CANADA
PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

C.A.Q. N°:
(C.S.Q. N°: 500-11-033234-085)

COURT OF APPEAL

Companies' Creditor's Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA")

IN THE MATTER OF THE ARRANGEMENT OF:

SHERMAG INC.

PETITIONER/Petitioner

and

RSM RICHTER INC.

RESPONDENT/Monitor

and

JAYMAR FURNITURE CORP.

and

SCIERIE MONTAUBAN INC.

and

MÉGABOIS (1989) INC.

and

SHERMAG CORPORATION

and

JAYMAR SALES CORPORATION

RESPONDENT/Mis-en-causes

and

GROUPE BERMEX INC.

INTERVENOR/Mis-en-cause

MOTION FOR LEAVE TO APPEAL

(Sections 13 and 14 of the *CCAA*)

TO ONE OF THE HONORABLE JUDGES OF THE COURT OF APPEAL OF QUÉBEC, IN AND FOR THE DISTRICT OF MONTRÉAL, PETITIONER SHERMAG INC. ("PETITIONER") RESPECTFULLY SUBMITS AS FOLLOWS :

1. INTRODUCTION

1. By the present motion for leave to appeal (the "**Motion**"), Petitioner seeks leave to appeal from a judgment of the Honorable Robert Mongeon, judge of the Quebec Superior Court, (the "**First Judge**") rendered on March 26, 2009 (the "**Judgment**"), a copy of the Judgment is communicated herewith as **Exhibit R-1**.

2. By the Judgment, the First Judge dismissed Petitioner's *Amended Motion for an Order Authorizing the Reorganization of the Share Capital of Shermag Inc. and Ancillary Reliefs* (the "**Reorganization Motion**"), a copy of the Reorganization Motion is communicated herewith as **Exhibit R-2**.

3. By the Reorganization Motion, Petitioner sought the authorization of the Québec Superior Court (the "**QSC**") to file a plan of arrangement under the *CCAA* (the "**Plan**") which would include, *inter alia*, the following features:

   (i) the existing common and preferred shares of Petitioner (the "**Shares**") would be cancelled;

   (ii) new common shares (the "**New Shares**") would be issued by Petitioner to Geosam Investments Limited ("**Geosam**") as a result of Geosam's investment as described hereinafter;

   (iii) new funds (the "**New Funds**") would be invested by Geosam either through the payment of the subscription amount (the "**Subscription Amount**") for the New Shares or through a combination of the Subscription Amount and new loans to be made available by Geosam to the benefit of Petitioner and its subsidiaries, namely Jaymar Furniture Corp., Scierie Montauban Inc, Mégabois (1989) Inc., Shermag

Corporatation and Jaymar Sales Corporation (collectively with Petitioner the "**Debtors**");

(iii) the New Funds would be used by the Debtors to fund the Plan and pay a dividend to their creditors as a compromise and settlement of their claims; and

(iv) the aggregate amount of the New Funds would be approximately $1,500,000.

(These features of the Plan will hereinafter be collectively defined as the "**Transaction**")

4. The Reorganization Motion also sought an order from the First Judge declaring that no shareholders' meeting or approval was required prior to the cancellation of the Shares pursuant to the Transaction.

5. Petitioner respectfully submits that the First Judge erred in dismissing the Reorganization Motion for the reasons more fully explained below.

6. The proposed appeal raises an extremely important question. The question of (i) whether it is possible for a company constituted under the Québec *Companies Act*, R.S.Q., ch. C-38 ("***QCA***") to restructure its share capital without shareholders' approval when it is insolvent and under a process of restructuring under the *CCAA* and more generally (ii) if the answer to such question should solely depend on the Act under which the company is constituted[1].

7. The specific question at stake here has never been brought to the attention of this Court or the QSC before the Judgment. That being said, contrary to the Judgment, corporations incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("***CBCA***") or other provincial statutes[2] have been authorized to proceed with transactions similar to the Transaction without the necessity to obtain any shareholders' approval[3].

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[1] The First Judge phrased the question as follows: "[...] *is a shareholders' approval necessary to restructure the share-capital of a Quebec corporation which is currently insolvent and under a process of restructuring under the C.C.A.A. ?*" (see paragraph 19).

[2] See, *inter alia*, *Loewen Group Inc. (Re)*, (2001) 32 C.B.R. (4th) 54 (Ont. S.C.J.) ("***Loewen***") where the company was constituted under the British Columbia *Company Act*, R.S.B.C. 1996, c. 62 (the "***BCCA***")

[3] See, *inter alia*, (i) *Loewen*, (ii) *Boutiques San Franciso (Re)*, (2004) 7 C.B.R. (5th) 189 (QSC) ("***Boutiques San Francisco***"), (iii) *Cable Satisfaction International Inc. (Re)*, 2004 CanLii 28107 (QSC) ("***Cable Satisfaction***"), (iv)

Such cases are only first instance cases, no appellate Court in Canada has ever discussed the possibility for a corporation to restructure its share capital without any shareholders' approval while being insolvent and under a process of restructuring under the *CCAA*.

2. BACKGROUND

2.1 THE PARTIES

2.1.1 Petitioner

8. Petitioner was constituted under the *QCA* on January 28, 1977. Petitioner's core business is the production of household goods and residential furniture. Petitioner's business is more fully described at paragraphs 20 to 25 of the *Petition for the Issuance of an Initial Order* (the "**Petition for Initial Order**"), the whole as more fully appears from said Petition for Initial Order communicated herewith as **Exhibit R-3**.

9. Petitioners share structure consists of only one class of voting common shares and one class of non-voting preferred shares, the whole as appears from paragraph 16 of the Reorganization Motion.

10. As of the day of this Motion, 13,348,724 common shares and 700,000 preferred shares are issued and outstanding with respect to Petitioner's equity, the whole as appears from paragraph 17 of the Reorganization Motion.

11. Petitioner's common shares have been traded on the Toronto Stock Exchange (the "**TSX**") since 1986, the whole as appears from paragraph 19 of the Reorganization Motion.

2.1.2 Clarke

Canadian Airlines Corporation (Re) [2000] 10, WWR 269 (Alta. Q.B.) ("***Canadian Airlines***"), (v) *Algoma Steel Inc (Re)*, 2002 CanLii 49571 (Ont. S.C.J.) ("***Algoma***"), (vi) *Beatrice Foods Inc. (Re)*, (1996) 43 C.B.R. (4th) 10 (Ont. Gen. Div.) ("***Beatrice***"), (vii) *Laidlaw Inc. (Re)*, 2003 CanLii 8003 (Ont. S.C.J.) ("***Laidlaw***") and (viii) *Stelco Inc. (Re)*, (2006) 17 C.B.R. (5th) 78 (Ont. S.C.J.) ("***Stelco***").

12. Clarke Inc. ("**Clarke**") is a Nova Scotia public company, the parent of a number of wholly-owned operating companies and divisions and the owner of a diversified portfolio of investments, the whole as appears from paragraph 21 of the Reorganization Motion.

13. As of the day of this Motion, Clarke owns approximately 19.99% of the outstanding common shares of Petitioner, the whole as appears from paragraph 25 of the Reorganization Motion.

2.1.3 Geosam

14. Geosam is a Nova Scotia private investment entity, the whole as appears from paragraph 27 of the Reorganization Motion.

15. Geosam owns approximately 22.9% of the outstanding common shares of Clarke, the whole as appears from paragraph 28 of the Reorganization Motion.

16. Geosam is not a shareholder of Petitioner.

17. On July 31st, 2008, pursuant to an Assignment Agreement between Wachovia Capital Finance Corporation (Canada) ("**Wachovia**") and Geosam approved by the First Judge, Wachovia assigned to Geosam all its rights, titles and interests under the loan agreements entered into amongst the Debtors and Wachovia, the whole as more fully appears from a copy of said Assignment Agreement communicated herewith as **Exhibit R-4**.

18. Pursuant to the aforementioned Assignment Agreement, Geosam is the principal secured creditor of the Petitioner, the whole as appears from paragraph 30 of the Reorganization Motion.

19. The Debtors' indebtedness towards Geosam is secured on virtually all of the assets, movable or immovable, of the Debtors, the whole as appears from paragraph 31 of the Reorganization Motion.

2.2 *CCAA* PROCEEDINGS

20. On May 5, 2008, an initial order (the "**Initial Order**") was rendered by the First Judge pursuant to the *CCAA* in relation to the Debtors, the whole as more fully appears from the Initial Order communicated herewith as **Exhibit R-5**.

21. The Debtors had no other alternative but to avail themselves of the special remedies provided for in the *CCAA* in order to maintain their financial integrity for the benefit of all of their stakeholders, to achieve a successful reorganization and to protect their assets and business, the whole as appears from paragraph 31 of the Reorganization Motion.

22. The Initial Order appointed RSM Richter Inc. as Court appointed monitor to the Debtors (the "**Monitor**"), the whole as appears from the Initial Order.

23. On July 16, 2008, the Debtors filed a *Petition to Establish a Claims and Meetings Process* which was granted according to its conclusions (the "**Claims Process Order**"), the whole as more fully appears from the Claims Process Order communicated herewith as **Exhibit R-6**.

24. The Claims Process Order provides, *inter alia*, that the bar date for the filing of a Proof of Claim or a Notice of Dispute (as defined in the Claims Process Order) with the Monitor was September 5, 2008 (the "**Canadian Bar Date**").

25. On December 10, 2008, the Debtors filed an application to seek the protection of the United States courts under Chapter 15 of the *United States Bankruptcy Code* (the "**US Application**"), the whole as more fully appears from a copy of said US Application communicated herewith as **Exhibit R-7**.

26. On January 13, 2009, the US Application was heard and granted, the whole as more fully appears from a copy of the order rendered on January 13, 2009 communicated herewith as **Exhibit R-8** (the "**US Order**"). The US Order (i) recognized the Canadian proceedings as "foreign main proceedings", (ii) enforced the Claims Process Order in the United States and (iii) established February 27, 2009 at 5:00 P.M. EST as the bar date for claims of U.S. creditors not otherwise bound by the Claims Process Order (the "**US Bar Date**").

27. The QSC extended the Stay Termination Date of the Stay Period (both as defined in the Initial Order) on several occasions, most recently, to July 13, 2009, the whole as more fully appears from a copy of the plumitif communicated herewith as **Exhibit R-9**.

2.3 THE DEBTORS' FINANCIAL SITUATION

28. The Debtors have suffered substantial financial difficulties in the course of the last years. Said financial difficulties and the reasons for such difficulties are more fully described at paragraphs 47 to 53 and 66 to 77 of the Petition for Initial Order (Exhibit R-3).

29. Pursuant to the Claims Process Order and as of the Canadian Bar Date, the Monitor received unsecured claims for an amount of approximately $20,200,000 and secured claims, excluding the secured claim of Geosam, for an amount of approximately $200,000. As of the day of this Motion, the Monitor accepted for voting and distribution purposes unsecured claims for an amount of approximately $10,100,00 and secured claims for an amount of approximately $200,000. An amount of approximately $2,300,000 of unsecured claims currently remains in dispute, the whole as appears from paragraph 37 of the Reorganization Motion.

30. Pursuant to the US Order and the US Bar Date, the Monitor has not received any proof of claim from any creditor, the whole as appears from paragraph 38 of the Reorganization Motion.

31. As of February 27, 2009, the Debtors are indebted towards their various creditors in the amount of approximately $26,900,000, the whole as appears from paragraph 39 of the Reorganization Motion.

32. Approximately $16,500,000 is owed to suppliers and providers of services of the Petitioner, the whole as appears from paragraph 40 of the Reorganization Motion.

33. As of February 27, approximately $10,400,000 is owed to the secured lender, Geosam, the whole as appears from paragraph 41 of the Reorganization Motion.

2.4 THE REPORT

34. The Debtors retained the services of RSM Richter Corporate Finance with a view to obtaining an Estimate Valuation Report (the "**Report**") as to the fair market value of the Shares, a copy of the Report will be filed under seal at the hearing of this Motion as **Exhibit R-10**.

35. The Report indicates *inter alia* the following:

(i) the fair market value of the Shares was established under three different scenarios;

(ii) under all three scenarios the fair market value of the Shares is substantially negative;

(iii) as a result, the fair market value of the Shares is nil and the Shares have no value; and

(iv) all avenues were explored and the Shares cannot and will not have any value;

the whole as more fully appears from the Report (Exhibit R-10)

3. THE REASONING BEHIND THE REORGANIZATION MOTION

36. Geosam has proposed to Petitioner to acquire its business in the context of the Transaction, the whole as appears from paragraph 45 of the Reorganization Motion.

37. It is a condition *sine qua non* for Geosam that the Shares be cancelled before it injects the New Funds, the whole as appears from paragraph 47 of the Reorganization Motion.

38. Moreover, without the New Funds, the Debtors will not be able to restructure their business and present a plan of arrangement to their creditors. Geosam would then be forced to realize on its various securities, the whole as appears from paragraph 48 of the Reorganization Motion. Said securities charge virtually all the assets, movable or immovable, of the Debtors as explained at paragraph 19 above.

39. The realization by Geosam of its securities would result in the following:

(i) in all likelihood the unsecured creditors of the Debtors would not receive any money or dividend;

(ii) in all likelihood the Debtors would cease business operations, to the detriment of many of the creditors' stakeholders, including suppliers and customers; and

(iii) the approximately 241 employees working for the Debtors would have to be laid off;

the whole as appears from paragraph 49 of the Reorganization Motion.

40. In light of Petitioner's insolvency, Petitioner's shareholders would not and will not be entitled to receive anything for their equity stake.

41. Indeed, as demonstrated in the Report (Exhibit R-10), the fair market value of the Shares is substantially negative and they have no value. Furthermore, the First Judge did "*not put in question*" the finding of the Report that "*the shares have no economic value*" (paragraph 70 b)).

42. Legal authors and case-law across Canada, including Quebec, have held that where a company is insolvent, the shareholders have no economic interest to protect, and that accordingly they have no standing to claim a right under a proposed arrangement where creditors' claims are not being paid in full. In this regard:

(i) Chaput J. in *Cable Satisfaction* wrote that "*in cases of an arrangement under the C.C.A.A., the shareholders of the debtor company cannot expect any advantage from the arrangement. As the company is insolvent, the shareholders have no economic interest to protect. More so when, as in the present case, the shareholders are not contributing to any funding required by the Plan. Accordingly, they have no standing to claim* ***a right*** *under the proposed arrangement* "[4] (paragraph 53. Our emphasis);

[4] Cited with approval by Farley J. in *Stelco* at paragraph 17 and by Professor Sarra in her book "*Rescue! The Companies' Creditors Arrangement Act*", 2007, Thomson Canada Limited, at pages 240-242.

(ii) Gascon J. in *Boutiques San Francisco* stated that "*les actionnaires n'avaient pas un intérêt économique en jeu dans le cadre d'une compagnie insolvable. Ils ne devraient donc* ***pas avoir un droit de veto*** *dans le cadre de la réorganisation de cette compagnie*" (paragraph 17. Our emphasis);

(iii) Paperny J. in *Canadian Airlines* wrote that "*to require a vote* [of the shareholders] *suggests that the shares have value. They do not. The formalities* [obtaining shareholders' approval] *of the ABCA serve no useful purpose* ***other than to frustrate*** *the reorganization to the detriment of all stakeholders,* ***contrary to the CCAA***" (paragraph 79. Our emphasis). She also added that "*where a company is insolvent, only the creditors maintain a meaningful stake in the assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder.* [...]***CCAA proceedings have recognized that shareholders may not have a true interest to be protected*** *because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company*" (paragraph 143. Our emphasis); and

(iv) Houlden J. in *Beatrice* wrote that when "*the common shares have no value* [...], *the shareholders have* ***no status to object*** *to the plan*" (paragraph 18. Our emphasis).

43. In the case at hand, the Plan would be financed through the New Funds, which are conditional upon the cancellation of the Shares and the issuance of the New Shares to Geosam.

44. The Plan is a critical step towards the reorganization of the Debtors and is necessary to allow them to continue their operations, the whole as appears from paragraph 59 of the Reorganization Motion.

45. In the event that the Plan could not be submitted to the creditors of the Debtors, they would in all likelihood receive nothing in the context of an eventual bankruptcy or

liquidation given the secured debt of Geosam, the whole as more fully appears from the Report (Exhibit R-10)

46. Given the foregoing, and in order to allow the Debtors to file and present the Plan, Petitioner submitted the Reorganization Motion.

4. THE JUDGMENT

47. On March 13, 2009, the Reorganization Motion was heard before the First Judge and the hearing lasted half a day.

48. On March 26, 2009, the First Judge rendered the Judgment dismissing the Reorganization Motion.

49. The First Judge correctly identified the main question raised by the Reorganization Motion as follows: "[...] *is a shareholders' approval necessary to restructure the share-capital of a Quebec corporation which is currently insolvent and under a process of restructuring under the C.C.A.A. ?*" (paragraph 19).

50. The First Judge however raised three sub-questions in the Judgment. The first sub-question was: "*Should the Court embark into the task of giving opinions outside the process of approving a plan of arrangement* ?" (paragraph 5). In response to such question, the First Judge concluded positively as follows:

> [15] The Court does not have before it all of the terms and conditions of the proposed plan of arrangement. What it has is a representation by the Monitor that the current financial situation is critical, that the proposed plan of arrangement is the only path leading to a possible restructuring and that the Shermag shares have no value (based on three different valuation scenarios). In other words, if this Motion is not adjudicated upon in favour of Geosam, it will not be prepared to disburse the necessary funds to justify the filing of a comprehensive plan of arrangement susceptible of being ratified by the creditors.
>
> [16] Consequently, what appears an attempt by Shermag to merely seek the Court's opinion is not a true portrait of the situation. Without the benefit of the Court's view on the question, Shermag may not be able to submit a plan. If the Court gives its opinion, then Shermag may be able to arrange its affairs and file a plan of arrangement.

> [17] Accordingly, the Court will accept to decide on the issue. This is, in my view, the purpose and intent of the C.C.A.A.
>
> (Our emphasis)

51. The second sub-question was: "*Is the proposed modification to the share-capital of Shermag* [the Transaction] *possible under Canadian legislation such as the Canada Business Corporations Act (CBCA) or other similar provincial equivalent statutes ?*" (paragraph 5). With respect to such question, the First Judge stated:

> [103] In conclusion, I make no finding that the proposed share reorganization [the Transaction] would be impossible under sections 191 and 173 CBCA although I express serious doubts in that respect, considering the imbalance of treatment of actual shareholders of Shermag.

52. The last sub-question, which is essentially the same one as the main question identified at paragraph 49 above, was: "*Is the proposed modification* [the Transaction] *possible under the QCA and, if not, may the Court authorize it on the basis of its inherent or discretionary powers?*" (paragraph 5). The First Judge answered negatively to this question:

> [101] I have no alternative but to acknowledge that what I am asked to do, I cannot do.
>
> [102] Counsel for all stakeholders present informed me that, to their knowledge, there was no specific case law on this issue. It is not sufficient to say that because the federal statute and other provincial statute contain provisions which enable the Court to intervene and change, modify, cancel or replace shareholders' rights then this Court has the inherent or discretionary power or discretion to import into the QCA provisions which will substantially change the methodology of section 49 QCA.
>
> (Our emphasis)

53. Petitioner respectfully submits that the First Judge made errors in law as well as errors in his findings of fact which are manifest and of a determinative nature.

5. LEAVE TO APPEAL

54. The present case meets the four criteria test established by the case-law in order for leave to appeal to be granted pursuant to sections 13 and 14 of the *CCAA*. This Court in *Parc*

industriel Laprade inc. c. *Conporec inc.*, J.E. 2008-2286 summarized the said test as follows [5]:

> [12] Sur la requête pour permission d'appeler, je rappelle que la décision de l'accorder ou de la refuser dépend de la démonstration des critères élaborés par la jurisprudence, que ma collègue la juge Bich a reproduits dans l'affaire de Papier Gaspésia inc. :
>
> > [4] La permission d'appeler est en l'espèce régie par les articles 13 et 14 L.A.C.C. De façon constante, la jurisprudence enseigne que la décision d'accorder ou de refuser la permission d'appeler en pareil cas dépend des critères suivants :
> >
> > 19 As set out in Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149 (Alta. C.A. [In Chambers]) ("Resurgence No. 1"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:
> >
> > (1) whether the point on appeal is of significance to the practice;
> >
> > (2) whether the point raised is of significance to the action itself;
> >
> > (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
> >
> > (4) whether the appeal will unduly hinder the progress of the action.
>
> (Our emphasis)

5.1 THE POINT ON APPEAL IS OF SIGNIFICANCE TO THE PRACTICE

55. The question raised by the Reorganization Motion is highly significant to the practice and there is no decision on this matter other than the Judgment. The Courts and insolvency practitioners of this Country need guidance from an appellate Court with respect thereto.

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[5] See also *Arrangement relatif à Papier Gaspésia Inc.*, J.E. 2005-75 (Q.C.A.) ("***Gaspésia***").

56. Corporations constituted under the *CBCA* or similar provincial statutes have been authorized on several occasions to proceed in a manner similar to the one contemplated by the Transaction without the need to obtain shareholders' approval.[6] However, those cases are only first instance cases[7], no appellate Court of this Country has ever discussed the possibility for a corporation to restructure its share capital without shareholders' approval while being insolvent and under a process of restructuring under the *CCAA*. This appeal, if leave to appeal is granted, would be the first time an appellate court examines such a significant issue. Said issue is even more significant in light of the current financial and economic crisis.

57. The Judgment is *prima facie* in direct conflict with all existing cases, although all first instance cases, dealing with analogous transactions, including the decisions of the QSC in *Boutiques San Francisco* and *Cable Satisfaction*. As acknowledged by Chadwick J. in *Canadian Asbestos Services Ltd. et al.* v. *Bank of Montreal* (1993), 13 O.R. (3d) 291 (Ont. S.C.J.), such conflict militates in favour of the leave to appeal[8].

58. Hence, it is highly important for this Court to determine (i) whether it is possible for a company constituted under the *QCA* to restructure its share capital without shareholders' approval when it is insolvent and under a process of restructuring under the *CCAA* and more generally (ii) if the answer to such question depends on the Act under which the company is constituted.

59. Further, the issue at stake is also of significance to the practice since it involves, for the first time, the question of the interplay between the *CCAA* and the *QCA*. The Alberta Court of Appeal acknowledged in *Kerr Interior Systems Ltd. (Re)*, (2008) 46 C.B.R. (5th)

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[6] See, *inter alia*, *Loewen*, *Boutiques San Francisco*, *Cable Satisfaction*, *Canadian Airlines*, *Algoma*, *Beatrice*, *Laidlaw* and *Stelco*.

[7] No motion for leave to appeal were filed in those cases.

[8] See also Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, Loose-leaf Edition, Vol. 4, at page 10A-68.1

20[9] that a case which involves the question of the interplay of two pieces of legislation for the first time is of significance to the practice.

60. Lastly, the question at stake is a significant one since the answer that this Court might provide will affect a considerable number of plan of arrangement.

61. Petitioner respectfully submits that the first criteria is met.

5.2 THE POINT RAISED IS OF SIGNIFICANCE TO THE ACTION ITSELF

62. In *Gaspésia*, this Court stated that this second criteria would be met if there is a "*prejudice réel **ou probable** aux droits de la* [Requérante]" (paragraphe 8. Our emphasis).

63. As noted above, the question raised by this appeal is serious and crucial to the restructuring of the Debtors.

64. Indeed, it is a condition *sine qua non* for Geosam that the Shares be cancelled before it injects the New Funds which are required to finance the Plan. In this regard, the First Judge noted that "*if this Motion is not adjudicated upon in favour of Geosam, it will not be prepared to disburse the necessary funds to justify the filing of a comprehensive plan of arrangement susceptible of being ratified by the creditors*" (paragraph 15).

65. The First Judge also recognized the importance of the Reorganization Motion for the Debtors also by acknowledging that "[w]*ithout the benefit of the Court's view on the question, **Shermag may not be able to submit a plan*** [and that] [i]*f the Court gives its opinion, then Shermag may be able to arrange its affairs and file a plan of arrangement*" (paragraph 16. Our emphasis). In fact, the question was so important for the First Judge that he refused to dismiss the Reorganization Motion on technicalities:

> [18] [...] Here the question is **important** and the undersigned feels that he would not fulfill his judicial duty if the Motion would be dismissed for the sole reason that it calls for an opinion or an "advanced ruling" on a portion of a plan of arrangement not yet submitted [...]

[9] Cited with approval in Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, Loose-leaf Edition, Vol. 4, at pages 10A-68.2(3) – 10A68.2(4).

(Our emphasis)

66. As indicated by the First Judge, the Reorganization Motion is of the utmost significance to the Debtors since it is intimately linked with the Debtors' ability to file a plan of arrangement and therefore complete a successful restructuring under the *CCAA*. The Reorganization Motion is therefore at the heart of the Debtors' restructuring and the Judgment affects the ultimate purpose of any filing under the *CCAA*: the conclusion of a plan of arrangement between the insolvent company and its creditors.

67. If the Judgment stands, the Debtors will suffer a substantial prejudice as they may not be able to arrange their affairs and present a plan of arrangement to their creditors.

68. Petitioner respectfully submits that the second criteria is met.

5.3 THE APPEAL IS *PRIMA FACIE* MERITORIOUS

69. With respect to this branch of the test, this Court in *Uniforêt Inc. (Re)* (2002), 40 C.B.R. (4th) 281 concluded that the petitioners seeking leave to appeal must show "*any likely flaw in the judgement* [sic] *which would give them a reasonable chance of success*" (paragraph 12. Our emphasis).

70. Petitioner respectfully submits that the First Judge made errors in law as well as overriding and palpable errors in his findings of fact.

5.3.1 The First Judge erred in concluding that Geosam was a shareholder of Petitioner and that the shareholders would be treated unequally by the Transaction

71. At the outset of the Judgment, the First Judge summarized the Reorganization Motion as follows and in doing so premised and founded the Judgment on an erroneous finding of fact:

> [1] Shermag Inc. (Shermag) seeks an authorization to file a plan of arrangement under the CCAA which will provide for the cancellation of all its shares (common and preferred) and the issuance of new equity in favour of one of its **current shareholders, Geosam** Investments Limited (Geosam)

> [...]
>
> [3] Shermag wishes to cause such plan to be approved by the creditors and the Court, but not by its current shareholders who, for all intents and purposes, will see their shares expropriated without compensation **for the benefit of an existing shareholder** [Geosam].
>
> (Our emphasis)

72. Contrary to what the First Judge found, Geosam is not an "*existing shareholder*" or "*current shareholder*" of Petitioner. As a matter of fact, the Reorganization Motion does not mention anywhere that Geosam is a shareholder of Petitioner.

73. The First Judge therefore erred in concluding that the Transaction would create "*unequal treatment*" or an "*imbalance of treatment*" between Petitioner's "*actual shareholders*". The finding of the First Judge that the shareholders would be unequally treated by the Transaction is a recurring and determining theme in the Judgment:

> [35] At this present juncture, the proposed plan of Shermag is not even drafted, the specific terms and conditions affecting its share-capital are not available for review and the creditors have not approved anything. Consequently, I cannot make any finding that the proposed reorganization of the shares of Shermag would not violate the letter and/or spirit of section 173 CBCA if the debtor company was to be incorporated under the CBCA instead of the QCA. Furthermore, a careful review of section 173 CBCA does not expressly authorize the pure and simple cancellation (equivalent to total expropriation) of shares of a company incorporated under the CBCA. Some of its sub-paragraphs seem to suggest that drastic transformations can be made to the articles but total expropriation of all the rights of all shareholders in favour of another who wishes to acquire all such rights for its own benefit is certainly not within the purpose and ambit of section 173 CBCA. **Unequal treatment of shareholders is not the kind of result envisaged**.
>
> [...]
>
> [103] In conclusion, I make no finding that the proposed share reorganization would be impossible under sections 191 and 173 CBCA although I express serious doubts in that respect, considering the **imbalance of treatment** of **actual shareholders** of Shermag.
>
> (Our emphasis)

74. The First Judge therefore also erred when distinguishing the Transaction from the cases submitted to his attention on the basis that the Transaction would benefit one "*current shareholder*" of Petitioner while being detrimental to the other shareholders:

> [37] The circumstances of the case before me are quite different [from *Canadian Airlines*]. Taken out of the context of a comprehensive plan approved by the creditors, can it be said that it will be fair and reasonable to give a blessing to the proposed changes in the share-capital and share ownership of Shermag? Am I asked to exercise my discretion in a vacuum? It should not be forgotten that the representation made before me at this stage is a proposed cancellation of all existing shares and the issuance of a new class of shares in which none of the existing shareholders will be invited to participate, **save one**, which makes it a "sine qua non" condition of further financing and funding the debtor company. This whole process "looks, smells and walks" like a take-over bid without the formalities.
>
> [...]
>
> [39] Here, it is far from being certain that the **special treatment** sought by **Geosam as a shareholder** of Shermag may not be **unfairly prejudicial to the other shareholders** of the debtor company.
>
> [...]
>
> [64] This is once again a case [*Laidlaw*] where alll [sic] the shares are cancelled and no new shares are issued to a new shareholder. There seems to be no apparent **unfair treatmet** [sic] **of one shareholder as opposed to another**.
>
> [...]
>
> [67] I see a distinction between the Stelco situation and the present one in **that none of the previous shareholders are treated differently. They seem to be on an equal footing. New shares are created in which the existing shareholders will not participate. This is not what is proposed to me by Shermag and Geosam which is currently a 19.9% existing shareholder**.
>
> [68] In summary, upon reviewing the above-cited cases, I must take into account that none of these cases present a factual situation **where existing shareholders are treated unequally vis-à-vis other existing shareholders of the same class.**
>
> (First Judge's emphasis underlined. Our emphasis in bold)

75. As clearly appears from the above, the First Judge attributed a manifest and determining weight to the erroneous fact that "*Geosam* [...] *is currently a 19.9% existing*

shareholder" (paragraph 67) when analyzing and ultimately dismissing the Reorganization Motion. Geosam is not a shareholder of Petitioner. Clarke is the entity who is a 19.9% shareholder of Petitioner, the whole as appears from paragraph 25 of the Reorganization Motion, and Clarke would have seen its shares cancelled pursuant to the Transaction just like any other "*current shareholder*".

76. Clarke and Geosam are two (2) completely different entities with different shareholders. Clarke is a publicly listed company on the TSX with over 26 million shares currently issued. Clarke would have had to answer to its shareholders pursuant to the Transaction and the cancellation of all the shares, approximately 2,600,000, it has of Petitioner, the whole as appears from paragraph 22 and 25 of the Reorganization Motio. Geosam is a privately held entity.

77. This overriding and palpable error of fact subsequently affected the whole analysis made by the First Judge and Petitioner respectfully submits that had the First Judge not made this error, he would have drawn different conclusions with regard to the questions brought to his attention.

5.3.2 The First Judge erred in concluding that the Shares have some value

78. The First Judge made a manifest and determining error in his findings of fact by concluding that the Shares must have some value.

79. The First Judge implied that the Shares must have some value since Geosam wishes to be the sole shareholder of Petitioner before it invests the New Funds:

> [37] The circumstances of the case before me are quite different. Taken out of the context of a comprehensive plan approved by the creditors, can it be said that it will be fair and reasonable to give a blessing to the proposed changes in the share-capital and share ownership of Shermag? Am I asked to exercise my discretion in a vacuum? It should not be forgotten that the representation made before me at this stage is a proposed cancellation of all existing shares and the issuance of a new class of shares in which none of the existing shareholders will be invited to participate, save one, which makes it a "sine qua non" condition of further financing and funding the debtor company. This whole process "looks, smells and walks" like a take-over bid without the formalities. **Geosam's insistence to become the sole**

> **shareholder of Shermag is not necessarily compatible with Geosam's argument that the shares have no value. On the contrary, it would seem that the shares in question definitely have value (monetary or otherwise) for Geosam.**
>
> [...]
>
> [47] [...] It is not for nothing that Geosam wishes to become the sole shareholder of Shermag Inc., otherwise it would not proceed in that fashion. **One may easily imagine that there might be some monetary advantage which may be worth something to Geosam.**
>
> (First Judge's emphasis underlined. Our emphasis in bold)

80. However, the only evidence filed at the hearing concerning the value of the Shares was the Report and the First Judge did "*not put in question*" the finding of the Report that "*the shares have no economic value*" (paragraph 70 b)).

81. With respect to the question of whether or not the Shares have value, the First Judge held manifestly contradictory positions. On the one hand, he said that the Shares must have a value (see paragraphs 37 and 47). On the other hand, he agreed with the uncontested evidence (i.e. the Report R-10) that the Shares have no economic value (see paragraphs 50 and 70).

82. The First Judge's confusion with respect to the economic value of the Shares, or lack thereof, negatively altered his analysis of the questions brought to his attention.

83. The finding of fact as to whether or not the Shares have value is of the outmost importance since, as established at paragraph 42 above, the shareholders have no standing to contest an arrangement under the *CCAA* when their shares have no value.

5.3.3 The First Judge erred in concluding that section 173 *CBCA* does not provide for the cancellation of shares

84. The First Judge erred in law when concluding that the Transaction might not even be possible under the *CBCA* since section 173 of the *CBCA* does not provide for the cancellation of shares. The First Judge expressed his conclusion as follows:

> [26] While it is true that the contemplated changes to the share-capital of a company may be far-reaching, section 173 does not

> expressly provide for the **pure and simple cancellation** and expropriation of all shareholders' rights with respect to all classes of shares, to be replaced by new share to be held by a sole shareholder for his entire benefit and to the detriment of others.
>
> [...]
>
> [35] At this present juncture, the proposed plan of Shermag is not even drafted, the specific terms and conditions affecting its share-capital are not available for review and the creditors have not approved anything. Consequently, I cannot make any finding that the proposed reorganization of the shares of Shermag would not violate the letter and/or spirit of section 173 CBCA if the debtor company was to be incorporated under the CBCA instead of the QCA. Furthermore, a careful review of section 173 CBCA **does not expressly authorize the pure and simple cancellation** (equivalent to total expropriation) of shares of a company incorporated under the CBCA. Some of its sub-paragraphs seem to suggest that drastic transformations can be made to the articles but total expropriation of all the rights of all shareholders in favour of another who wishes to acquire all such rights for its own benefit is certainly not within the purpose and ambit of section 173 CBCA. Unequal treatment of shareholders is not the kind of result envisaged.
>
> (Our emphasis)

85. This conclusion conflicts with the case law on the matter. In this regard:

(i) Farley J. wrote in *Stelco* that "***it is well established*** *that a reorganization pursuant to s. 191 of the CBCA may be made in conjunction with a sanction order under the CCAA and that such a reorganization may result in the* ***cancellation of existing shares*** *of the reorganized corporation based on the shares/equity having no present value*" (paragraph 14. Our emphasis); and

(ii) Farley J. in *Laidlaw* also noted that "*Section 173 of the CBCA is supported by paragraph 176(1)(b) of the CBCA, which contemplates amendments to the articles of a corporation to effect cancellation of all or part of the shares of a class of shares*" (paragraph 9. Our emphasis).

5.3.4 The First Judge erred in concluding that it was not possible for a company constituted under the *QCA* to restructure its share capital without shareholders' approval

86. The First Judge erred in law when concluding that it was not possible for a company constituted under the *QCA* to restructure its share capital without shareholders' approval when it is currently insolvent and under a process of restructuring under the *CCAA*.

87. The First Judge summarized his position as follows:

> [76] However, even if I do realize that Quebec corporations may not have access to the same "tools" to restructure themselves, in the absence of statutory dispositions equivalent to those found, for example in the *CBCA* [sections 173, 191 and 192], there is a limit beyond which I cannot go. The present instance is a clear example of same.
>
> [...]
>
> [86] The Quebec law being silent on the powers of the Court alone to modify articles is, however, not silent in the manner in which a corporate restructuring or reorganization may be effected when rights attributed to shares are concerned.
>
> [87] The methodology is clearly outlined in sections 48, 49 and 50 *QCA*. Therefore, we are not in the presence of a legislative void: we are in the presence of statutory dispositions which set the rules. The rules may be outdated but they are still the rules and until they are abrogated and/or amended by the Quebec legislature, the Courts must follow and apply theses rules. Inherent or discretionary powers are not equivalent to legislative powers.
>
> [...]
>
> [102] Counsel for all stakeholders present informed me that, to their knowledge, there was no specific case law on this issue. It is not sufficient to say that because the federal statute and other provincial statute contain provisions which enable the Court to intervene and change, modify, cancel or replace shareholders' rights then this Court has the inherent or discretionary power or discretion to import into the QCA provisions which will substantially change the methodology of section 49 QCA.
>
> (Our emphasis)

88. In a nutshell, the First Judge concluded that section 49 of the *QCA* provides that shareholders' approval is necessary to modify the share capital of a company constituted under the *QCA* and that there is therefore no other way to proceed. Hence a Court, when dealing with a company constituted under the *QCA*, could not amend alone said share

capital as it can for a corporation incorporated under the *CBCA* pursuant to sections 173 and 191 of the *CBCA*.

89. Respectfully, the First Judge erred. There is either a legislative void in the *QCA* or, if not, the *QCA* is in conflict with the purpose of the *CCAA* and the latter should then prevails over the specific provisions of the *QCA*.

5.3.4.1 The Legislative Void of the *QCA*

90. The *QCA*, contrary to *inter alia* the *CBCA*[10], the Alberta *Business Corporation Act* R.S.A. 2000, c. B-9 (the "***ABCA***")[11] and the Ontario *Business Corporation Act* R.S.O. 1990, c. B.16 (the "***OBCA***")[12], does not include a provision which allows a Court to order a modification to the share capital of an insolvent company without any shareholders' approval. The *QCA* provides for a mechanism to modify the share capital of the company when it is solvent, but nothing in the Act provides for such modification when the company is insolvent. There is therefore a gap in the *QCA*.

91. The case law under the *CCAA* has stated on numerous occasions that the Courts have an inherent jurisdiction to fill any gaps in the legislation so as to promote the objectives of the *CCAA*. In this regard:

(i) Farley J. concluded in *Babcok & Wilcox Canada Ltd. (Re)*, (2000) 5 B.L.R. (3d) 75 (Ont. S.C.J.) that "*the Courts of this country have utilized inherent jurisdiction to fill any gaps in the legislation and to promote the objectives of the CCAA*" (paragraph 18); and

(ii) Macdonald J. in *Westar Mining Ltd. (Re)* [1992] 14 C.B.R. (3d) 88 (B.C.S.C.) echoed that principle in stating that : "*Proceedings under the C.C.A.A. are a prime example of the kind of situation where the Court must draw such power to*

[10] See sections 191 and 192 *CBCA*.

[11] See sections 192 and 193 *ABCA*.

[12] See section 186 *OBCA*.

> *"flesh out" the bare bones of an inadequate incomplete statutory provision in order to give effect to its objectives*" (page 93).

92. In the present instance, the *QCA* is an incomplete piece of legislation since it does not provide for a mechanism to modify the share capital of the company when it is insolvent. Therefore, the First Judge should have used his inherent jurisdiction to complete the *QCA* and echo the mechanism that has been applied under *inter alia* the *CBCA*, so as to promote the objective of the *CCAA* which is to "*facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors*"[13].

5.3.4.2 The Conflict Between the *QCA* and the Purpose of the *CCAA*

93. In the event that this Court should conclude that there is no gap in the *QCA*, then section 49 of the *QCA* is in conflict with the purposes of the *CCAA* and should therefore be disregarded. Farley J. came to a similar conclusion in *Loewen* with respect to certain provisions of the *BCCA*.

94. In *Loewen*, the proposed plan provided for a sale of all or substantially all the assets of the debtor company. Under section 126 of the *BCCA*, a company must always obtain the approval of its shareholders when it sells all or substantially all its assets. However, in *Loewen*, given that the company was the object of a restructuring under the *CCAA* and that section 126 of the *BCCA* would be in conflict with the objective of the *CCAA*, Farley J. disregarded the section as follows :

> [7] If a conflict arises between the CCAA and a provincial statute, then under the doctrine of paramountcy, the CCAA provision prevails and the conflicting provisions of the provincial statute are rendered inoperative. See Pacific National Lease Holding Corp. v. Sun Life Trust Co. (1995), 34 C.B.R. (3d) 4 (B.C.C.A.) at pp. 11-2. Thus even if s. 126 of the BC Company Act were to be interpreted as applying (which I have found it does not), then in this case the Loewen shareholders would have an opportunity to veto a key component of the US Plan which is being recognized by this Court pursuant to s. 18.6(2) of the CCAA. **Thus there would be an irreconcilable conflict between those provisions of the provincial statute and the CCAA**.

[13] See *Hong Kong Bank of Canada* v. *Chef Ready Foods Ltd.* (1990) 4 C.B.R. (3d) 311 (B.C.C.A.) ("***Chef Ready***").

> [8] Under U.S. bankruptcy law, shareholders having no economic interest to protect have no right to vote on a plan of reorganization. **Consistent with that appropriate economic and legal principle, courts in Ontario and Alberta have held that where shareholders similarly have no economic interest to protect, it would defeat the policy objectives of the CCAA to give those shareholders a right to veto a plan of arrangement**. In the subject case the shareholders of Loewen have no economic interest. Loewen has in fact to its credit consistently advised in press releases that it considered its shares to be valueless, notwithstanding that these shares continued to trade for somewhat more than nominal value during a considerable portion of the CCAA and U.S. Chapter 11 Bankruptcy Code proceedings.[14]
>
> (Our emphasis)

95. By analogy, the same reasoning should be applied in the present case and accordingly the Reorganization Motion should have been granted. The dismissal of the Reorganization Motion goes against the principles laid down in *Loewen* since it gives a right of veto to Petitioner's shareholders on Petitioner's restructuring even though their shares are of no economic value. They could thus veto a restructuring in which they have no interest at all and by the same token defeat the objective of the *CCAA* which is to "*facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors*"[15].

96. Petitioner respectfully submits that the third criteria is met.

5.4 THE APPEAL WILL UNDULY HINDER THE PROGRESS OF THE ACTION

97. As noted above at paragraphs 37 and 64, it is a condition *sine qua non* for Geosam that the Shares be cancelled before it injects the New Funds.

98. Consequently, the appeal will not unduly hinder the progress of the action.

99. On the contrary, the appeal, if granted, will accelerate the progress of the action as it will allow the Debtors to file and present the Plan.

100. Petitioner respectfully submits that the fourth criteria is met.

---

[14] See also for the same principle *Pacific National Lease Holding Corporation (Re)*, 1995 CanLii 2575 (B.C.C.A.).

[15] See *Chef Ready*.

6. CONCLUSION

101. Petitioner respectfully submits that the present case raises important issues that will have a significant impact both on the present case and on the practice in Canada.

102. If this Court does not grant the leave to appeal sought by Petitioner:

a) Petitioner will suffer a substantial prejudice as it will not be able to arrange its affairs and file a plan in the near future;

b) The answer to the question as to (i) whether it is possible for a company constituted under the *QCA* to restructure its share capital without shareholders' approval when it is insolvent and under a process of restructuring under the *CCAA* and more generally (ii) whether the answer to such question depends on the Act under which the company is constituted will remain uncertain.

103. Accordingly, the Appeal sought by the Petitioner is justified and necessary.

104. This Motion is well founded both in fact and in law.

WHEREFORE, MAY IT PLEASE THIS COURT TO:

[1] **GRANT** the present motion for leave to appeal;

[2] **GRANT** leave to appeal;

[3] **DISPENSE** Petitioner from filing security for costs;

[4] **GRANT** any other order that this Court may deem appropriate under the circumstances .

BY FINAL JUDGMENT TO INTERVENE TO:

[1] **ALLOW** the appeal;

[2] **SET ASIDE** the conclusions of the judgment appealed from;

[3] **MODIFY** the conclusions of the judgment appealed from so that they read as follows:

GRANTS the Amended Motion for an Order Authorizing the Reorganization of the Share Capital of Shermag Inc. and Ancillary Reliefs (the "**Motion**");

AUTHORIZES the Petitioner Shermag Inc. (the "**Petitioner**") to file a plan of arrangement under the *CCAA*, which plan will provide, *inter alia*, for the cancellation of all of issued and outstanding shares of the Petitioner, including all of its existing common and preferred shares, and providing for the issuance by the Petitioner of new equity in favour of Geosam Investments Limited upon cancellation of the existing equity;

CANCELS all the outstanding common shares and all the preferred shares of the Petitioner (the "**Shares**") upon the approval and an homologation by this Court of the Plan of Arrangement to be filed;

AUTHORIZES the issuance of the new equity described at paragraph 46 of the Motion to Geosam Investments Limited upon cancellation of the Shares;

DECLARES that no shareholders' meeting or approval is required prior to the cancellation of the Shares;

DECLARES that no other approval is required to cancel the Shares;

DECLARES that notices given of the presentation of the Motion are proper and sufficient;

ORDERS the sealing of the Estimate Valuation Report prepared by RSM Richter Corporate Finance filed as Exhibit R-6;

ORDERS the provisional execution of the Order to be rendered notwithstanding any appeal and without the necessity of furnishing any security.

THE WHOLE with costs against the opposing party.

[4] **RENDER** any other order that this Court may deem just and appropriate under the circumstances.

THE WHOLE WITH COSTS in first instance and in this appeal.

MONTRÉAL, April 15, 2009

Davies Ward Phillips & Vineberg

DAVIES WARD PHILLIPS & VINEBERG LLP
Attorneys for Petitioner Shermag Inc.

AFFIDAVIT OF JOSÉE GIRARD

I, the undersigned, JOSÉE GIRARD, Vice-President Finance of Shermag Inc., having my place of business at 2171 King Street West, in the City of Sherbrooke, Province of Québec, solemnly declare as follows:

1. I am duly authorized for the purposes hereof on behalf of the Petitioner;

2. I have taken cognizance of the present "Motion for Leave to Appeal";

3. All the facts contained in the said Motion are true.

AND I HAVE SIGNED:

JOSÉE GIRARD

Solemnly affirmed before me, in the
City of Montréal, Province of Québec,
this 15th day of April, 2009

Commission for Oaths for all judicial districts of Québec

WENDY CURRAN 118,345

CANADA
PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

C.A.Q. N°:
(C.S.Q. N°: 500-11-033234-085)

COURT OF APPEAL

***Companies' Creditor's Arrangement Act, R.S.C. 1985, c. C-36* ("*CCAA*")**

IN THE MATTER OF THE ARRANGEMENT OF:

SHERMAG INC.

PETITIONER/Petitioner

and

RSM RICHTER INC.

RESPONDENT/Monitor

and

JAYMAR FURNITURE CORP.

and

SCIERIE MONTAUBAN INC.

and

MÉGABOIS (1989) INC.

and

SHERMAG CORPORATION

and

JAYMAR SALES CORPORATION

RESPONDENT/Mis-en-causes

and

GROUPE BERMEX INC.

INTERVENOR/Mis-en-cause

NOTICE OF PRESENTATION

TO: Me Martin Desrosiers
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Attorneys for Groupe Bermex Inc.

TAKE NOTICE that Petitioner's Motion for Leave to Appeal will be presented for adjudication before a judge of the Court of Appeal, Ernest-Cormier Building, 100 Notre-Dame Street East, in the City and District of Montréal, in room RC-18 on May 1st, 2009 at 9:30 am.

DO GOVERN YOURSELVES ACCORDINGLY.

MONTRÉAL, April 15, 2009

Davies Ward Phillips & Vineberg LLP

DAVIES WARD PHILLIPS & VINEBERG LLP
Attorneys for Petitioner Shermag Inc.

CANADA
PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

C.A.Q. N°:
(C.S.Q. N°: 500-11-033234-085)

COURT OF APPEAL

***Companies' Creditor's Arrangement Act, R.S.C. 1985, c. C-36* ("*CCAA*")**

IN THE MATTER OF THE ARRANGEMENT OF:

SHERMAG INC.

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and

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JAYMAR FURNITURE CORP.

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and

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and

SHERMAG CORPORATION

and

JAYMAR SALES CORPORATION

RESPONDENT/Mis-en-causes

and

GROUPE BERMEX INC.

INTERVENOR/Mis-en-cause

LIST OF EXHIBITS IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO APPEAL

Exhibit R-1 Copy of the judgment of Honorable Robert Mongeon rendered on March 26, 2009;

Exhibit R-2 Copy of the *Amended Motion for an Order Authorizing the Reorganization of the Share Capital of Shermag Inc. and Ancillary Reliefs*;

Exhibit R-3 Copy of the *Petition for the Issuance of an Initial Order*;

Exhibit R-4 Copy of the *Assignment Agreement between Wachovia Capital Finance Corporation (Canada) and Geosam Investments Limited*;

Exhibit R-5 Copy of the Initial Order rendered on May 5, 2008;

Exhibit R-6 Copy of the *Claim Process*;

Exhibit R-7 Copy of the *Application under Chapter 15 of the United States Bankruptcy Code*;

Exhibit R-8 Copy of the Order rendered on January 13, 2009;

Exhibit R-9 Copy of the Plumitif;

Exhibit R-10 Copy of the Estimate Valuation Report (*under sealed).*

MONTRÉAL, April 15, 2009

Davies Ward Phillips & Vineberg LLP

DAVIES WARD PHILLIPS & VINEBERG LLP
Attorneys for Petitioner Shermag Inc.

No.

C O U R T O F A P P E A L
District of Montréal

IN THE MATTER OF THE ARRANGEMENT OF:

SHERMAG INC.

Petitioner

and

RSM RICHTER INC.

Monitor

MOTION FOR LEAVE TO APPEAL
(Sections 13 and 14 of the *CCAA*)

ORIGINAL

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