FLEXIBILITY VS. CERTAINTY:
THE LAW RELATING TO ARRANGEMENTS AFTER BCE

Anita I. Anand*

I. INTRODUCTION

In *BCE Inc. (Re)*, the Supreme Court of Canada set out numerous criteria that a board of directors needs to consider in committing a corporation to an arrangement. While some of these principles were already included in the law relating to arrangements, *BCE* expands the list of relevant principles and establishes a specific structure for their consideration. Thus, the case raises important questions: what doctrinal contribution does *BCE* make to the law on arrangements? Has *BCE* undermined the flexibility that characterizes these transactions from a policy standpoint? I argue that although the court has expanded the list of principles to be considered in the arrangement context, it has retained the flexibility that has traditionally characterized this area of law. However, the law on arrangements is also somewhat uncertain following *BCE* due to newly introduced concepts, including the distinction between legal rights and economic interests.

Part II outlines the law relating to arrangements following the *BCE* decision. Part III discusses why arrangements are considered to be an attractive form of acquisition for parties and assesses whether *BCE* has fundamentally altered the arrangement procedure. Part IV examines the uncertainty inherent in the arrangement process as set forth by the Supreme Court in this case. Part V examines one aspect of the decision, in which the court attempted to clarify when different parties will be accorded a vote in the transaction by distinguishing economic interests from legal rights, and suggests that this effort created new uncertainty of its own. Part VI concludes.

*Associate Professor, Faculty of Law, University of Toronto, anita.anand@utoronto.ca. Many thanks to Jeremy Opolosky for valuable comments and to Emily Bala for very helpful research assistance.
II. LAW ON ARRANGEMENTS FOLLOWING BCE

1. Legislation and Policy

The starting point for understanding the law of arrangements is s. 192(3) of the Canada Business Corporations Act\(^2\) (or the corresponding provisions in related statutes). This provision states that, “[w]here it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation”.\(^3\) Thus, to fall within the s. 192 framework, the applicant must be unable to carry out the transaction(s) under another provision of the statute, and the transaction(s) at issue must be a fundamental change in the nature of an arrangement.\(^4\) Apart from these requirements, the arrangement can be multi-faceted and involve numerous corporate entities.

In terms of process, the party proposing the arrangement applies to the court for an interim order approving the procedure to be followed in seeking approval for the arrangement from shareholders, and possibly other interested stakeholders. After having followed the procedure approved at the interim stage, the applicant returns to court to seek a final order approving the arrangement.\(^5\) Separate class votes may also be contemplated in the interim order and approved by the court. Indeed, the court may make any number of orders in its discretion, including an order approving the arrangement.\(^6\)

Shareholder approval is not mandatory, but the CBCA Policy states that “at a minimum, all security-holders whose legal rights are affected by the proposed arrangement are entitled to vote on the arrangement”.\(^7\) The CBCA Policy contemplates voting thresholds for debtholders being two-thirds of the total debt held by all debtholders of each class.\(^8\) In addition, the CBCA Policy indicates that approvals of

---

\(^2\) Canada Business Corporations Act, R.S.C. 1985, c. C-44 (CBCA). This was the statute at issue in the BCE case.

\(^3\) Ibid., s. 192(3).


\(^5\) CBCA, supra, footnote 2, s. 192(3) and s. 192(4)(c) (the latter of which states that a court can make an interim order requiring the corporation to hold a meeting of security holders). See Christopher C. Nicholls, Mergers, Acquisitions, and Other Changes of Corporate Control (Toronto: Irwin Law, 2007), pp. 74-75.

\(^6\) CBCA, supra, footnote 2, s. 192(4).

\(^7\) See CBCA Policy, supra, footnote 4.

\(^8\) Ibid., s. 3.09.
minority shareholders may be necessary in accordance with the majority of the minority voting rules in securities legislation. The key point to note is that decisions relating to the parties who will vote on the arrangement and the applicable voting thresholds rest in the hands of the board in the first instance prior to approval of the interim order and that the legislation itself does not set firm rules in this respect.

2. BCE and Jurisprudence on Arrangements

In BCE, the debentureholders disapproved of the proposed arrangement. Their securities stood to be devalued to below investment grade if the corporation took on significantly more debt as proposed; in addition, they were not going to be accorded a vote in the transaction. Once BCE announced that the Ontario Teachers Pension Plan Board bid had been successful, the debentureholders brought an action in the Quebec Superior Court claiming that the proposed arrangement was oppressive within the meaning of CBCA s. 241. The trial judge dismissed the claim because, in his view, the debt guarantee to be assumed by Bell Canada had a valid business purpose and the transaction was within the debentureholders' reasonable expectations. The debentureholders appealed, and the Quebec Court of Appeal allowed the appeal on the basis that the arrangement did not meet the fair and reasonableness standard required by case law dealing with arrangements.

The Supreme Court heard the case on the following issues: whether the Court of Appeal erred in dismissing the debentureholders' oppression claim, and whether the Court of Appeal erred in overturning the plan of arrangement. Part of the analysis was whether the fair and reasonable test in the arrangement context was distinct from the notion of reasonable expectations, a concept central to the analysis of oppression. Holding that the two concepts are indeed distinct and implicate differing provisions of the corporate statute, the Supreme Court of Canada also examined whether the

9. Ibid., s. 3.3.
11. BCE, supra, footnote 1, at para. 119. See also Canadian Pacific Ltd. (Re) (1990), 73 O.R. (2d) 212 at para. 85, 70 D.L.R. (4th) 349 (H.C.J.) (drawing a distinction between the arrangement process and the oppression remedy: "the jurisprudence has established that for an arrangement to get court approval, it must not only be not oppressive, it must be fair and reasonable").
transaction at issue met the fair and reasonableness standard in the arrangement context.

The Supreme Court reiterated the importance of three basic principles that must be followed by the applicant corporation. First, the applicant must have strictly complied with the statutory provisions set forth above. Second, the plan of arrangement must be put forward in good faith. Third, the plan must be fair and reasonable. It was this third principle — the “fair and reasonable” requirement — that primarily concerned the Supreme Court of Canada in the case.

While the fair and reasonable test has been stated differently by various courts, the Supreme Court explains that the test has two prongs: whether the arrangement has a valid business purpose, and whether it resolves the objections of those whose rights are being arranged in a fair and balanced way. The plan of arrangement chosen need not be the most fair plan possible; rather, the arrangement must be “fair and reasonable in all the circumstances”. As the Supreme Court stated, “there is no such thing as a perfect arrangement”.

Regarding valid business purpose, the court explains that “there must be a positive value to the corporation to offset the fact that rights are being altered”, and distinguishes this analysis from the best interests of the corporation test under s. 122 by stating that it “may be” narrower than s. 122. In the court’s view, the analysis should

13. Both the Alberta Superior Court and the British Columbia Supreme Court have indicated that the test is actually a “business judgment test”, i.e. whether “an intelligent and honest business person as a member of the voting class, and acting in his or her own interest, might reasonably approve the Arrangement”. See Pacifica Papers Inc. v. Johnstone (2001), 15 B.L.R. (3d) 249, 92 B.C.L.R. (3d) 158 (S.C.), affd 268 W.A.C. 23 sub nom. 3017970 Nova Scotia Co. v. Johnstone, 93 B.C.L.R. (3d) 20 (C.A.); Trizec Corp., ibid., at paras. 31-32. Authority for this position is said to come from the United States and the United Kingdom as well as other Canadian law. See Alabama, New Orleans, Texas and Pacific Junction Railway Co. (Re), [1891] 1 Ch. 213 (C.A.); Dorman, Long & Co. Ltd. (Re), [1933] All E.R. 460, [1934] Ch. 635. However, not all courts have adopted the “business judgment test”, and the Supreme Court in BCE explicitly rejected it in favour of a more broadly formulated test: BCE, supra, footnote 1, at paras. 155 and 164.
15. Trizec, supra, footnote 12, at para. 32.
16. BCE, supra, footnote 1, at para. 155.
17. BCE, ibid., at para. 145.
centre on a balance between the burden placed on security holders on the one hand and the interests of the corporation in completing the transaction on the other. The proposed arrangement “must further the interests of the corporation as an ongoing concern”.\textsuperscript{18} Valid business purpose is to be assessed by looking at whether the arrangement is necessary for the corporation’s continued existence. The court cites \textit{Canadian Pacific} on the point of the level of judicial scrutiny: “the lower the degree of necessity, the higher the degree of scrutiny that should be applied”.\textsuperscript{19} The reason for a higher degree of scrutiny where there is no necessity is to ensure that the transaction does not favour one particular stakeholder group over another.\textsuperscript{20}

With regard to the second prong of the fair and reasonableness test, the court held that the arrangement must strike a fair balance having regard to the ongoing interests of the corporation.\textsuperscript{21} A number of factors will be relevant to this analysis: whether a majority of security holders has voted to approve the arrangement; whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve the plan;\textsuperscript{22} proportionality of the compromise between various securities; security holders’ position before and after arrangement; impact on various security holders’ rights; the reputation of the directors and advisors who endorse the arrangement; the existence of a special committee; the delivery of a fairness opinion from a reputable expert; shareholder access to dissent; and appraisal remedies.\textsuperscript{23}

The following diagram sets forth the principles and factors that a court should take into account in analyzing the arrangement following \textit{BCE}:

\begin{itemize}
\item \textsuperscript{18} \textit{Ibid.}
\item \textsuperscript{19} \textit{Ibid.}, at para. 146, citing \textit{Canadian Pacific}, supra, footnote 11, at para. 35.
\item \textsuperscript{20} This point raises questions relating to the board’s fiduciary duties in Canada, a topic dealt with at length in the \textit{BCE} decision but not in this paper.
\item \textsuperscript{21} \textit{BCE}, supra, footnote 1, at para. 148.
\item \textsuperscript{22} \textit{Ibid.}, at para. 151.
\item \textsuperscript{23} \textit{Ibid.}, at para. 152. The court states at para. 154 that “...in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation’s continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.”
\end{itemize}
This diagram illustrates the complexity of the law relating to arrangements following the BCE decision. As mentioned previously, some of the principles referred to in the diagram and in the court's decision were part of the case law prior to BCE. But BCE is relatively more authoritative (i.e. given that it is a Supreme Court decision). In addition, unlike previous case law, it provides structure and guidance as to how these principles should be interpreted.

III. ALTERED FLEXIBILITY?

A fundamental purpose of the legal regime governing arrangements is to allow parties flexibility to structure transactions to achieve their business objectives while balancing the interests of affected parties.24 Given the more formalized structure and list of principles set out in BCE, a key question is whether the basic policy

---
rationale of flexibility that is inherent in the arrangement process has been replaced with principles that undermine the ease with which parties can undertake these transactions. Have the attractive aspects of choosing to proceed by way of arrangement been diminished?

While the court has introduced and reiterated existing principles for boards to consider and apply in the arrangement context, the law nonetheless continues to be flexible in this area. This flexibility persists largely because the law relating to arrangements is principles-based; that is, it is comprised of a series of standards that govern the structuring of the transaction. A prime example of this principles-based regulation is the fair and reasonableness test outlined above, which requires compliance with somewhat abstract terms rather than with concrete rules. In contrast to this type of regulation, the statutory provisions relating to take-over bids tend to be more rules-based, for example by stipulating how long a bid must remain open once a take-over bid is made. 25

Further enhancing the flexibility of an arrangement is the fact that, generally, the transaction is a one-step process that can be completed upon receiving court approval. A take-over bid is often a two-step process whereby the bid is followed by a second step, a going-private transaction (or compulsory squeeze-out), if more than 66% or 2/3 of the shares have been tendered. In some cases, a takeover bid will also require compliance with further regulations; for example, Multilateral Instrument 61-101 mandates a valuation and majority of the minority approval for special transactions relating to minority security holders. 26

After BCE, the policy rationale underlying arrangements has not changed: the law allows flexibility for parties pursuing an arrangement transaction. While the Supreme Court establishes a complex web of considerations (some of which existed and were applied prior to the BCE case), it does not alter the fundamental approach to arrangements, which is that parties need to comply with a set of broad principles, not detailed rules, in structuring their transactions.


IV. LACKING CERTAINTY

The previous section suggested that the law relating to arrangements is based on principles rather than on rules, and that the principles that apply to arrangements have increased after BCE. This section asks whether the law relating to arrangements lacks certainty after BCE. It argues that each prong of the fair and reasonableness test is a source of uncertainty following the case. Yet this uncertainty is the price to be paid in a principles-based regime such as that relating to arrangements.

To begin principles are standards that require clarification to guide those who seek to comply with them. Rules contain more information for parties and therefore serve to guide their conduct ex ante, whereas principles require adjudicators to undertake information gathering ex post. This uncertainty in the law can be costly since judges will need to gather information in adjudicating lawsuits that come before them. Litigant parties may also bear costs in trying to ascertain the law prior to adjudication.

In terms of the substantive law, one area of particular uncertainty is in the notion of "necessity". Recall that the first prong of the fair and reasonableness analysis will involve assessing whether there was a valid business purpose, and that this will entail an examination of the necessity of the transaction for the corporation's existence. Previous arrangement cases have focused on the concept of necessity. In Canadian Pacific, for example, the court argued that the transaction did not arise out of necessity and that it decreased the assets of the corporation in favour of one of the classes of shareholders. The court stated the test as follows: "The greater the necessity to make changes in order for the corporation to survive, the more the Courts appear prepared to approve interference with existing rights and interests." In BCE, the Supreme Court brought this test to the fore by explaining that the transaction must be necessary for the continued existence of the corporation and that the

28. Ibid.
29. This argument derives from Kaplow, supra, footnote 27. Note that information gathering is costly in the case of rules also but these costs are borne ex ante by legislators when the rules are being formed.
30. Ibid., at pp. 583-84. Kaplow refers to costs that arise because of the absence of information in principles as "costs of inquiry". Such costs are relevant at both the promulgation and enforcement stages, though maybe less in the latter case given that only one specific set of facts needs to be examined.
lower the degree of necessity, the higher the degree of court scrutiny it will receive.

But was the arrangement necessary for BCE to survive? It is unlikely that it was; the deal itself died despite court approval for it to proceed, and the corporation seems nonetheless to be surviving! In fact, the question must be asked as to whether a leveraged buyout such as that (contemplated in the BCE case) is ever necessary for the continued existence of a corporation, especially since it involves the corporation taking on significant levels of debt. BCE was a relatively healthy corporation and the proposed arrangement was not necessary for its continued existence.

Admittedly, necessity is simply one of many factors that a court will look to, and is not determinative in and of itself. However, one must question whether necessity should be a consideration at all: why should a company need to prove that an arrangement is necessary for its continued existence, especially given the flexibility rationale underlying the arrangement process? From a policy standpoint, the notion that a transaction such as an arrangement must be necessary for the corporation's continued existence sets a high standard. Strict adherence to this standard could transform the law relating to arrangements from a flexible process with reasonable legal parameters to one with which only few corporations can comply in the final stages of their existence.

Perhaps this interpretation of "necessity" is too literal since the Supreme Court agreed with the trial judge's conclusion that, in this case, the LBO met the necessity threshold. A conspicuous tension

32. Recall that the court stated that the lower the necessity, the higher the degree of scrutiny by the court. See supra, footnote 19.

33. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Sup. Ct. Del.). Some may argue that the phrase "necessity of the arrangement to the corporation's continued existence" is a reference to the Revlon test, which states that once a company is "in play", the role of the board changes from "defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company". The idea would be perhaps that embodied in the notion of a firm's continued existence is the idea that the corporation is "in play". Yet this is a tenuous link — if it exists. Having attempted to be relatively clear on the issue of directors' duties, the court would certainly tread carefully if it were stepping into Revlon territory again.

34. See ibid., supra, footnote 1, at para. 163 ("We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of the debentures stood to diminish as a result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. It was clear to the judge that the continuance of the corporation
arises between the legal test (i.e., necessary for the continued existence for the corporation) and the application of this test to the facts. Indeed, the court sets out numerous indicia of necessity to consider, including technological, regulatory and competitive factors as well as the reaction of the market and availability of alternatives. These indicia—as well as the finding of necessity in this instance—point to a broad understanding of necessity.

The second prong in the fair and reasonableness analysis, that parties’ rights must be resolved in a fair and balanced way, is another area of uncertainty. Here, the court laid down a series of principles that should be considered, such as majority approval or, in the absence of a vote, whether an honest businessperson might reasonably vote in favour of the transaction. The court was additionally concerned with the proportionality of the transaction’s impact on affected groups as well as a number of other factors enumerated above (special committee, reputable fairness opinion, dissent and appraisal rights, etc.).

Shareholder approval increases the validity of any acquisition, and separate class votes do so all the more. Therefore, although not mandated in the arrangement context, ensuring shareholder votes and even separate class votes are often part of the corporation’s strategy in completing the transaction and in receiving court approval. Courts will often issue interim orders and require certain levels of shareholder approval on a class-by-class basis. Where there is no vote, a consideration of the honest businessperson’s view as a member of the “concerned class” is relevant.

Yet following BCE, it is unclear when debtholders will be consulted. The presence of debt securities in the transaction is clearly contemplated in the CBCA Policy, which states that “the Director recognizes that it may be appropriate to utilize the arrangement provision under the CBCA to effect transactions affecting debtholders, provided the statutory requirements are met.”

---

35. BCE, supra, footnote 1, at para. 146.
36. BCE, ibid., at para. 151, “Where there has been no vote, courts may consider whether an intelligent and honest businessperson, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan: Re Alabama, New Orleans, Texas and Pacific Junction Railway Co., [1891] 1 Ch. 213 (C.A.); Trizec.”
37. BCE, ibid., at para. 154.
38. CBCA Policy, supra, footnote 4, s. 2.05.
This provision of the CBCA Policy is directly relevant to the BCE case, as the transaction at issue implicated the interests of debtholders in Bell Canada/BCE. Nevertheless, the policy is not legally binding and in this case there was no violation of the law in not offering the debentureholders a vote.

More broadly, it appears that there is some ambiguity after the BCE decision with regard to the fair and reasonableness test as a whole. Given the plethora of principles that the court asserts as relevant in the fair and reasonableness analysis, questions arise as to the order in which the principles should be considered and the weight that should be given to each individual consideration. For example, is “necessity” more important than shareholder voting? While the question of weighting cannot be answered definitively, the court implies that necessity is a first consideration. The necessity criterion plays a role in ensuring that an arrangement is not solely in the interest of any one shareholder. Given that undertaking an arrangement generally provides the board with the ability to alter parties’ legal rights, the court sought to ensure that this power was not exercised in an unwieldy or unchecked manner by setting out guiding principles. Thus, it seems that if a corporation cannot show that the arrangement is necessary for its continued existence, the court will require additional proof to ensure that this broad power to structure and undertake arrangements is not being abused. This is not certain, however, and future litigation will be important in further defining the stated principles and the relative weight to be accorded to them.

V. PROVIDING CLARITY? LEGAL RIGHTS VS. ECONOMIC INTERESTS

Explaining why the debentureholders in the case were not permitted to vote on the arrangement, the court drew a distinction between economic interests and legal rights:

The purpose of s. 192 . . . suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the rights of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval.40

39. Many thanks to Jeremy Opolsky for his views and discussions relating to this point.
40. BCE, supra, footnote 1, at para. 133.
Thus, the court held that the debentureholders' legal rights were not violated if the transaction proceeded without allowing them to benefit from the s. 192 process. The test now under s. 192 is whether the legal rights of the parties are affected. If they are affected, then s. 192 is implicated and the procedure thereunder is available to the parties. However, if economic or other non-legal interests are affected, then there is no recourse under s. 192.

The distinction between legal rights and economic interests usefully allows the court to circumscribe the ambit of s. 192, thereby providing at least some certainty to the law relating to arrangements. The court recognizes that not all economic interests can be accommodated. The question in its view is whether the stakeholder group at issue has a legal right under s. 192. Generally speaking, debentureholders will not have standing under this section. The court held that their legal rights are limited to the terms of the trust indenture and the failure to negotiate them in this instance was determinative.

Yet the distinction between economic interests and legal rights creates some uncertainty. While the legal rights of debentureholders are ascertainable (i.e. from a plain reading of the trust indenture and statute), ambiguity about the strict legal rights of a shareholder may arise. Basic terms of this contract are found in the articles and bylaws, but a "gap-filling" argument can be made that the contract extends to statutory protections in the CBCA. In particular, the CBCA can be conceived as forming a standard form contract between shareholders and the corporation since parties cannot account for all contingencies in their contract. It represents "the bargain that investors and agents would strike if they were able to dicker at no cost".

If one agrees that legal rights extend to statutory protections, and given that the court states that only legal rights (i.e. not economic interests) can be protected by s. 192, the question arises as to whether

41. The court stated: "Since only [the debentureholders'] economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192." BCE, ibid., at para. 161.
42. In future cases, this analysis will likely be undertaken by the trial judge charged with approving the arrangement.
43. BCE, supra, at para. 161.
a valid oppression claim relating to unfair conduct can ground a s. 192 argument. Of course, this possibility seems antithetical to the court's conclusion that the oppression remedy claim is distinct from the considerations relating to arrangements. However, the term "legal rights" is vague and allows this interpretation. Conceiving legal rights in this way presents a solution to the unpalatable paradox where oppression is found but a plan is deemed fair and reasonable nonetheless.\(^{46}\)

Despite its conclusion that s. 192 protects legal rights rather than economic interests, the court also stated that it remained open to the trial judge to consider the debentureholders' economic interests in deciding whether the plan is fair and reasonable under s. 192.\(^{47}\) Isolating economic interests as a consideration in the fair and reasonableness calculation raises the question of whether directors must consider the effect of the arrangement on all parties (i.e. those whose legal rights and economic interests stand to be rearranged).\(^{48}\) Moreover, by potentially allowing creditors to contest arrangements on the basis that their economic interests were not taken into account in the fair and reasonableness calculation as the court suggested they should, this interpretation could allow creditors to increase the cost and length of the court process. This legal avenue could provide creditors with added leverage in pre-application negotiations over and above their strict legal rights (i.e. rights in the trust indenture).

The one exception that the Supreme Court isolates in regard to its holding on legal rights relates to a subset of cases labeled "exceptional circumstances". The court held that non-legal interests can be considered under s. 192 in exceptional circumstances, which the court found did not exist in this case.\(^{49}\) In other words, the court seems to reason that the legal rights of the debentureholders are not contained in s. 192 but rather in contract via the trust indenture.\(^{50}\)

\(^{46}\) See \textit{bce, supra}, footnote 1, at paras. 119-20.

\(^{47}\) \textit{Ibid.}, at para. 161.

\(^{48}\) This paragraph in the court's judgment gives rise to uncertainty in structuring an arrangement, and perhaps should be relegated to \textit{obiter dicta}.

\(^{49}\) The court states at para. 159 that "authority and principle suggest that s. 192 is generally concerned with legal rights, absent exceptional circumstances". The court also refers to the CBCA Policy, \textit{supra}, footnote 4, at s. 3.08. See \textit{bce, supra}, footnote 1, at para. 134.

\(^{50}\) This is consistent with the court's view in other parts of its decision. See \textit{bce, supra}, footnote 1, at para. 108 ("... trust indentures can include change of control and credit rating covenants where those protections have been negotiated. Protections of that type would have assured debentureholders a right to vote, potentially through their trustee, on the leveraged buyout, as the trial judge pointed out. This failure to negotiate protections was significant...").
However, there is little discussion of what count as “exceptional circumstances” as a matter of law. We must ask, therefore, what are the implications of the exceptional circumstances “exception?” The court provides one example of what is not an exceptional circumstance: “that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not constitute such a circumstance.” But this aids little in determining the circumstances in which security holders’ economic interests will be significantly transformed so that they fall within the s. 192 framework. The CBCA Policy, which the court refers to, states:

\[
\ldots \text{[N]otwithstanding that a proposed arrangement may not affect the legal rights of holders of securities of a particular class, it may nevertheless be appropriate in cases where a proposed arrangement fundamentally alters the security holders’ investment, whether economically or otherwise, that the right to vote on the arrangement should be provided to these security holders. For example, in an arrangement involving a divestiture of significant assets, the Director will review the financial statements, looking at such factors as the percentage of assets being “dividend-ed-out”, credit ratings and rights of participation of any preferred shareholder classes. At the same time, the Director recognizes that in determining whether debt security holders should be provided with voting and approval rights, the trust indenture or other contractual instrument creating such securities should ordinarily be determinative absent extraordinary circumstances.}
\]

According to the policy, therefore, the question is whether the proposed plan of arrangement “fundamentally alters the investment”. The Supreme Court concluded that it is not the function of the law of arrangements to protect such interests. Rather, parties can choose what economic interests they wish to protect through contract (such as in this case the trust indenture), thus limiting the court’s need to consider economic interests absent extraordinary circumstances. As noted, this argument has its basis in the CBCA Policy. However, the policy suggests that the analysis applies to creditors only. Many arrangement cases involve preferred shareholders whose legal rights are not affected by the plan of arrangement.

While the distinction between legal rights and economic interests is useful and can potentially add certainty to the law, the exceptional circumstances exception remains vague. When will “exceptional circumstances” arise? What does it mean to “fundamentally alter” the investment? These are questions that remain to be answered in future litigation. The presence of these questions again reiterates the

---

51. *BCE*, supra, footnote 1, at para. 159.
52. *CBCA Policy*, supra, footnote 4, at s. 3.08, quoted by the court in *BCE*, ibid., at para. 134.
point made in the previous section: that the law relating to
arrangements is generally composed of broad-based principles or
standards that are to a significant extent uncertain. In order for
parties to comply with the law, they will likely bear some costs in
discerning what the law is or might be at adjudication. In some cases,
bearing such costs may be less preferable than the comparatively
certain rules contained in a take-over bid code.

VI. CONCLUSION

The law of arrangements has changed after BCE. The list of
principles that courts will consider in approving the transaction is
lengthy and includes an analysis of necessity, which likely precedes
examination of the other principles. Necessity is broadly conceived
in this context, given the court’s judgment and the fact that the
arrangement in this case received the sanction of both the Quebec
Superior Court and the Supreme Court of Canada despite its not
being strictly necessary for BCE’s continued existence. Courts will
also undertake to determine if parties’ legal rights, rather than
their economic interests, are affected by the transaction, and will
only uphold and protect the former absent exceptional
circumstances. However, there is ambiguity in the court’s
reasons on this point, given that the court also stated that
consideration of parties’ economic interests is a valid aspect of the
fair and reasonableness analysis.

Of course, some of these principles were in existence prior to BCE,
and clarification of their scope and application has continued to
emerge through litigation. The choice for issuers in structuring
acquisition transactions continues to be whether they seek the
relative certainty contained in the comprehensive set of rules relating
to take-over bids (such as a relatively protracted bid period) or
whether they prefer an arrangement procedure, where a complex set
of broad principles guides their conduct and the structure of the
transaction ex ante. There will be relatively less information about the
meaning of particular principles as opposed to rules, given that
principles are essentially broad standards. Thus, although parties
have some flexibility to structure the type of transaction they wish
under the arrangement provisions, they remain tied to court approval
of the transaction. A court will still need to apply the principles set out
in BCE to determine if a party is legally compliant. Over time, through
litigation, more information will emerge with regard to particular
ways in which compliance with the principles can occur and, in particular, conduct that courts will likely sanction based on precedent.