



November 7, 2012

Via email: Mireille-France.LebLANC@justice.gc.ca

Mireille France Leblanc
Department of Justice Canada
International Private Law Section
Room 5308, East Memorial Bldg.
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Ms. Leblanc:

Re: UNCITRAL Working Paper 104

The Bankruptcy, Insolvency & Restructuring Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on the United Nations Commission on International Trade Law (UNCITRAL)'s working paper A/CN.9/WG.V/WP.104 (WP 104) entitled *Directors' Obligations in the Period Approaching Insolvency*.

The CBA is a national association of over 37,000 lawyers, law students, Québec notaries and law teachers, and our mandate includes improvements in the law and the administration of justice. The CBA Section is a geographically diverse membership made up of counsel representing clients in the areas of foreclosures, banking, creditor's rights, insolvency, and commercial and personal bankruptcy matters.

The CBA Section supports the initiative taken by UNCITRAL Working Group V on Insolvency Law in WP 104 on directors' obligations in the period approaching insolvency and supports the recommendations and conclusions in that report.

In addition, the CBA Section proposes three recommendations on WP 104 to be reviewed by the Department of Justice for further discussion with Working Group V.

CBA Recommendation 1:

Issue: Does imposing a Director's duty before an insolvency occurs create a special class of creditor?

The imposition of a director's duty to creditors in the period approaching an insolvency would not create a special class of creditor. All creditors would benefit from the new duty because they would all have the right to commence an action against a director for conduct that occurs during the period approaching an insolvency. The CBA Section recommends that the new director's duty be

applicable to all creditors in general, and not only new credit advanced in the period approaching the insolvency. The remedies for any breach by a director should also be available to all creditors.

CBA Recommendation 2:

Issue: Who should have status to initiate a claim against a Director?

If a breach of duty has occurred on the part of the director, the authority and jurisdiction to pursue a claim should initially lie with the duly appointed insolvency representative, such as the receiver, monitor or trustee. If the insolvency representative does not pursue the claim, a claim process should also be made available to creditors and the cause of action could be assigned to the creditors themselves. The process available to creditors under section 38 of the *Bankruptcy and Insolvency Act* (The Act) would be an appropriate model to propose with the necessary modifications for use in a foreign jurisdiction.

CBA Recommendation 3:

Issue: What remedy should be available to trace assets of an insolvent debtor?

Where the assets of an insolvent entity have been improperly removed from the jurisdiction by a Director in the period approaching the insolvency, the insolvency representative should have, within a reasonable timeframe, the means to apply for an order freezing the assets in the foreign jurisdiction until the matter has been properly adjudicated. The director could attempt to justify the transfer and have the freeze lifted by arguing that removal of the assets was required for a specific valid business purpose.

The insolvency representative should have to establish a strong *prima facie* case to obtain the freezing order. The test for obtaining a Mareva injunction¹ could be used as an appropriate model in this instance: 1) there is a real risk the assets will disappear; 2) there has been full disclosure to the court; 3) the estate has a strong prima facie case; 4) the Directors have been guilty of some type of fraud or misconduct.

It is anticipated that only in rare cases would the insolvency representative have to invoke an application, but it would be a necessary and important tool in appropriate circumstances.

The CBA Section trusts these comments will assist the Department of Justice in its work. We would be pleased to respond to questions and to provide further information on any issues addressed in this letter or on future UNCITRAL insolvency matters.

Yours truly,

(original signed by Noah Arshinoff for David R. M. Jackson)

David R. M. Jackson
Chair, National Bankruptcy, Insolvency & Restructuring Section

¹ See *Standal Estate v. Swecan International Ltd.*, [1990] 1 F.C. 115 (C.A.).