders.[50]

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[44] *OBCA,* s. 34(4) provides that a corporation cannot reduce its stated capital if there are reasonable grounds for believing that (i) the corporation is or, after the taking of such action, will be unable to pay its liabilities as they become due, or (ii) after the taking of such action, the realizable value of the corporation's assets would be less than the aggregate of its liabilities. Danier has satisfied all creditors' claims; therefore, there are no reasonable grounds to believe it will not meet the solvency requirements immediately following a distribution.

[45] *OBCA*, s. 34(1)(b)(i). "Special Resolution" is defined to mean: (a) a resolution "submitted to a special meeting of the shareholders of a corporation duly called for the purpose of considering the resolution and passed, with or without amendment, at the meeting by at least two-thirds of the votes cast" or (b) a resolution "consented to in writing by each shareholder of the corporation entitled to vote at such a meeting or the shareholder's attorney authorized in writing": see *OBCA*, s. 1(1).

[46] *OBCA*, s. 94(1).

[47] *OBCA*, s. 95(2).

[48] *OBCA*, s. 95(4), 96(6)(b). Section 98 of the *OBCA* provides that a shareholder can waive notice of meeting "in any manner." However, it is impracticable for an offering corporation such as Danier, where the Shares are widely held, to obtain a waiver from each Shareholder.

[49] *OBCA*, s. 111.

[50] *OBCA*, s. 112. Section 113 of the *OBCA* allows "any interested person" to apply to the Ontario Securities Commission for an order exempting the directors of an offering corporation from soliciting proxies and furnishing an information circular. However, this provision does not allow for a corporation to apply for relief from the requirement that directors fix a record date for meeting of shareholders, and provide notice of said meeting to the shareholders.

35. Danier also cannot practicably pass a special resolution in writing because the vast majority of the Shares are held by CDS for beneficial owners, many of whom are "objecting beneficial owners."[51] An objecting beneficial owner is one that has provided instructions to its intermediary that the beneficial owner objects to the intermediary disclosing ownership information about the beneficial owner.[52]

36. Without a board of directors, Danier similarly cannot comply with the corporate formalities necessary to declare and pay a dividend. Subsection 38(1) of the *OBCA* provides that, subject to certain restrictions, the "directors may declare and the corporation may pay a dividend [...] in money or property" (emphasis added). Directors are also required to fix a record date for the payment of any dividend.[53] While Danier meets the substantive requirements to declare and pay a dividend, [54] it cannot comply with the procedural requirements.

37. This functional gap exists because the remedial provisions of the *OBCA* intended to address circumstances in which all the directors of a corporation have resigned do not apply to bankrupt corporations. Subsection 115(4) provides that where all the directors of a corporation have resigned, "any person who manages or supervises the business or affairs of the company" is deemed to be a director for purposes of the *OBCA*. However, section 115(5)(c) excludes trustees in bankruptcy and receivers from this deeming provision – in order to avoid imposing additional

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Although section 106 of the *OBCA* authorizes a court, upon the application of a shareholder, to order a shareholders' meeting to be called, held and conducted in such manner as the court directs, if it is otherwise impracticable to do so, such a meeting would require the same steps outlined in paragraph 34 above, and add additional expense and delay to distributing the Surplus, with no benefit to the Shareholders. In other words, Danier cannot resort to section 113 or section 106 of the *OBCA* to cure the functional gap that exists in the *OBCA*.

[51] Sixth Report, at 9, MR, Tab 2.

[52] National Instrument 54-101 (*Proxy Solicitation*), s. 1.1.

[53] *OBCA*, s. 95(1).

[54] For example, *OBCA*, s. 38(3) provides that a corporation cannot pay a dividend if there are reasonable grounds for believing that (i) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or (ii) the value of the corporation's assets would thereby be less than the aggregate of its (a) liabilities and (b) stated capital of all classes. As all creditors have been paid in full, Danier has no outstanding liabilities and there are no reasonable grounds to believe that it would not meet these solvency tests following a dividend payment.

liabilities or responsibilities on the trustee and receiver outside of the bankruptcy and receivership proceedings.

38. As a consequence, Danier is caught by a narrow functional gap in the *BIA* and *OBCA*. Neither statute contemplates the (very unusual) event of a bankrupt corporation, without any directors or officers, having a surplus to distribute to its shareholders. Since the Trustee is not empowered to declare a dividend or call a meeting to approve a reduction and distribution of stated capital on Danier's behalf, and because there is no other actor supervising or managing the business or affairs of Danier, Danier cannot in its current circumstances declare a dividend or authorize a reduction and distribution of stated capital.

The Shareholder Distribution Process is an appropriate exercise of the judicial "gap filling" discretion

39. The judicial "gap-filling" discretion refers to the power of the Court to "make explicit what is already implicit in the words of a statute" and to do what is necessary to make the legislative scheme "work" in the face of a functional gap. [55]

40. The Shareholder Distribution Process will "give effect" to subsections 34(1) and 38(1) of the *OBCA* and make those provisions "work" in practice for Danier, by allowing it to declare and pay a dividend and distribution of stated capital. Significantly, there is nothing in the *OBCA* or *BIA* to suggest that the legislatures intended to preclude a bankrupt corporation without directors, but with a surplus, from effecting a dividend or distribution of stated capital.

41. Approving the Shareholder Distribution Process is consistent with the accommodations and relief from formalities granted in other circumstances in bankruptcy proceedings. In the context of bankruptcy proceedings subject to Court-supervision, it is not necessary to insist on full

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[55] *Portus Alternative Asset Management Inc. Re*, 88 OR (3d) 313 (Ont Sup Ct), at para 22, BOA Tab 9; see also *City Construction Co. Re*, [1961] 29 DLR (2d) 568 (BCCA) at para 11-13, BOA Tab 12.

compliance with all corporate formalities specified in the *OBCA;* rather, it is appropriate to allow the corporation (or the trustee) to step outside the ordinary procedures under the *OBCA* when necessary to give effect to the substantive objectives of the *BIA* and to accommodate practical circumstances.

42. Approving the Shareholder Distribution Process will also not "negate the unambiguous expression of legislative will";[56] the statutes in this case have "not dealt with the matter exhaustively."[57] Neither the *BIA* nor the *OBCA* address, in unambiguous terms, how a bankrupt corporation without directors is to declare a dividend or return of capital to its shareholders.

43. The one potentially applicable section of the OBCA that the Trustee has identified is subsection 24(9):

> A corporation shall not reduce its stated capital or any stated capital account except in the manner provided in this Act.

44. The Trustee believes that under the Shareholder Distribution Process, Danier would still be substantively in compliance with the above provision as it is only seeking relief from procedural formalities. The purpose of the stated capital account is a "creditors' guarantee fund", as a creditor can look to stated capital if necessary for payment: "The creditor takes the risk that the capital may be diminished in the ordinary course of business operations of the corporation, but the creditor has the right to assume that it will not be diminished other than as authorized at law."[58] Subsection 24(9) of the OBCA is intended to ensure that a corporation does not reduce its stated capital and

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[56] *Residential Warranty (Court of Appeal)*, at para 20, BOA Tab 7; see also *Stelco Inc, Re*, [2005] OJ No 1171 (CA) at para 35, BOA Tab 11.
[57] *Residential Warranty (Queen's Bench)*, at para 26, BOA Tab 6.
[58] Wayne Gray, *Annotated Canada Business Corporations Act* (Thomson Reuters: Toronto, 2017) (loose-leaf) at 1-122.53 (commenting on the equivalent provision in the *CBCA*), BOA Tab 21; see also *Unisource Canada Inc v. Hongkong Bank of Canada*, [1998] OJ No 5586 at para 80 (Ont Gen Div), aff'd [2000] OJ No 947 (CA), BOA Tab 22.

return it to its shareholders without complying with the applicable solvency tests that protect its creditors.

45. In this case, all creditors' claims have been paid in full, with interest, and there is no other purpose for Danier to continue to maintain the stated capital account. If Danier were able to go through the corporate formalities it is seeking relief from, it would be in compliance with the substantive provisions of the *OBCA*, in particular the applicable solvency test. Therefore, the Trustee does not believe that this provision inhibits the Court's ability to exercise its inherent jurisdiction to grant the proposed Order. Significantly, this Court has previously invoked its inherent jurisdiction to authorize a trustee in bankruptcy to make a final distribution to shareholders by way of a reduction of stated capital, without requiring the trustee or bankrupt corporation to comply with the corporate formalities ordinarily applicable to such a distribution.[59]

2. The benefit of approving the Shareholder Distribution Process outweighs any potential prejudice

46. In addition to the "functional gap", this Court should be satisfied that the benefits of providing the requested relief outweigh any prejudice that will result in the circumstances.[60] In this vein, this Court should approve the Shareholder Distribution Process if it is a "fair and efficient means of resolving the issue [or functional gap] to the benefit of all stakeholders."[61]

47. These requirements are satisfied here. As set out in more detail below, the Shareholder Distribution Process (i) maximizes the Surplus available for Shareholders as it is the most cost and time effective process for distribution, and (ii) does not result in any prejudice to Shareholders or any other stakeholder.

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[59] See *In the Matter of the Bankruptcy of Areopostale Canada Corp.*, Order of Madam Justice Conway, dated July 7, 2017 BOA, Tab 16. The bankrupt corporation in that matter was not a reporting issuer.
[60] *Residential Warranty (Court of Appeal)*, at para 37, BOA Tab 7.
[61] *Residential Warranty (Court of Appeal),* at para 37, BOA Tab 7.

(b) The Shareholder Distribution Process is the most cost and time effective process

48. Due to the functional gap outlined above, any other means of distribution that may be available to Danier are time-consuming, not cost effective, and/or simply not practicable in the circumstances. Prior to proposing the Shareholder Distribution Process, the Trustee considered the below alternative mechanisms of distribution.

49. *Receivership Proceedings/Winding-up Proceedings*. Subsection 159(2) of the *Income Tax Act* ("***ITA***") generally requires a legal representative, other than a trustee in bankruptcy, who proposes to distribute property on the winding-up of a taxpayer to obtain a tax clearance certificate from the Canada Revenue Agency (the "**CRA**") certifying that all taxes of the taxpayer have been paid, prior to making any such distribution.[62] If the Surplus were to be distributed through the receivership proceedings or pursuant to a court-supervised winding-up, rather than pursuant to the bankruptcy proceedings, the Receiver or court-appointed liquidator would (among other things) be required to first obtain a tax clearance certificate from the CRA before making the distribution. Obtaining such clearance certificates under the circumstances would be redundant given the payment of all proven claims and BIA section 149 notices having been sent to the CRA in June 2016.[63] This would also cause significant delay as well as give rise to increased costs. If the Surplus is distributed pursuant to the Shareholder Distribution Process as part of the bankruptcy proceedings, the Trustee will not be required to obtain a tax clearance certificate from the CRA, thereby saving both time and expense. Moreover, having the Trustee distribute the Surplus as part

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[62] *Income Tax Act*, RSC 1985, c.1 (5th Sup), s. 159(1)-(3). A legal representative (other than a trustee in bankruptcy) who fails to first obtain a clearance certificate as required may be personally liable for any unpaid taxes of the taxpayer, up to the amount distributed by the legal representative.

[63] Sixth Report, at 6, MR, Tab 2.

of the bankruptcy proceedings should not result in any prejudice to the CRA, as the discharge of Danier from bankruptcy would have the effect of extinguishing any prior tax claims in any event.[64]

50. Second, the Shareholder Distribution Process should allow for the most favourable tax treatment under the *ITA* to Shareholders in connection with the distribution of Surplus. As a general rule, amounts distributed by a corporation to its shareholders as a reduction of stated capital can (to the extent the distribution does not exceed the "paid-up capital" for purposes of the *ITA* of the shares on which the distribution is paid)[65] be received by the shareholders free of tax; in those circumstances, the distribution serves instead to reduce the shareholder's tax basis in the shares on which the distribution is received.[66] On the other hand, amounts distributed by a corporation to its shareholders otherwise than on a reduction of stated capital will generally be taxed either as a taxable dividend (subject to tax at a rate of approximately 39.4%, based on the top marginal tax rate applicable to an individual resident in Ontario)[67] or, in some circumstances, as a fully taxable shareholder benefit (subject to tax at a rate of approximately 53.5%, based on the top marginal tax rate applicable to an individual resident in Ontario).[68]

51. It is anticipated that the distribution of a portion of the Surplus (equal to Danier's "paid-up capital" as determined for purposes of the *ITA*) to Shareholders as a reduction of stated capital pursuant to the Shareholder Distribution Process should qualify for the favourable tax treatment

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[64] This is reflected in the statutory regime, which expressly excludes trustees-in-bankruptcy from the clearance certificate requirements in subsection 159(2) of the *ITA*, on the basis that any outstanding tax liabilities will be dealt with as part of the bankruptcy proceedings.

[65] Sixth Report, at 7-8, MR, Tab 2. In general terms, a share's "paid-up capital" for purposes of the *ITA* is equal to its stated capital under the applicable corporate statute (in this case, the *OBCA*), as adjusted by certain provisions under the *ITA*. Based on advice received by the Trustee from Danier's accountants, it is not expected that the "paid-up capital" of the Shares will differ materially from their stated capital under the *OBCA*.

[66] Sixth Report, at 7-8, MR, Tab 2.

[67] In the case of a non-resident shareholder, dividends will normally be subject to Canadian withholding tax at a rate of 25%, unless the rate is reduced under an applicable income tax treaty or convention.

[68] In the case of a non-resident shareholder, shareholder benefits will normally be subject to Canadian withholding tax at a rate of 25% (similar to dividends), unless the rate is reduced under an applicable income tax treaty or convention.

generally accorded to reductions of stated capital as described in the preceding paragraph, and that any distribution pursuant to the Shareholder Distribution Process in excess of the stated capital reduction should be treated as a taxable dividend for Canadian income tax purposes.

52. In contrast, if the Surplus were distributed pursuant to a court-ordered winding-up process, it is possible that the entirety of the distribution to a Shareholder could be treated as a fully taxable shareholder benefit. It is in the interests of the Shareholders to avoid this characterization and have the Surplus distributed to them pursuant to the Shareholder Distribution Process.

53. Third, the receivership proceedings or a winding-up process would be a more expensive mechanism of distributing the Surplus. Both alternative procedures would create redundancies with the existing bankruptcy proceedings, without realizing any practical benefit for the Shareholders. For example, in order to distribute the Surplus within a Court-ordered winding-up process, the Trustee would be required to obtain a separate appointment as the liquidator of Danier.[69] Since all creditors' claims have been paid in full, there is no need to duplicate the claims procedure already run within the bankruptcy proceedings. Similarly, the receivership proceedings were commenced primarily to afford a more efficient realization process and were not contemplated as the process by which funds would be distributed to Danier stakeholders; rather, it was intended that this would be done by the Trustee. The Shareholder Distribution Process allows for Court supervision within the existing bankruptcy proceedings, but does not require the Trustee to take additional procedural steps to distribute the Surplus that will have the effect of prolonging the administration of Danier's estate and increasing the costs of distributing the Surplus.

54. *Court-Requisitioned Meeting*. The Shareholder Distribution Process is also preferable to a Court-requisitioned meeting of Shareholders to elect directors and approve the reduction of capital

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[69] *OBCA*, s. 210.

and distribution of the Surplus to Shareholders. First, as a practical matter, the Trustee does not have standing to ask this Court to call a meeting. The Court can order a meeting only on "application by a director or shareholder entitled to vote at the meeting" (emphasis added).[70] As the Shares are widely held, requiring a Shareholder to apply for a Court order to conduct a meeting, and then requiring that the meeting actually be held, would be a large cost burden and would significantly delay the distribution of the Surplus with no practical benefit.

55. Second, a Court-requisitioned meeting would require Danier to incur significant costs associated with (at a minimum) providing notice of the meeting and furnishing meeting materials to each Shareholder, as well as the costs of actually hosting the meeting. Doing so would require Danier to have a board of directors to call and give notice of the meeting and to prepare, deliver and certify the management information circular for such a meeting. This would also decrease the Surplus available for distribution to Shareholders.

56. Since Danier remains a reporting issuer under Ontario securities law, calling a meeting would also trigger additional requirements under securities law relating to, among other things, preparing a management information circular and furnishing proxy materials.[71] Since Danier cannot currently comply with these requirements, it would also be necessary to commence separate proceedings before the OSC in order to obtain exemptive relief. This would increase costs and decrease each Shareholder's recovery without any benefit to Danier's stakeholders.

57. As discussed further below, despite the significant potential costs of a Court-ordered meeting, the meeting would be of no practical utility. Since all Shareholders are identically entitled to share in the Surplus, there is no reason why any Shareholder would oppose the distribution of

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[70] *OBCA*, s. 106(1). A Shareholder cannot requisition a meeting pursuant to s. 105 of the *OBCA* because the requisition is to be directed to the directors of the corporation. Danier has no directors.

[71] See, for example, *Securities Act*, RSO 1990, c. S.5, as am, s. 84, 85, 86; National Instrument 54-101 (*Proxy Solicitation*), 2.1; National Instrument 51-102 (*Continuous Disclosure Obligations*), s. 9.1.

the Surplus to Shareholders, nor any legitimate legal basis for them to do so. The Shareholder Distribution Process merely gives effect to the Shareholders' legal entitlement to the Surplus, in the most cost-effective way possible. The results of the meeting would be a foregone conclusion.

58. The Shareholder Distribution Process will maximize the Surplus in Danier's estate and maximize recovery for the Shareholders, the only remaining stakeholders in the bankruptcy. It will further allow for the most expedient resolution of the bankruptcy proceedings. In this regard, the Shareholder Distribution Process is consistent with the core objectives of the *BIA* to provide for the fair, efficient and orderly distribution of the bankrupt's property.[72] Weighed against these significant benefits, the Shareholder Distribution Process will also not prejudice any Shareholder or any other stakeholder.

(c) There is no prejudice to Shareholders (or other parties)

59. Section 34 of the *OBCA* ordinarily contemplates that a reduction in stated capital will be authorized by a special resolution of shareholders.[73] However, in these circumstances, a shareholders' meeting to authorize the reduction in stated capital and distribution to shareholders is unnecessary. There are no conflicts of interests between the Shareholders because all Shareholders hold the same class of shares and are equally entitled to receive a distribution of $3.85 per Share. All Shareholders are equally interested in receiving their portion of the Surplus in the most cost-effective, timely and tax-effective manner possible. Characterizing a portion of the Surplus as a distribution of stated capital (and return of paid-up capital for tax purposes) is consistent with each individual Shareholder's interest as it will ensure the most preferential tax

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[72] *Residential Warranty (Queen's Bench)*, at para 25, BOA Tab 6; *Aevo Co v. D&A MacLeod Co*, [1991] OJ No 1354 (Ont Gen Div) at para 22, BOA Tab 23.
[73] *OBCA*, s. 34(1)(b)(i).

treatment possible in the circumstances. As such, the result of any shareholders' meeting to approve such a distribution would be a foregone conclusion.

60. Relatedly, the Shareholders will not be prejudiced in not receiving a management information circular. Ordinarily, a management information circular would be furnished in connection with a meeting of shareholders to authorize a distribution pursuant to a reduction of stated capital, so that shareholders can decide whether or not such a distribution is to be preferred to some other potential course of action, such as reinvesting the funds in the corporation's business. In the present circumstances, there is no other possible alternative use for the Surplus, since Danier no longer carries on any business and its creditors have been paid. As a result, there is, in effect, no decision for the Shareholders to make. As a consequence, there is no need for Shareholders to receive the more fulsome disclosure provided by a management information circular. Since Danier no longer has any operating business or assets, and the Shares have been cease traded, the Shareholders will not derive any further benefit in being provided with more fulsome disclosure. In particular, the policy considerations that animate the continuous disclosure requirements under corporate and securities law – for example, ensuring that shareholders are provided with timely access to "material information" likely to affect the market price or value of their securities – are not engaged.[74]

61. Similarly, other securities disclosure requirements are not practically engaged in Danier's current circumstances. Securities laws require various disclosures, such as information circulars, for all reporting issuers. However, the obligation for such disclosures arises when a meeting is being called.[75] In this case, Danier is seeking relief from any requirement to call a meeting; if such

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[74] *YBM Magnex International Inc,* (2003) 26 OSCB 5285 (Ont Sec Comm), at paras 1, 89-91, BOA Tab 24.
[75] *Securities Act*, RSO 1990, c. S.5, as am, s. 85, 86; National Instrument 51-102 (*Continuous Disclosure Obligations*), s. 9.1; National Instrument 54-101 (*Proxy Solicitation*), s. 2.1.

relief is granted, the securities disclosure requirements in relation to such a meeting are not applicable. Disclosure and other securities obligations are, in practice, intended to deal with going-concern companies and issues that could affect the market price of securities.[76] These concerns are not relevant to Danier where all shares have been cease-traded and the only course of action left is a distribution of the remaining Surplus.

62. The Trustee also believes that the Shareholders have been provided with sufficient information to date regarding the Shareholder Distribution Process to ensure that their interests are protected and being furthered. All material information relating to Danier's bankruptcy and receivership proceedings have been made available on the Trustee's website. Computershare has also disseminated preliminary information regarding the Shareholder Distribution Process, including the Trustee's motion record and details regarding the hearing, and will provide further information to Shareholders if the Shareholder Distribution Process is approved by this Court.

63. In addition, no prejudice will result to any other parties from the Court directing the Trustee to distribute a portion of the Surplus to Shareholders as a distribution of stated capital. The principal objective of the statutory criteria in section 34 of the *OBCA* that govern the reduction of stated capital is to prevent corporations from distributing assets to shareholders and thereby prejudicing creditors.[77] This policy objective is not engaged with respect to Danier under the circumstances because all proven creditor claims have been paid in full (with interest) within the bankruptcy proceedings and Danier therefore complies with the solvency test in section 34 of the OBCA.

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[76] See discussion in *YBM Magnex International Inc,* (2003) 26 OSCB 5285 (Ont Sec Comm), at paras 1, 89-91, BOA Tab 24.

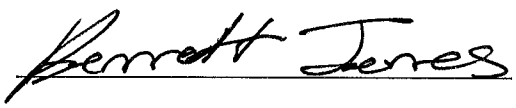
[77] *Unisource Canada Inc v. Hongkong Bank of Canada*, [1998] OJ No 5586 at para 80 (Ont Gen Div), aff'd [2000] OJ No 947 (CA), BOA Tab 22. Wayne Gray, *Annotated Canada Business Corporations Act* (Thomson Reuters: Toronto, 2017) (loose-leaf) at 1-122.53 (commenting on the equivalent provision in the *CBCA*), BOA Tab 21.

64. Any potential prejudice is further diminished because the Court will continue to supervise the Shareholder Distribution Process in the context of the ongoing bankruptcy proceedings. Similarly, the role of the Trustee in administering the Shareholder Distribution Plan, as an officer of the Court, will assist in protecting against any potential prejudice.

PART V: ORDER REQUESTED

65. The Trustee respectfully requests an order approving the Shareholder Distribution Process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 2nd day of February, 2018.



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SCHEDULE "A"

SCHEDULE "A"

LIST OF AUTHORITIES

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4. *Re Nortel Networks*, 2015 ONSC 2987.
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21. Wayne Gray, *Annotated Canada Business Corporations Act* (Thomson Reuters: Toronto, 2017) (loose-leaf).
22. *Unisource Canada Inc v. Hongkong Bank of Canada*, [1998] OJ No 5586 (Ont Gen Div) [aff'd [2000] OJ No 947 (CA)].
23. *Aevo Co v. D&A MacLeod Co*, [1991] OJ No 1354 (Ont Gen Div).

24. *YBM Magnex International Inc,* (2003) 26 OSCB 5285 (Ont Sec Comm).

SCHEDULE "B"

SCHEDULE "B"

RELEVANT STATUTES

Bankruptcy and Insolvency Act, RSC 1985, c. B-3, as am.

Trustee may apply to court for directions

34(1) A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

To report to court after three years

(2) Where an estate has not been fully administered within three years after the bankruptcy, the trustee shall, if requested to do so by the Superintendent, report that fact to the court as soon as practicable thereafter, and the court shall make such order as it considers fit to expedite the administration.

Notice to Superintendent's division office

(3) The trustee must send notice to the Superintendent's division office of the day and time when any application for directions made under subsection (1) is to be heard and of the day and time when the trustee intends to report to the court as required by the Superintendent under subsection (2).

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by

the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Interest from date of bankruptcy

143 Where there is a surplus after payment of the claims as provided in sections 136 to 142, it shall be applied in payment of interest from the date of the bankruptcy at the rate of five per cent per annum on all claims proved in the bankruptcy and according to their priority.

Right of bankrupt to surplus

144 The bankrupt, or the legal personal representative or heirs of a deceased bankrupt, is entitled to any surplus remaining after payment in full of the bankrupt's creditors with interest as provided by this Act and of the costs, charges and expenses of the bankruptcy proceedings.

Levy payable out of dividends for supervision

147 (1) For the purpose of defraying the expenses of the supervision by the Superintendent, there shall be payable to the Superintendent for deposit with the Receiver General a levy on all

payments, except the costs referred to in subsection 70(2), made by the trustee by way of dividend or otherwise on account of the creditor's claims, including Her Majesty in right of Canada or of a province claiming in respect of taxes or otherwise.

Rate of levy

(2) The levy referred to in subsection (1) shall be at a rate to be fixed by the Governor in Council and shall be charged proportionately against all payments and deducted therefrom by the trustee before payment is made.

Notice that final dividend will be made

149 (1) The trustee may, after the first meeting of the creditors, send a notice, in the prescribed manner, to every person with a claim of which the trustee has notice or knowledge but whose claim has not been proved. The notice must inform the person that, if that person does not prove the claim within a period of 30 days after the sending of the notice, the trustee will proceed to declare a dividend or final dividend without regard to that person's claim.

Court may extend time

(2) Where a person notified under subsection (1) does not prove the claim within the time limit or within such further time as the court, on proof of merits and satisfactory explanation of the delay in making proof, may allow, the claim of that person shall, notwithstanding anything in this Act, be excluded from all share in any dividend, but a taxing authority may notify the trustee within the period referred to in subsection (1) that it proposes to file a claim as soon as the amount has been ascertained, and the time for filing the claim shall thereupon be extended to three months or such further time as the court may allow.

Certain federal claims

(3) Despite subsection (2), a claim may be filed for an amount payable under the following Acts or provisions within the time limit referred to in subsection (2) — or within three months after the return of income or other evidence of the facts on which the claim is based is filed or comes to the attention of the Minister of National Revenue or, in the case of an amount payable under legislation referred to in paragraph (c), the minister in that province responsible for the legislation:

(a) the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or *Employment Insurance Act* that refers to the *Income Tax Act* and provides for the collection of a contribution as defined in the *Canada Pension Plan,* an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts;

(c) any provincial legislation that has a purpose similar to the *Income Tax Act*, or that refers to that Act, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, if the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a provincial pension plan as defined in that subsection;

(d) the *Excise Tax Act*;

(e) the *Excise Act, 2001*;

(f) the *Customs Act*; and

(g) the *Air Travellers Security Charge Act*.

No dividend allowed

(4) Unless the trustee retains sufficient funds to provide for payment of any claims that may be filed under legislation referred to in subsection (3), no dividend is to be declared until the expiry of three months after the trustee has filed all returns that the trustee is required to file.

Bankruptcy to operate as application for discharge

169 (1) The making of a bankruptcy order against, or an assignment by, a person other than a corporation or an individual in respect of whom subsection 168.1(1) applies operates as an application for discharge.

Appointment to be obtained by trustee

(2) The trustee, before proceeding to his or her discharge and in any case not earlier than three months and not later than one year after the bankruptcy of a person for whom there is an application for discharge by virtue of subsection (1) shall, on five days notice to the bankrupt, apply to the court for an appointment for a hearing of the application for the bankrupt's discharge, and the hearing must be held within 30 days after the day on which the appointment is made or at any other time that may be fixed by the court at the bankrupt's or trustee's request.

(3) [Repealed, 2005, c. 47, s. 101]

Bankrupt corporation

(4) A bankrupt corporation may not apply for a discharge unless it has satisfied the claims of its creditors in full.

Fees and disbursements of trustee

(5) The court may, before issuing an appointment for hearing on application for discharge, if requested by the trustee, require such funds to be deposited with, or such guarantee to be given to, the trustee, as it deems proper, for the payment of his fees and disbursements incurred in respect of the application.

Notice to creditors

(6) The trustee, on obtaining or being served with an appointment for hearing an application for discharge, shall, not less than 15 days before the day appointed for the hearing of the application, send a notice of the hearing, in the prescribed form and manner, to the Superintendent, the bankrupt and every known creditor, at the creditor's latest known address.

Procedure when trustee not available

(7) Where the trustee is not available to perform the duties required of a trustee on the application of a bankrupt for a discharge, the court may authorize any other person to perform such duties and may give such directions as it deems necessary to enable the application of the bankrupt to be brought before the court.

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts **vested** with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Business Corporations Act, RSO 1990, c. B.16

Definitions and interpretation

1 (1) In this Act,

"special resolution" means a resolution that is,

(a) submitted to a special meeting of the shareholders of a corporation duly called for the purpose of considering the resolution and passed, with or without amendment, at the meeting by at least two-thirds of the votes cast, or

(b) consented to in writing by each shareholder of the corporation entitled to vote at such a meeting or the shareholder's attorney authorized in writing; ("résolution spéciale")

Shares

22 (1) Shares of a corporation shall be in registered form and shall be without nominal or par value. R.S.O. 1990, c. B.16, s. 22 (1).

Idem

(2) Shares with nominal or par value of a corporation incorporated before the 29th day of July, 1983 shall be deemed to be shares without nominal or par value. R.S.O. 1990, c. B.16, s. 22 (2).

Rights of shareholders

(3) Where a corporation has only one class of shares, the rights of the holders thereof are equal in all respects and include the rights,

(a) to vote at all meetings of shareholders; and

(b) to receive the remaining property of the corporation upon dissolution. R.S.O. 1990, c. B.16, s.22(3).

Idem

(4) The articles may provide for more than one class of shares and where they so provide,

(a) the rights, privileges, restrictions and conditions attaching to the shares of each class shall be set out therein; and

(b) each of the rights set out in subsection (3) shall be attached to at least one class of shares, but both such rights are not required to be attached to any one class. R.S.O. 1990, c. B.16, s. 22 (4).

Saving provision

(5) Despite subsection (4), the right of the holders of a class of shares to one vote for each share at all meetings of shareholders other than meetings of the holders of another class of shares, or to receive the remaining property of the corporation upon dissolution, need not be set out in the articles. R.S.O. 1990, c. B.16, s. 22 (5).

Shares within a class equal

(6) Except as provided in section 25, each share of a class shall be the same in all respects as every other share of that class. R.S.O. 1990, c. B.16, s. 22 (6).

Same rights, etc.

(7) The articles may provide that two or more classes of shares or two or more series within a class of shares may have the same rights, privileges, restrictions and conditions. 2006, c. 34, Sched. B, s. 5.

Separate capital account

24 (1) A corporation shall maintain a separate stated capital account for each class and series of shares it issues. R.S.O. 1990, c. B.16, s. 24 (1).

Idem

(2) A corporation shall add to the appropriate stated capital account in respect of any shares it issues the full amount of the consideration it receives as determined by the directors which, in the case of shares not issued for money, shall be the amount determined by the directors in accordance with clause 23 (4) (a) or, if a determination is made by the directors in accordance with subclause 23 (4) (b) (i), the amount so determined. R.S.O. 1990, c. B.16, s. 24 (2).

Exceptions

(3) Despite subsection (2) and subsection 23 (3), a corporation may, subject to subsection (4), add to the stated capital accounts maintained for the shares of classes or series the whole or any part of the consideration that it receives in exchange if the corporation issues shares,

(a) in exchange for,

(i) property of a person who immediately before the exchange did not deal with the corporation at arm's length within the meaning of that term in the *Income Tax Act* (Canada),

(ii) shares of, or another interest in, a body corporate that immediately before the exchange, or that because of the exchange, did not deal with the corporation at arm's length within the meaning of that term in the *Income Tax Act* (Canada), or

(iii) property of a person who, immediately before the exchange, dealt with the corporation at arm's length within the meaning of that term in the *Income Tax Act* (Canada), if the person, the corporation and all holders of shares in the class or series of shares so issued consent to the exchange; or

(b) under an agreement referred to in subsection 175 (1) or an arrangement referred to in clause (c) or (d) of the definition of "arrangement" in subsection 182 (1) or to shareholders of an amalgamating corporation who receive the shares in addition to or instead of securities of the amalgamated corporation. 2006, c. 34, Sched. B, s. 6.

Consent not required

(3.1) The consent referred to in subclause (3) (a) (iii) is not required if the issuance of the shares does not result in a decrease in the value of the stated capital account maintained for the class or series divided by the number of shares in the class or series. 2006, c. 34, Sched. B, s. 6.

Addition to stated capital account

(4) On the issue of a share, a corporation shall not add to a stated capital account in respect of the share an amount greater than the amount referred to in subsection (2). R.S.O. 1990, c. B.16, s. 24 (4).

Stated capital at time of coming into force or continuance

(5) Despite subsection (2), on the 29th day of July, 1983 or at such time thereafter as a corporation has been continued under this Act, as the case may be, the amount in the stated capital account maintained by a corporation in respect of each class or series of shares then issued shall be equal to the aggregate amount paid up on the shares of each such class or series of shares immediately prior thereto, and, after such time, a corporation may, upon complying with subsection (6), add to the stated capital account maintained by it in respect of any class or series of shares any amount it has credited to a retained earnings or other surplus account. R.S.O. 1990, c. B.16, s. 24 (5).

Additions to stated capital account

(6) Where a corporation proposes to add any amount to a stated capital account that it maintains in respect of a class or series of shares otherwise than under subsection 38 (2), the addition to the stated capital account must be approved by special resolution if,

(a) the amount to be added,

(i) was not received by the corporation as consideration for the issue of shares, or

(ii) was received by the corporation as consideration for the issue of shares but does not form part of the stated capital attributable to such shares; and

(b) the corporation has outstanding shares of more than one class or series. R.S.O. 1990, c. B.16, s. 24 (6).

Idem

(7) Where a class or series of shares of a corporation would be affected by the addition of an amount to any stated capital account under subsection (6) in a manner different from the manner in which any other class or series of shares of the corporation would be affected by such action, the holders of the differently affected class or series of shares are entitled to vote separately as a class or series, as the case may be, on the proposal to take the action, whether or not such shares otherwise carry the right to vote. R.S.O. 1990, c. B.16, s. 24 (7).

Expressed in one or more currencies

(8) Stated capital accounts of a corporation may be expressed in one or more currencies. R.S.O. 1990, c. B.16, s. 24 (8).

Reduction in stated capital

(9) A corporation shall not reduce its stated capital or any stated capital account except in the manner provided in this Act. R.S.O. 1990, c. B.16, s. 24 (9).

Reduction of liability re unpaid share: stated capital

34 (1) Subject to subsection (4), a corporation may by special resolution,

(a) extinguish or reduce a liability in respect of an amount unpaid on any share; or

(b) reduce its stated capital for any purpose including, without limiting the generality of the foregoing, for the purpose of,

(i) distributing to the holders of issued shares of any class or series of shares an amount not exceeding the stated capital of the class or series, or

(ii) declaring its stated capital to be reduced by,

(A) an amount that is not represented by realizable assets, or

(B) an amount otherwise determined in respect of which no amount is to be distributed to holders of issued shares of the corporation. R.S.O. 1990, c. B.16, s. 34 (1).

Right to vote where reduction under subs.

(2) Where a class or series of shares of a corporation would be affected by a reduction of stated capital under clause (1) (b) in a manner different from the manner in which any other class or series of shares of the corporation would be affected by such action, the holders of the differently affected class or series of shares are entitled to vote separately as a class or

series, as the case may be, on the proposal to take the action, whether or not the shares otherwise carry the right to vote. R.S.O. 1990, c. B.16, s. 34 (2).

Account to be reduced specified

(3) A special resolution under this section shall specify the stated capital account or accounts from which the reduction of stated capital effected by the special resolution will be made. R.S.O. 1990, c. B.16, s. 34 (3).

Restriction on reduction

(4) A corporation shall not take any action to extinguish or reduce a liability in respect of an amount unpaid on a share or to reduce its stated capital for any purpose other than the purpose mentioned in sub-subclause (1) (b) (ii) (A) if there are reasonable grounds for believing that,

(a) the corporation is or, after the taking of such action, would be unable to pay its liabilities as they become due; or

(b) after the taking of such action, the realizable value of the corporation's assets would be less than the aggregate of its liabilities. R.S.O. 1990, c. B.16, s. 34 (4).

Application for order where improper reduction

(5) A creditor of a corporation is entitled to apply to the court for an order compelling a shareholder or other recipient,

(a) to pay to the corporation an amount equal to any liability of the shareholder that was extinguished or reduced contrary to this section; or

(b) to pay or deliver to the corporation any money or property that was paid or distributed to the shareholder or other recipient as a consequence of a reduction of capital made contrary to this section. R.S.O. 1990, c. B.16, s. 34 (5).

Class action

(7) Where it appears that there are numerous shareholders who may be liable under this section, the court may permit an action to be brought against one or more of them as representatives of the class and, if the plaintiff establishes a claim as creditor, may make an order of reference and add as parties in the referee's office all such shareholders as may be found, and the referee shall determine the amount that each should contribute towards the plaintiff's claim, which amount may not, in the case of any particular shareholder, exceed the amount referred to in subsection (5), and the referee may direct payment of the sums so determined. R.S.O. 1990, c. B.16, s. 34 (7).

Shareholder holding shares in fiduciary capacity

(8) No person holding shares in the capacity of a personal representative and registered on the records of the corporation as a shareholder and therein described as the personal representative of a named person is personally liable under this section, but the person named is subject to all liabilities imposed by this section. R.S.O. 1990, c. B.16, s. 34 (8).

s. 130 does not apply

(9) This section does not affect any liability that arises under section 130.

Declaration of dividends

38 (1) Subject to its articles and any unanimous shareholder agreement, the directors may declare and a corporation may pay a dividend by issuing fully paid shares of the corporation or options or rights to acquire fully paid shares of the corporation and, subject to subsection (3), a corporation may pay a dividend in money or property. R.S.O. 1990, c. B.16, s. 38 (1).

Stock dividend

(2) If shares of a corporation are issued in payment of a dividend, the corporation may add all or part of the value of those shares to the stated capital account of the corporation maintained or to be maintained for the shares of the class or series issued in payment of the dividend. 2006, c. 34, Sched. B, s. 11.

When dividend not to be declared

(3) The directors shall not declare and the corporation shall not pay a dividend if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of,

(i) its liabilities, and

(ii) its stated capital of all classes. R.S.O. 1990, c. B.16, s. 38 (3).

Shareholders' meetings

94 (1) Subject to subsection 104 (1), the directors of a corporation,

(a) shall call an annual meeting of shareholders not later than eighteen months after the corporation comes into existence and subsequently not later than fifteen months after holding the last preceding annual meeting; and

(b) may at any time call a special meeting of shareholders.

Date for determining shareholders

95 (1) For the purpose of determining shareholders,

(a) entitled to receive payment of a dividend;

(b) entitled to participate in a liquidation or distribution; or

(c) for any other purpose except the right to receive notice of or to vote at a meeting,

the directors may fix in advance a date as the record date for such determination of shareholders, but the record date shall not precede by more than fifty days the particular action to be taken. R.S.O. 1990, c. B.16, s. 95 (1).

Same

(2) For the purpose of determining shareholders entitled to receive notice of a meeting of shareholders, the directors may fix in advance a date as the record date for such determination of shareholders, but the record date shall not precede by more than 60 days or by less than 30 days the date on which the meeting is to be held.

Idem

(3) Where no record date is fixed,

(a) the record date for the determination of shareholders entitled to receive notice of a meeting of shareholders shall be,

(i) at the close of business on the day immediately preceding the day on which the notice is given, or

(ii) if no notice is given, the day on which the meeting is held; and

(b) the record date for the determination of shareholders for any purpose other than to establish a shareholder's right to receive notice of a meeting or to vote shall be at the close of business on the day on which the directors pass the resolution relating thereto. R.S.O. 1990, c. B.16, s. 95 (3).

Notice of date

(4) If a record date is fixed, unless notice of the record date is waived in writing by every holder of a share of the class or series affected whose name is set out in the securities register at the close of business on the day the directors fix the record date, notice thereof shall be given, not less than seven days before the date so fixed,

(a) by advertisement in a newspaper published or distributed in the place where the corporation has its registered office and in each place in Canada where it has a transfer agent or where a transfer of its shares may be recorded; and

(b) by written notice to each stock exchange in Canada on which the shares of the corporation are listed for trading. R.S.O. 1990, c. B.16, s. 95 (4).

Notice of shareholders' meetings

96 (1) Notice of the time and place of a meeting of shareholders shall be sent, in the case of an offering corporation, not less than twenty-one days and, in the case of any other corporation, not less than ten days, but, in either case, not more than fifty days, before the meeting,

(a) to each shareholder entitled to vote at the meeting;

(b) to each director; and

(c) to the auditor of the corporation. R.S.O. 1990, c. B.16, s. 96 (1).

Idem

(2) A notice of a meeting is not required to be sent to shareholders who were not registered on the records of the corporation or its transfer agent on the record date determined under subsection 95 (2) or (3), but failure to receive a notice does not deprive a shareholder of the right to vote at the meeting. R.S.O. 1990, c. B.16, s. 96 (2).

Idem

(3) If a meeting of shareholders is adjourned for less than thirty days, it is not necessary, unless the by-laws otherwise provide, to give notice of the adjourned meeting other than by announcement at the earliest meeting that is adjourned. R.S.O. 1990, c. B.16, s. 96 (3).

Idem

(4) If a meeting of shareholders is adjourned by one or more adjournments for an aggregate of thirty days or more, notice of the adjourned meeting shall be given as for an original meeting but, unless the meeting is adjourned by one or more adjournments for an aggregate of more than ninety days, section 111 does not apply. R.S.O. 1990, c. B.16, s. 96 (4).

Special business

(5) All business transacted at a special meeting of shareholders and all business transacted at an annual meeting of shareholders, except consideration of the minutes of an earlier meeting, the financial statements and auditor's report, election of directors and reappointment of the incumbent auditor, shall be deemed to be special business. R.S.O. 1990, c. B.16, s. 96 (5).

Idem

(6) Notice of a meeting of shareholders at which special business is to be transacted shall state or be accompanied by a statement of,

(a) the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon; and

(b) the text of any special resolution or by-law to be submitted to the meeting. R.S.O. 1990, c. B.16, s. 96 (6).

Waiving notice

98 A shareholder and any other person entitled to attend a meeting of shareholders may in any manner and at any time waive notice of a meeting of shareholders, and attendance of any such person at a meeting of shareholders is a waiver of notice of the meeting, except where such person attends a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called. R.S.O. 1990, c. B.16, s. 98.

Requisition for shareholders meeting

105 (1) The holders of not less than 5 per cent of the issued shares of a corporation that carry the right to vote at a meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition. R.S.O. 1990, c. B.16, s. 105 (1).

Idem

(2) The requisition referred to in subsection (1) shall state the business to be transacted at the meeting and shall be sent to the registered office of the corporation. R.S.O. 1990, c. B.16, s. 105 (2).

Duty of directors to call meeting

(3) Upon receiving the requisition referred to in subsection (1), the directors shall call a meeting of shareholders to transact the business stated in the requisition unless,

(a) a record date has been fixed under subsection 95 (2) and notice thereof has been given under subsection 95 (4);

(b) the directors have called a meeting of shareholders and have given notice thereof under section 96; or

(c) the business of the meeting as stated in the requisition includes matters described in clauses 99 (5) (b) to (d). R.S.O. 1990, c. B.16, s. 105 (3).

Where requisitionist may call meeting

(4) Subject to subsection (3), if the directors do not within twenty-one days after receiving the requisition referred to in subsection (1) call a meeting, any shareholder who signed the requisition may call the meeting. R.S.O. 1990, c. B.16, s. 105 (4).

Calling of meeting

(5) A meeting called under this section shall be called as nearly as possible in the manner in which meetings are to be called under the by-laws, this Part and Part VIII. R.S.O. 1990, c. B.16, s. 105 (5).

Repayment of expenses

(6) The corporation shall reimburse the shareholders for the expenses reasonably incurred by them in requisitioning, calling and holding the meeting unless the shareholders have not acted in good faith and in the interest of the shareholders of the corporation generally. R.S.O. 1990, c. B.16, s. 105 (6)

Requisition by court

106 (1) If for any reason it is impracticable to call a meeting of shareholders of a corporation in the manner in which meetings of those shareholders may be called or to conduct the meeting in the manner prescribed by the by-laws, the articles and this Act, or if for any other reason the court thinks fit, the court, upon the application of a director or a shareholder entitled to vote at the meeting, may order a meeting to be called, held and conducted in such manner as the court directs and upon such terms as to security for the costs of holding the meeting or otherwise as the court deems fit. R.S.O. 1990, c. B.16, s. 106 (1).

Power of court

(2) Without restricting the generality of subsection (1), the court may order that the quorum required by the by-laws, the articles or this Act be varied or dispensed with at a meeting called, held and conducted under this section. R.S.O. 1990, c. B.16, s. 106 (2).

Effect of meeting

(3) A meeting called, held and conducted under this section is for all purposes a meeting of shareholders of the corporation duly called, held and conducted. R.S.O. 1990, c. B.16, s. 106 (3).

Mandatory solicitation of proxy

111 The management of an offering corporation shall, concurrently with or prior to sending notice of a meeting of shareholders, send a form of proxy to each shareholder who is entitled to receive notice of the meeting. R.S.O. 1990, c. B.16, s. 111.

Information circular

112 (1) No person shall solicit proxies in respect of an offering corporation unless,

(a) in the case of solicitation by or on behalf of the management of the corporation, a management information circular in prescribed form, either as an appendix to or as a separate document accompanying the notice of the meeting; or

(b) in the case of any other solicitation, a dissident's information circular in prescribed form,

is sent to the auditor of the corporation, to each shareholder whose proxy is solicited and, if clause (b) applies, to the corporation. R.S.O. 1990, c. B.16, s. 112 (1).

Exemption order re ss. 111, 112

113 Upon the application of any interested person, the Commission may, if satisfied in the circumstances of the particular case that there is adequate justification for so doing, make an order, on such terms and conditions as the Commission may impose, exempting, in whole or in part, any person from the requirements of section 111 or from the requirements of section 112. R.S.O. 1990, c. B.16, s. 113.

Directors

115 (1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation. R.S.O. 1990, c. B.16, s. 115 (1).

Board of directors

(2) A corporation shall have a board of directors which shall consist of,

(a) in the case of a corporation that is not an offering corporation, at least one individual; and

(b) in the case of a corporation that is an offering corporation, not fewer than three individuals. R.S.O. 1990, c. B.16, s. 115 (2); 1994, c. 27, s. 71 (11).

Idem

(3) At least one-third of the directors of an offering corporation shall not be officers or employees of the corporation or any of its affiliates. R.S.O. 1990, c. B.16, s. 115 (3).

Deemed directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this Act. 1994, c. 27, s. 71 (12).

Exceptions

(5) Subsection (4) does not apply to,

(a) an officer who manages the business of the corporation under the direction or control of a shareholder or other person;

(b) a lawyer, accountant or other professional who participates in the management of the corporation solely for the purposes of providing professional services; or

(c) a trustee in bankruptcy, receiver, receiver-manager or secured creditor who participates in the management of the corporation or exercises control over its property solely for the purposes of enforcement of a security agreement or administration of a bankrupt's estate, in the case of a trustee in bankruptcy. 1994, c. 27, s. 71 (12).

Reorganization

186 (1) In this section,

"reorganization" means a court order made under section 248, an order made under the *Bankruptcy and Insolvency Act* (Canada) or an order made under the *Companies Creditors Arrangement Act* (Canada) approving a proposal. 2000, c. 26, Sched. B, s. 3 (9).

Articles amended

(2) If a corporation is subject to a reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 168. R.S.O. 1990, c. B.16, s. 186 (2).

Auxiliary powers of court

(3) Where a reorganization is made, the court making the order may also,

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office. R.S.O. 1990, c. B.16, s. 186 (3).

Articles of reorganization

(4) After a reorganization has been made, articles of reorganization in prescribed form shall be sent to the Director. R.S.O. 1990, c. B.16, s. 186 (4).

Certificate

(5) Upon receipt of articles of reorganization, the Director shall endorse thereon in accordance with section 273 a certificate which shall constitute the certificate of amendment and the articles are amended accordingly. R.S.O. 1990, c. B.16, s. 186 (5).

No dissent

(6) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section. R.S.O. 1990, c. B.16, s. 186 (6).

Application of ss. 207-218

206 Sections 207 to 218 apply to corporations being wound up by order of the court. R.S.O. 1990, c. B.16, s. 206.

Winding up by court

207 (1) A corporation may be wound up by order of the court,

(a) where the court is satisfied that in respect of the corporation or any of its affiliates,

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or

(b) where the court is satisfied that,

(i) a unanimous shareholder agreement entitled a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred,

(ii) proceedings have been begun to wind up voluntarily and it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court,

(iii) the corporation, though it may not be insolvent, cannot by reason of its liabilities continue its business and it is advisable to wind it up, or

(iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; or

(c) where the shareholders by special resolution authorize an application to be made to the court to wind up the corporation. R.S.O. 1990, c. B.16, s. 207 (1).

Court order

(2) Upon an application under this section, the court may make such order under this section or section 248 as it thinks fit. R.S.O. 1990, c. B.16, s. 207 (2).

Who may apply

208 (1) A winding-up order may be made upon the application of the corporation or of a shareholder or, where the corporation is being wound up voluntarily, of the liquidator or of a contributory or of a creditor having a claim of $2,500 or more. R.S.O. 1990, c. B.16, s. 208 (1).

Notice

(2) Except where the application is made by the corporation, four days' notice of the application shall be given to the corporation before the making of the application. R.S.O. 1990, c. B.16, s. 208 (2).

Appointment of liquidator

210 (1) The court in making the winding-up order may appoint one or more persons as liquidator of the estate and effects of the corporation for the purpose of winding up its business and affairs and distributing its property. R.S.O. 1990, c. B.16, s. 210 (1).

Remuneration

(2) The court may at any time fix the remuneration of the liquidator. R.S.O. 1990, c. B.16, s. 210 (2).

Vacancy

(3) If a liquidator appointed by the court dies or resigns or the office becomes vacant for any reason, the court may by order fill the vacancy. R.S.O. 1990, c. B.16, s. 210 (3).

Notice of appointment

(4) A liquidator appointed by the court under this section shall forthwith give to the Director notice in the prescribed form of the liquidator's appointment and shall, within twenty days after being appointed publish the notice in *The Ontario Gazette*. R.S.O. 1990, c. B.16, s. 210 (4).

Articles of dissolution where corporation active

238 (1) For the purpose of bringing the dissolution authorized under clause 237 (a) or (b) into effect, articles of dissolution shall follow the prescribed form and shall set out,

(a) the name of the corporation;

(b) that its dissolution has been duly authorized under clause 237 (a) or (b);

(c) that it has no debts, obligations or liabilities or its debts, obligations or liabilities have been duly provided for in accordance with subsection (3) or its creditors or other persons having interests in its debts, obligations or liabilities consent to its dissolution;

(d) that after satisfying the interests of creditors in all its debts, obligations and liabilities, if any, it has no property to distribute among its shareholders or that it has distributed its remaining property rateably among its shareholders according to their rights and interests in the corporation or in accordance with subsection (4) where applicable; and

(d.1) if it was at any time a registered owner of land in Ontario, that it is no longer a registered owner of land in Ontario; and

(e) that there are no proceedings pending in any court against it.

Articles of dissolution where corporation never active

(2) For the purpose of bringing a dissolution authorized under clause 237 (c) into effect, articles of dissolution shall follow the prescribed form and shall set out,

(a) the name of the corporation;

(b) the date set out in its certificate of incorporation;

(c) that the corporation has not commenced business;

(d) that none of its shares has been issued;

(e) that dissolution has been duly authorized under clause 237 (c);

(f) that it has no debts, obligations or liabilities;

(g) that after satisfying the interests of creditors in all its debts, obligations and liabilities, if any, it has no property to distribute or that it has distributed its remaining property to the persons entitled thereto; and

(g.1) if it was at any time a registered owner of land in Ontario, that it is no longer a registered owner of land in Ontario; and

(h) that there are no proceedings pending in any court against it.

Where creditor unknown

(3) Where a corporation authorizes its dissolution and a creditor is unknown or a creditor's whereabouts is unknown, the corporation may, by agreement with the Public Guardian and Trustee, pay to the Public Guardian and Trustee an amount equal to the amount of the debt due to the creditor to be held in trust for the creditor, and such payment shall be deemed to be due provision for the debt for the purposes of clause (1) (c). R.S.O. 1990, c. B.16, s. 238 (3).

Where shareholder unknown

(4) Where a corporation authorizes its dissolution and a shareholder is unknown or a shareholder's whereabouts is unknown, it may, by agreement with the Public Guardian and Trustee, deliver or convey the shareholder's share of the property to the Public Guardian and Trustee to be held in trust for the shareholder, and such delivery or conveyance shall be deemed to be a distribution to that shareholder of his, her or its rateable share for the purposes of the dissolution. R.S.O. 1990, c. B.16, s. 238 (4).

Power to convert

(5) If the share of the property so delivered or conveyed to the Public Guardian and Trustee under subsection (4) is in a form other than cash, the Public Guardian and Trustee may at any time, and within ten years after such delivery or conveyance shall, convert it into cash. R.S.O. 1990, c. B.16, s. 238 (5).

Payment to person entitled

(6) If the amount paid under subsection (3) or the share of the property delivered or conveyed under subsection (4) or its equivalent in cash, as the case may be, is claimed by the person beneficially entitled thereto within ten years after it was so delivered, conveyed or paid, it shall be delivered, conveyed or paid to the person, but, if not so claimed, it vests in the Public Guardian and Trustee for the use of Ontario, and, if the person beneficially entitled thereto at any time thereafter establishes a right thereto to the satisfaction of the Lieutenant Governor in Council, an amount equal to the amount so vested in the Public Guardian and Trustee shall be paid to the person. R.S.O. 1990, c. B.16, s. 238 (6).

***Income Tax Act*, RSC 1985, c.1 (5th Sup)**

Person acting for another

159 (1) For the purposes of this Act, where a person is a legal representative of a taxpayer at any time,

(a) the legal representative is jointly and severally, or solidarily, liable with the taxpayer

(i) to pay each amount payable under this Act by the taxpayer at or before that time and that remains unpaid, to the extent that the legal representative is at

that time in possession or control, in the capacity of legal representative, of property that belongs or belonged to, or that is or was held for the benefit of, the taxpayer or the taxpayer's estate, and

(ii) to perform any obligation or duty imposed under this Act on the taxpayer at or before that time and that remains outstanding, to the extent that the obligation or duty can reasonably be considered to relate to the responsibilities of the legal representative acting in that capacity; and

(b) any action or proceeding in respect of the taxpayer taken under this Act at or after that time by the Minister may be so taken in the name of the legal representative acting in that capacity and, when so taken, has the same effect as if it had been taken directly against the taxpayer and, if the taxpayer no longer exists, as if the taxpayer continued to exist.

Certificate before distribution

(2) Every legal representative (other than a trustee in bankruptcy) of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a certificate from the Minister, by applying for one in prescribed form, certifying that all amounts

(a) for which the taxpayer is or can reasonably be expected to become liable under this Act at or before the time the distribution is made, and

(b) for the payment of which the legal representative is or can reasonably be expected to become liable in that capacity

have been paid or that security for the payment thereof has been accepted by the Minister.

Personal liability

(3) If a legal representative (other than a trustee in bankruptcy) of a taxpayer distributes to one or more persons property in the possession or control of the legal representative, acting in that capacity, without obtaining a certificate under subsection (2) in respect of the amounts referred to in that subsection,

(a) the legal representative is personally liable for the payment of those amounts to the extent of the value of the property distributed;

(b) the Minister may at any time assess the legal representative in respect of any amount payable because of this subsection; and

(c) the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, to an assessment made under this subsection as though it had been made under section 152 in respect of taxes payable under this Part.

***Securities Act*, RSO 1990, c. S.5**

Definitions

84 In this Part,

"information circular" means an information circular prepared in accordance with the regulations; ("circulaire d'information")

"solicit" and "solicitation" include,

(a) any request for a proxy whether or not accompanied by or included in a form of proxy,

(b) any request to execute or not to execute a form of proxy or to revoke a proxy,

(c) the sending or delivery of a form of proxy or other communication to a security holder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy,

(d) the sending or delivery of a form of proxy to a security holder under section 85,

but do not include,

(e) the sending or delivery of a form of proxy to a security holder in response to an unsolicited request made by the security holder or on the security holder's behalf,

(f) the performance by any person or company of ministerial acts or professional services on behalf of a person or company soliciting a proxy, or

(g) such other activities as may be prescribed in the regulations. ("solliciter", "sollicitation") R.S.O. 1990, c. S.5, s. 84; 2005, c. 31, Sched. 20, s. 4.

Mandatory solicitation of proxies

85 Subject to section 88, if the management of a reporting issuer gives or intends to give to holders of its voting securities notice of a meeting, the management shall, concurrently with or prior to giving the notice to the security holders whose latest address as shown on the books of the reporting issuer is in Ontario, send to each such security holder who is entitled to notice of meeting, at the security holder's latest address as shown on the books of the reporting issuer, a form of proxy for use at the meeting that complies with the regulations. R.S.O. 1990, c. S.5, s. 85; 2001, c. 23, s. 214.

Information circular

86 (1) Subject to subsection (2) and section 88, no person or company shall solicit proxies from holders of its voting securities whose latest address as shown on the books of the reporting issuer is in Ontario unless,

(a) in the case of a solicitation by or on behalf of the management of a reporting issuer, an information circular, either as an appendix to or as a separate document accompanying the notice of the meeting, is sent to each such security holder of the reporting issuer whose proxy is solicited at the security holder's latest address as shown on the books of the reporting issuer; or

(b) in the case of any other solicitation, the person or company making the solicitation, concurrently with or prior thereto, delivers or sends an information circular to each such security holder whose proxy is solicited. R.S.O. 1990, c. S.5, s. 86 (1); 2001, c. 23, s. 215.

National Instrument 51-102 (Continuous Disclosure)

9.1 Sending of Proxies and Information Circulars

(1) If management of a reporting issuer gives notice of a meeting to its registered holders of voting securities, management must, at the same time as or before giving that notice, send to each registered holder of voting securities who is entitled to notice of the meeting a form of proxy for use at the meeting.

(2) Subject to section 9.2, a person or company that solicits proxies from registered holders of voting securities of a reporting issuer must,

(a) in the case of a solicitation by or on behalf of management of a reporting issuer, send an information circular with the notice of meeting to each registered securityholder whose proxy is solicited; or

(b) in the case of any other solicitation, concurrently with or before the solicitation, send an information circular to each registered securityholder whose proxy is solicited.

National Instrument 54-101 (Proxy Solicitation)

1.1 **Definitions** - In this Instrument

[...]

"objecting beneficial owner" means a beneficial owner of securities that

(a) has provided instructions to an intermediary holding the securities in an account on behalf of the beneficial owner that the beneficial owner objects, for that account, to the intermediary disclosing ownership information about the beneficial owner under this Instrument, or

(b) is an objecting beneficial owner under subparagraph (iii) of paragraph 3.3(b);

2.1 **Establishment of Meeting and Record Dates** - A reporting issuer that is required to give notice of a meeting to the registered holders of any of its securities shall fix

(a) a date for the meeting;

(b) a record date for notice of the meeting, which shall be no fewer than 30 and no more than 60 days before the meeting date; and

(c) if required or permitted by corporate law, a record date for voting at the meeting.

***Courts of Justice Act*, R.S.O 1990, c C. 43**

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

IN THE MATTER OF THE BANKRUPTCY OF DANIER LEATHER INC.

Court File No.: 31-2084381
Estate No.: 31-2084381

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST}

FACTUM OF THE TRUSTEE RE: SHAREHOLDER DISTRIBUTION

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