

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF:

Application by Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the “**Companies**” and the “**Applicants**”), for relief under the *Companies’ Creditors Arrangement Act*

PART I - INTRODUCTION

1. On January 31, 2019, Quadriga Fintech Solutions Corp., Whiteside Capital Corporation, and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the “**Companies**”, and the “**Applicants**”) made an application for creditor protection under the *Companies’ Creditors Arrangement Act* (Canada) (the “**CCAA**”). Ernst & Young Inc. has agreed to be appointed as an officer of the CCAA Court and to act as monitor for the Companies.¹

2. As indicated in the Affidavit of Jennifer K. M. Robertson sworn on January 30, 2019 (the “**Robertson Affidavit**”) in support of the Companies’ application for an initial order under the CCAA, there were approximately 115,000 users (the “**Affected Users**”) of the Quadriga Platform (defined below) that held balances in their personal accounts, representing obligations payable by Quadriga to the Affected Users in the form of: (i) cash obligations of approximately \$70 million

¹ Affidavit of Xitong Zou, sworn February 4, 2019 (**Zou Affidavit**), Exhibit “A”, Motion Record of the Affected Users, Tab A at 1-2, ¶2.

in Canadian funds; and (ii) obligations to hold cryptocurrency coins, value of approximately \$180 million (based on cryptocurrency market pricing as of December 17, 2018).²

3. The Affected Users seek an Order (the “**Representation Order**”), substantially in the form attached to the Motion Record, among other things:

- (a) appointing Bennett Jones LLP (“**Bennett Jones**”) as lead counsel and McInnes Cooper as local counsel (collectively, “**Representative Counsel**”) to represent the interests of the Affected Users in the Companies’ CCAA proceedings;
- (b) ordering that a committee of Affected Users initially comprising of five individuals shall be appointed as the official committee of Affected Users (the “**Official Committee of Affected Users**”) to act as representatives (collectively, the “**Affected User Representatives**”) or all Affected Users in the Companies’ CCAA proceedings; and
- (c) ordering that the payment of Representative Counsel’s professional fees and disbursements be secured by the “Administration Charge” or similar charge granted in the Companies’ CCAA proceedings, or, in the alternative, granting a separate charge over the property, assets, and undertakings of the Companies to secure the professional fees and disbursements of Representative Counsel.

PART II - THE FACTS

4. The facts with respect to this Motion are more fully set out in the Affidavit of Xitong Zou sworn on February 4, 2019 (the “**Zou Affidavit**”) and in the Affidavit of Jennifer K. M. Robertson

² Zou Affidavit, Motion Record of the Affected Users, at ¶2.

sworn on January 30, 2019 (the “**Robertson Affidavit**”) attached as Exhibit “A” to the Zou Affidavit.

THE COMPANIES’ CCAA PROCEEDINGS

5. Details regarding the background to the Companies’ CCAA proceedings are set out in the Robertson Affidavit and, unless relevant to the present motion, are not repeated herein. Capitalized terms not otherwise defined herein have the meaning ascribed to them in the draft Representation Order, a copy of which is included in the Motion Record.³

6. As described in the Robertson Affidavit, the operating company of the Applicants, 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (“**Quadriga**”), operated a platform (the “**Quadriga Platform**”) to facilitate the purchase and sale of cryptocurrencies for Canadian customers and users.⁴

7. At the time of the Companies’ CCAA application, the Companies did not have funds to meet their obligations to the Affected Users. There are funds being held for the benefit of the Companies, including but not limited to: (a) funds held by third party payment processors; (b) bank drafts; and (c) cash. As described in the Robertson Affidavit, Quadriga also has access to approximately \$30 million in the form of bank drafts. Once such bank drafts are accepted for deposit by one or more financial institutions, the funds will be made available for Quadriga and can potentially be used, in part, to fund the cost of the Companies’ CCAA proceedings.⁵

³ Zou Affidavit, Motion Record of the Affected Users, at ¶4.

⁴ Zou Affidavit, Motion Record of the Affected Users, at ¶5.

⁵ Zou Affidavit, Motion Record of the Affected Users, at ¶7.

PART III - ISSUES

8. The issues before this Court are:

- (a) whether Bennett Jones as lead counsel and McInnes Cooper as local counsel should be appointed as Representative Counsel for the Affected Users in the Companies' CCAA Proceedings;
- (b) whether the Official Committee of Affected Users should be established to represent the interests of the affected users in the Companies' CCAA Proceedings; and
- (c) whether the payment of Representative Counsel's professional fees and disbursements should be secured by a charge granted in the Companies' CCAA Proceedings.

PART IV - LAW AND ARGUMENT

APPOINTMENT OF THE REPRESENTATIVE COUNSEL

9. The Court's authority to appoint representative counsel derives from Rule 10.01 of the *Ontario Rules of Civil Procedure*. Rule 10.01 provides as follows:

10.01(1) In a proceeding concerning,

...

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons . . . who have a present, future, contingent or

unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.⁶

10. In *Dugal v Research In Motion Ltd*,⁷ the Honourable Justice Colin Campbell stated that the test for a Rule 10 representation order is a “simple balance of convenience test”:

... the court is to consider the inconvenience that would be experienced by each party if the order were or were not granted.⁸

11. In that case, the Honourable Justice Campbell decided that a representation order was appropriate, particularly given the opt-out provision that was included in the Order. In his analysis, Campbell J referred to *Police Retirees of Ontario v Ontario Municipal Employees' Retirement Board*,⁹ a leading case on representation orders as follows:

... the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience test, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted.¹⁰

12. The equivalent provision for Rule 10.01 in the *Nova Scotia Civil Procedure Rules* is Rule 36.10. Rule 36.10 provides as follows:

36.10(1) In a proceeding concerning the administration of an estate of a deceased, property subject to a trust, or the interpretation of an instrument or legislation, a judge may appoint a person to be a party to represent any of the following persons:

(a) unborn and other unascertained persons;

⁶ *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 10.01.

⁷ *Dugal v Research in Motion Ltd* (2007), 87 OR (3d) 721 (Commercial List).

⁸ *Ibid* at para 21.

⁹ *Police Retirees of Ontario v Ontario Municipal Employees' Retirement Board* (1997), 35 OR (3d) 177 at para 18 (Ont Gen Div).

¹⁰ *Dugal*, *supra* note 8 at para 21.

(b) the members of a class who may have a future, contingent, or unascertained interest in a subject of the proceeding;

(c) persons who may be affected by the proceeding but cannot reasonably be identified or found.¹¹

13. CCAA Courts have more generally recognized the jurisdiction to appoint representative counsel where it will “simplify the process” for the purpose of facilitating the administration of the estate.¹²

14. In addition, the Court has wide discretion under section 11 of the CCAA to appoint representatives to act on behalf of a group of individuals with like interests in CCAA proceedings. Section 11 of the CCAA provides as follows:

11(1) General power of court

Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.¹³

15. In *Re Fraser Papers Inc.*,¹⁴ Pepall J recently stated that section 11 of the CCAA and the *Rules of Civil Procedure* provide the Court with broad jurisdiction in respect of a representative counsel motion:

No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favours the granting of such an order and it is in the interests of justice to do so.¹⁵

¹¹ *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov 19, 2008, s 36.10.

¹² *Muscletech Research and Development Inc (Re)*, [2006] OJ No 3300 at paras 34-37, 41 (Commercial List); *Dylex Ltd, Re*, [2002] OJ No 1505 at para 14 (SCJ).

¹³ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11.

¹⁴ *Fraser Papers Inc, Re*, [2009] OJ No 3188 (Commercial List).

¹⁵ *Ibid* at para 7.

16. In *Re Nortel Networks Corp.*,¹⁶ the Court was asked to appoint representative counsel to represent the interests of the present and former employees of Nortel, which was under CCAA protection. In his reasons, Morawetz J highlighted three critical principles that provide the fundamental rationale for the appointment and funding of representative counsel in the CCAA process:

- (a) Representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding;
- (b) Representative counsel should be appointed where there is a social benefit by assisting vulnerable creditors, and that representative counsel would provide a reliable resource for former employees for information about the CCAA process; and
- (c) Representative counsel would provide a benefit to the overall CCAA process by introducing efficiency to the process for all parties involved.¹⁷

17. In terms of covering the cost of legal representation, CCAA Courts have stated that an order may be made in respect of the funding of representative counsel where it is “fair and just” to do so. The onus is on the requesting party to establish the benefit:

As was recognized in *Re Eron Mortgage Corp* [citations omitted], to succeed in this application Ladner Downs must establish that the legal work it is doing for the Greenhills Mine Suppliers Group is work that will either benefit the Westar Estate or is work that is necessary for the management and preservation of the assets of the Estate. *Eron Mortgage Corp*, supra, also recognized that:

Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another

¹⁶ *Nortel Networks Corp, Re*, [2009] OJ No 2166 (Commercial List).

¹⁷ *Ibid* at paras 13-14.

person would have been required to perform the work if the party claiming compensation had not done it.

The Court should proceed cautiously to ensure that it is just and equitable for the owners of the trust property to bear the expense of a third party who has not been engaged by them.¹⁸

18. In granting such funding, courts have considered factors relating to "what practicality demands", including the size of the estate and the size, substance, and coherence of the proposed class of creditors and structural conflicts.¹⁹

19. In *Re Fraser Papers*, Pepall J stated that "funding by the Applicants should only be provided for the benefit of those who otherwise would have no legal representation".²⁰

20. In the present case, Representative Counsel is sought to "simplify the process". The appointment of Representative Counsel sought herein to represent the interests of Affected Users is necessary and justified for the following reasons, among others:

- (a) Representative Counsel will be able to represent the interests of the Affected Users for the purpose of all decisions which might affect their rights in the course of the Companies' CCAA proceeding and, if necessary, to bring to the Court's attention the concerns of the Affected Users and any other matters that need to be dealt with;
- (b) Representative Counsel will endeavor to communicate with the large and diffuse group of Affected Users, regarding their rights and the progression of the Companies' restructuring efforts;

¹⁸ *Westar Mining Ltd, Re* (1999), 13 CBR (4th) 289 at para 23 (BCSC).

¹⁹ *Ibid*; *Ontario (Securities Commission) v Portus Alternative Asset Management Inc*, 2005 CarswellOnt 7446 (Commercial List).

²⁰ *Fraser Papers*, *supra* note 15 at para 10.

- (c) Representative Counsel will be able to provide the advice needed by the Affected Users to protect their interests and participate in the Companies' restructuring process; and
- (d) Representative Counsel will be able to advise the Affected Users on matters related to any plan of compromise or arrangement that might be put forward by the Companies.

21. Moreover, if the Affected Users are not represented by Representative Counsel, the following issues could arise:

- (a) multiplicity of representations for various Affected Users;
- (b) impediment to the orderly course of the Companies' restructuring process;
- (c) inability of many of the Affected Users to be represented due to lack of financial means; and
- (d) potential further stress and inconvenience for the Affected Users.²¹

22. The totality of these factors gives rise to the practical benefit of streamlining and simplifying the restructuring process, and will also benefit the Affected Users.

23. Additional relevant criteria include:

- (a) The importance of the stakeholder group sought to be represented;

²¹ In *Canwest Publishing Inc, Re*, Pepall J set out an oft-cited list of factors that courts have considered when determining whether to grant a representative order: (a) the vulnerability and resources of the group sought to be represented; (b) any benefit to the companies under CCAA protection; (c) any social benefit to be derived from representation of the group; (d) the facilitation of the administration of the proceedings and efficiency; (e) the avoidance of a multiplicity of legal retainers; (f) the balance of convenience and whether it is fair and just including to the creditors of the Estate; (g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and (h) the position of other stakeholders and the Monitor. See *Canwest Publishing*, 2010 ONSC 1328 at para 21 (Commercial List).

- (b) The existence of an opt-out process when considering the balance of convenience, which provides flexibility to members who do not wish to be represented; and
- (c) The expertise and experience of proposed representative counsel.²²

24. Representative Counsel have sufficient experience and demonstrated expertise in representing creditors and investor groups in fraud and insolvency proceedings. Specifically:

- (a) Representative Counsel have significant experience acting on behalf of creditors committees in CCAA cases which have included acting for the senior noteholders committee in the CCAA proceedings of NewPage Port Hawkesbury Corp. before the Supreme Court of Nova Scotia as well as numerous mandates on behalf of creditors and creditors committee in CCAA cases throughout Canada; and
- (b) Representative Counsel also has significant expertise in recovery issues related to fraud including, international asset tracing, large-scale fraud investigations, and ponzi schemes.²³

APPOINTMENT OF THE OFFICIAL COMMITTEE OF AFFECTED USERS

25. In appointing representative counsel, courts have also recognized the benefit of a leadership group or committee that can organize a process for obtaining advice and directions of the group, and who can assist with relevant communications.²⁴

26. For efficiency purposes and to ensure effective representation, the Representation Order contemplates the appointment of a committee of up to five individuals who are all Affected Users and who have volunteered to participate as members of the Official Committee of Affected Users.

²² See e.g. *US Steel Canada Inc, Re*, 2014 ONSC 6145 at paras 36-42.

²³ Zou Affidavit, Motion Record of the Affected Users, at ¶11-14.

²⁴ *Ibid* at para 38.

The Official Committee of Affected Users will consider matters affecting or relevant to the Affected Users, and will provide instructions to Representative Counsel.

27. It is appropriate in the circumstances that the Official Committee of Affected Users be appointed. Many of the Affected Users are vulnerable stakeholders that do not have the means to pursue a claim in the Companies' complex CCAA proceedings, and will require assistance at various stages in the Companies' restructuring process.

28. Many of the Affected Users have relatively small amounts owing to them by Quadriga. On the other hand, the Official Committee of Affected Users represents a critical constituency of Quadriga's creditors that, in the aggregate, hold substantial claims and whose support may be necessary in order to successfully restructure the Companies.

29. Finally, given that there are a large number of Affected Users, the appointment of the Official Committee of Affected Users will provide a more efficient means for the Affected Users to provide instructions to Representative Counsel. Accordingly, the establishment of the Official Committee of Affected Users will allow individual Affected Users to have a say in the Companies' restructuring process.

30. In addition, the appointment of the Official Committee of Affected Users is justified for the following reasons:

- (a) the Official Committee of Affected Users will endeavor to protect and constructively advance the interests of the Affected Users by acting as a "check and balance" to the Companies' activities; and

(b) the Official Committee of Affected Users will increase the efficiencies of the Companies restructuring process and in particular, it is expected that the establishment of the Official Committee of Affected Users will:

- (i) allow for an exchange of ideas among Affected Users, provide structure, and allow Affected Users to work together to develop restructuring alternatives and solutions;
- (ii) avoid duplicative filings with the Court and permit stakeholders to coordinate applications on a streamlined basis; and
- (iii) reduce professional fees or expenses.²⁵

ADMINISTRATION CHARGE

31. Section 11.52 of the CCAA provides this Court with the statutory authority to grant an Administration Charge:

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge

²⁵ Zou Affidavit, Motion Record of the Affected Users, at ¶28.

is necessary for their effective participation in proceedings under this Act.²⁶

32. In the CCAA context, Pepall J set out in *Canwest Publishing Inc, Re* an oft-cited non-exhaustive list of factors to be considered in approving an administration charge:

- (a) The size and complexity of the business being restructured;
- (b) The proposed role of the beneficiaries of the charge;
- (c) Whether there is an unwarranted duplication of roles;
- (d) Whether the quantum of the proposed Charge appears to be fair and reasonable;
- (e) The position of the secured creditors likely to be affected by the Charge; and
- (f) The position of the Monitor.²⁷

33. It is requested that, as security for their professional fees and disbursements, the Representative Counsel be granted the benefit the Administration Charge on all current and future assets of the Companies. The Administration Charge to be granted in the Companies' CCAA proceedings should rank prior to the interests of all secured and unsecured creditors.

34. The participation of the Representative Counsel will be critical to ensure that the interests of the Affected Users are represented in the Companies' CCAA proceedings, and as described previously, will facilitate the restructuring of the Companies under the CCAA. As described in the Robertson Affidavit, there are several complex factual, legal and financial issues that must be addressed in order to successfully restructure the business of the Companies. The knowledge and

²⁶ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11.52.

²⁷ *Canwest Publishing*, *supra* note 22 at para 54.

the essential legal services provided by the proposed Representative Counsel and other professionals that are the beneficiaries of the Administration Charge will be necessary in order to, among other things, properly investigate the operation and current state of Companies' assets, verify relevant legal and financial information, adequately represent (without an unwarranted duplication of roles) the interests of the Affected Users, and otherwise navigate these CCAA proceedings to completion.

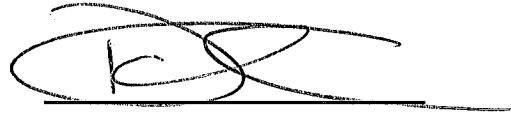
35. Given, among other things, the complexity of the proceedings and Quadriga's limited liquidity, the Administration Charge is fair and reasonable. The Administration Charge will also ensure the continued involvement and effective participation of the professionals, which is necessary for the success of this restructuring.

PART V - ORDER REQUESTED

36. The informal committee of Affected Users request an Order substantially in the form attached to the Motion Record, among other things:

- (a) Appointing the proposed Representative Counsel to represent the interest of the Affected Users in the Companies' CCAA proceedings;
- (b) establishing the Official Committee of Affected Users to represent the interests of the Affected Users in the Companies' CCAA proceedings; and
- (c) ordering that the payment of Representative Counsel's professional fees and disbursements be secured by the "Administration Charge" or similar charge granted in the Companies' CCAA proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of February, 2019.

A handwritten signature in black ink, appearing to be 'JP', is written over a horizontal line.

February 5, 2019

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Canwest Publishing Inc, Re*, 2010 ONSC 1328 (Commercial List)
2. *Dugal v Research in Motion Ltd* (2007), 87 OR (3d) 721 (Commercial List)
3. *Dylex Ltd, Re*, [2002] OJ No 1505 (SCJ)
4. *Fraser Papers Inc, Re*, [2009] OJ No 3188 (Commercial List)
5. *Muscletech Research and Development Inc (Re)*, [2006] OJ No 3300 (Commercial List)
6. *Nortel Networks Corp, Re*, [2009] OJ No 2166 (Commercial List)
7. *Ontario (Securities Commission) v Portus Alternative Asset Management Inc*, 2005
CarswellOnt 7446 (Commercial List)
8. *Police Retirees of Ontario v Ontario Municipal Employees' Retirement Board* (1997), 35
OR (3d) 177 (Ont Gen Div)
9. *US Steel Canada Inc, Re*, 2014 ONSC 6145
10. *Westar Mining Ltd, Re* (1999), 13 CBR (4th) 289 (BCSC)

SCHEDULE "B"

RELEVANT STATUTES

1. *Rules of Civil Procedure, RRO 1990, Reg 194, Rule 10.01*

REPRESENTATION OF AN INTERESTED PERSON WHO CANNOT BE ASCERTAINED

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the Variation of Trusts Act;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

2. *Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008, s 36.10*

REPRESENTATIVE OF UNKNOWN PERSONS

36.10 (1) In a proceeding concerning the administration of an estate of a deceased, property subject to a trust, or the interpretation of an instrument or legislation, a judge may appoint a person to be a party to represent any of the following persons:

- (a) unborn and other unascertained persons;
- (b) the members of a class who may have a future, contingent, or unascertained interest in a subject of the proceeding;
- (c) persons who may be affected by the proceeding but cannot reasonably be identified or found

3. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11

GENERAL POWER OF COURT

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

4. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11.52

COURT MAY ORDER SECURITY OR CHARGE TO COVER CERTAIN COSTS

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

IN THE SUPREME COURT OF
NOVA SCOTIA

FACTUM

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