Hfx. No. 484742

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 for relief under the *Companies' Creditors Arrangement Act*

BRIEF IN SUPPORT OF THE MOTION OF CERTAIN AFFECTED USERS FOR THE APPOINTMENT OF REPRESENTATIVE COUNSEL

February 11, 2019

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PART I - OVERVIEW

1. On this motion, the Court must decide whether to appoint Osler and Patterson to advocate the interests of the up to 115,000 Affected Users of the Quadriga cryptocurrency exchange in this CCAA Proceeding.[1]

2. The moving parties submit that it is just and appropriate for this Court to do so. This would ensure that Affected Users – a vulnerable class - are fairly represented by counsel with sufficient expertise and experience to understand the position of Affected Users, communicate with them effectively, and work constructively with the Monitor and the Applicants to advance the Affected Users' interests. Further, this appointment would benefit all stakeholders in this CCAA Proceeding by preventing a multiplicity of legal counsel, facilitating communication, and increasing efficiency of the proceedings.

3. The moving parties propose an initial committee comprised of motivated individuals with considerable relevant knowledge, experience and expertise. They propose to appoint additional Affected Users to ensure the committee represents the perspectives of various types of persons that are Affected Users, and taking into account the wide disparity of amounts claimed by Affected Users. The committee will ensure all members possess the requisite knowledge and expertise to provide appropriate direction to Representative Counsel.

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[1] R.S.C. 1985, c. C-36, as amended (the "CCAA").

4. This committee would be advised and represented by Osler and Patterson, who together have the significant CCAA, cryptocurrency, and litigation expertise to understand and advance Affected Users' interests, communicate with Affected Users effectively, and work productively, efficiently, and on a cost-effective basis with the Monitor and the Applicants.

PART II -- FACTS

(a) The Vulnerability of Quadriga's Affected Users

5. The Affected Users are the primary creditors of Quadriga. They deserve effective representation as the most significant stakeholder in these CCAA Proceedings.

6. However, the Affected Users are diverse. Some are individual investors; some are individuals with business interests; still others are established businesses.

7. Affected Users supporting this motion have disclosed claims with values ranging from $200 to approximately $4 million.[2]

8. There is limited evidence on the whereabouts of Affected Users, though they appear to be mostly Canadian, with some in foreign countries.

9. Many have expressed confusion and have many questions about the CCAA Proceedings.[3] Misinformation is circulating rapidly and unchecked through various electronic means.[4]

10. Many Affected Users cannot afford to retain counsel.[5]

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2 Affidavit of Giuseppe Burtini sworn February 8, 2019 [Burtini Affidavit] at para 10.
3 Burtini Affidavit at para 10.
4 Burtini Affidavit at para 10.

(b) Qualifications of the Affected Users Committee

11. This motion contemplates that a committee of Affected Users be constituted immediately, with the intention of adding others following consultations with the Applicants and the Monitor.

12. The proposed initial committee members have impressive credentials and expertise:

(a) Ryan Kneer is an Affected User with an individual claim against Quadriga. Mr. Kneer has been involved in cryptocurrency since 2013 and has acted as a professional market maker on the Quadriga trading platform since 2017.[6] Mr. Kneer has used Quadriga's exchange platform almost daily for the past two years.[7] He has been communicating extensively with other Affected Users since Quadriga announced its intention to file under the CCAA.

(b) Richard Kagerer is an Affected User with an individual claim for approximately $19,900 against Quadriga. [8] Mr. Kagerer's cryptocurrency expertise enabled him to contribute to the development of technological standards that secure cryptocurrencies today.[9] Osler represented Mr. Kagerer in a claim against another Canadian cryptocurrency exchange.[10] Mr. Kagerer was also a creditor in the the MtGox insolvency proceedings in 2014.[11] Mr. Kagerer has communicated with many individuals who have identified themselves as Affected Users and considers

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5 Burtini Affidavit at para 10.
6 Affidavit of Ryan Kneer sworn February 8, 2019 [Kneer Affidavit] at para 2.
7 Kneer Affidavit at paras 13-14.
8 Affidavit of Richard Kagerer sworn February 11, 2019 [Kagerer Affidavit] at para 4.
9 Kagerer Affidavit at para 7.
10 Kagerer Affidavit at para 14-15.
11 Kagerer Affidavit at para 11.

that for many, answers to their questions about what has taken place may be just as important as recovery of their funds.[12]

(c) Giuseppe Burtini represents a corporate Affected User - referred to as the Blockchain Company for privacy and other reasons - with a multi-million dollar claim against Quadriga.[13] Mr. Burtini has substantial credentials and expertise with respect to cryptocurrency, blockchain technology, and other technical matters that will likely be relevant to this CCAA Proceeding.[14] Mr. Burtini is already very familiar with Quadriga's situation, as the Blockchain Company engaged Osler several months ago to advise the Blockchain Company regarding matters relating to Quadriga.[15]

13. This motion is supported by at least 59 Affected Users with total claims against Quadriga valued at more than $12.4 million.[16]

(c) Qualifications of Osler and Patterson

14. Osler is a leading Canadian business law firm recognized as one of the top restructuring practices in the country.[17] Osler's national insolvency and restructuring practice is particularly known for developing creative solutions to complex insolvency challenges.[18] In recent years, Osler has had leading roles in many of Canada's largest and most complex restructuring and insolvency proceedings, including acting for Sears Canada, Target Canada, and the board of

12 Kagerer Affidavit at paras 18-19.
13 Burtini Affidavit at para 3.
14 Burtini Affidavit at para 23.
15 Burtini Affidavit at para 4.
16 Burtini Affidavit at para 10.
17 Burtini Affidavit at para 26; see also Burtini Affidavit, Exhibit "C" page 5.
18 Burtini Affidavit, Exhibit "C" page 1.

directors of Nortel Networks in their CCAA proceedings.[19] Osler also acted as counsel for the Province of Nova Scotia in this Court with respect to the complex CCAA proceedings of NewPage Port Hawkesbury Corp.[20]

15. Osler has experience representing creditors' committees and supporting complex insolvency proceedings involving thousands of individual investors.[21] Osler's recent insolvency mandates include proceedings involving groups of significant individual claimants, such as the CCAA proceedings relating to League Assets and BDMC. Osler's leading roles in the Target Canada and Sears Canada CCAA proceedings also involved supporting co-ordination of multiple stakeholder groups, including representative counsel for thousands of individual claimants.[22]

16. Osler is the top-ranked Canadian law firm for information technology and financial technology advice, and leads in providing specific expertise relating to cryptocurrency and blockchain technology.[23] Osler has advised cryptocurrency exchanges, companies developing blockchain platforms, digital currency investment funds, and customers of a cryptocurrency trading platform.[24]

17. Patterson is well known for its significant experience in complex litigation matters before the Nova Scotia courts.[25]

PART III – ISSUES AND THE LAW

18. The issues before the Court on this motion are:

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19 Burtini Affidavit at para 26.
20 Burtini Affidavit at para 29.
21 Burtini Affidavit at para 27.
22 Burtini Affidavit at para 26.
23 Burtini Affidavit at para 28; see also Burtini Affidavit, Exhibit "E" page 1-2.
24 Burtini Affidavit at para 28; see also Burtini Affidavit, Exhibit "E" page 2.
25 Burtini Affidavit at para 30.

(a) Should this Court appoint Representative Counsel for the Affected Users, to be instructed by a committee of Affected Users?

(b) Should Osler and Patterson be appointed as Representative Counsel?

(c) Should payment of Representative Counsel's professional fees and disbursements be secured by an Administration Charge?

(a) Representative Counsel should be appointed and the Affected Users Committee should be established

19. This Court has jurisdiction to appoint representative counsel under section 11 of the CCAA, which grants this Court broad discretion to "make any order that it considers appropriate in the circumstances."[26] This is buttressed by Rule 36.10 of the *Nova Scotia Civil Procedure Rules*, which authorizes the Court to "appoint a person to be a party to represent… the members of a class who may have a future, contingent, or unascertained interest in the subject of a proceeding."[27]

20. The standard for appointing Representative Counsel in a CCAA proceeding is when "the balance of convenience favours the granting of such an order and it is in the interests of justice to do so."[28]

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26 CCAA s. 11.

27 N.S. Civ. Pro. Rules 2009, Rule 36.10. Rule 36.10 applies to "a proceeding concerning administration of an estate of a deceased, property subject to a trust, or the interpretation of an instrument or legislation." This broad wording arguably encompasses the circumstances currently before this Court, wherein the parties will be called upon to interpret numerous instruments governing the Affected Users' claims.

28 *Re Fraser Papers*, 2009 CarswellOnt 6169 [*Fraser Papers*] at para 7.

21. The goal of representative counsel in CCAA proceedings is to ensure that all parties' positions are advanced in an efficient and co-ordinated manner that will benefit all stakeholders.[29] CCAA Courts have appointed representative counsel because:

(a) vulnerable creditors lack the resources to pursue their claims individually;

(b) there is a social benefit to assisting vulnerable creditors;

(c) representative counsel can provide an information resource and communication strategy for individual creditors; and

(d) representative counsel will introduce efficiency to the CCAA process for all parties.[30]

22. Quadriga's CCAA Proceeding is the first of its kind in Canada and one of the very few involving cryptocurrency around the world. It is unlikely to be the last. This CCAA Proceeding may be a model for future proceedings in Canada and internationally and it may affect the development of the law and regulation concerning cryptocurrencies. As such, it is particularly important that the complex issues raised by this CCAA Proceeding be addressed with the benefit of the best possible expertise, and that all stakeholders' perspectives be fairly represented.

23. Representative Counsel would serve a social benefit by identifying and advancing other interests of vulnerable Affected Creditors. In particular, Affected Users have particular concerns about safeguarding their privacy and information security in the course of this proceeding.[31] This

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[29] *Re League Assets Corp*, 2013 BCSC 2043 [*League*] at para 76.
[30] *Re Nortel Networks Corp*, 2009 CarswellOnt 3028 [*Nortel*] at paras 13-14.
[31] Kagerer Affidavit at paras 20-23.

is but one example of non-financial interests that may have to be addressed in the CCAA Proceeding.

24. Accordingly, it is submitted that it is just and convenient to appoint representative counsel, which would provide advice and receive instructions from a committee composed of Affected Users representing the interests of this class of creditors.

(b) Osler and Patterson should be appointed as Representative Counsel

25. There are multiple motions before this Court seeking the appointment of different committees and representative counsel. There is relatively little insolvency jurisprudence to guide the Court in selecting representative counsel in such a situation. Nonetheless, the limited jurisprudence and analogous case law in the class actions context all favour granting this motion.

26. In *Fraser Papers*, Pepall J. of the Ontario Superior Court of Justice selected representative counsel based on factors including "the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice, the need for facility in both official languages; and estimated costs."[32] The court did not address the weight or content of these factors in substantial detail.

27. This motion has the support of a substantial subset of the Affected Users, both by number and by claims value: evidence of a strong mandate to act.

[32] *Fraser Papers* at para 12. The leading recent case involving court selection of representative counsel is *Nortel*, cited above. However, in that case the selection of representative counsel hinged on the commonality of the proposed class of creditors to be represented, rather than on factors such as the qualifications of representative counsel or the proposed representation strategy and preparation.

28. This motion also contemplates that representative counsel would represent the interests of all Affected Users (subject to any opt outs), which would bring considerable efficiency to the process.

29. There are also four factors drawn from class action carriage motions jurisprudence that may assist this Court in selecting counsel: quality of counsel, quality of representatives, preparation and readiness, and approach to case.[33]

30. All four factors favour the appointment of Osler and Patterson as representative counsel, to be instructed by the committee that proposes them:

(a) Quality of Counsel/Legal Expertise

(i) Osler has a top-tier insolvency practice, which includes experience in insolvency matters in Nova Scotia and matters involving large stakeholder groups with representative counsel.[34]

(ii) Osler has acted for the Province of Nova Scotia in a major Nova Scotia insolvency proceeding in the past and will be working with highly experienced Nova Scotia counsel in Patterson.

(iii) Osler has extensive experience and expertise specific to the cryptocurrency and blockchain technology.

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33 See for instance *David v Loblaw*, 2018 ONSC 1298 at para 6. In carriage disputes, courts must consider which consortium of counsel and representative claimants will represent the interests of a vulnerable class. Courts in carriage disputes have generally considered an expansive list of factors, many of which are specific to the class-action context.

34 These factors were sufficient to satisfy the British Columbia Supreme Court about the selection of representative counsel in *League*: para 67.

(iv) Osler and Patterson have the resources to coordinate meetings of Affected Users across Canada.

(v) These qualities have attracted strong support, both in terms of number of Affected Users and aggregate value of their claims.[35]

(b) <u>Quality of Representatives</u>

(i) The proposed committee members are Affected Users with extensive knowledge of cryptocurrencies and cryptocurrency markets.

(ii) The proposed committee members have impressive technical expertise, including the ability to understand, if not perform, blockchain analysis to trace blockchain transactions.

(iii) The proposed committee members reflect different constituencies Affected Users that may have different perspectives.

(c) <u>Preparation and Readiness</u>

(i) The proposed committee is ready to start immediately. Although more committee members may be added, the committee need not wait to interview and select all its members before acting.

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[35] Burtini Affidavit at para 10.

(ii) Osler is already well-versed in matters relating to Quadriga, having been engaged to advise regarding matters relating to Quadriga some months before the CCAA.

(iii) The proposed committee members have been closely following developments relating to Quadriga, including in this Proceeding.

(iv) Osler and the proposed committee members have communicated with numerous Affected Users and already understand their interests and concerns.

(v) The proposed committee and Osler already have a plan for communicating effectively with Affected Users in the context of this CCAA Proceeding, including using non-traditional media popular among the cryptocurrency community and many Affected Users.

(d) Approach to Case

(i) The proposed committee members emphasize the importance of communication with Affected Users to dispel misinformation, reduce anxiety, and permit the proceedings to advance in an orderly and efficient manner. They have identified communication channels most likely to reach the Affected Users, and Osler and Patterson have the resources to ensure that accurate information is disseminated effectively and that Affected Users can easily communicate their views.[36] This emphasis on

[36] Burtini Affidavit at para 17.

communication, combined with the committee's and Osler's knowledge of cryptocurrency and blockchain technology, would assist the Monitor in communicating complex technical information to a disparate group of individuals.

(ii) The proposed committee members have considerable technical expertise and relationships that may be of assistance to the Monitor and the Applicants. There are many others who wish to help. The proposed committee and its representative counsel can organize and focus any such assistance to ensure it is provided efficiently.

(c) Representative Counsel's fees should be secured by an Administration Charge

31. If this Court appoints Representative Counsel, Section 11.52 of the CCAA authorizes this Court to grant an Administration Charge with respect to Representative Counsel's reasonable fees and disbursements (the "**Representative Counsel Fees**").[37]

32. When determining whether to grant an administrative charge with respect to representative counsel fees, CCAA courts have considered factors including:[38]

(a) The vulnerability and resources of the group sought to be represented;

(b) Any benefits to the companies under CCAA protection;

(c) Any social benefit to be derived from representation of the group;

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37 CCAA s. 11.52.

38 *Re Canwest Publishing Inc.*, 2010 ONSC 1328 at para 21.

(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 creditors of the estate;

(g) Whether representative counsel has already been appointed for those who have similar interests; and

(h) The position of other stakeholders and the Monitor.

33. These factors support the grant of an Administration Charge on all current and future assets of the Companies to secure the reasonable professional fees and disbursements of Representative Counsel. This Administration Charge should be granted in these CCAA Proceedings ranking prior to the interests of all secured and unsecured creditors. The Court will maintain an overall supervisory role with respect to fees.

PART IV – ORDER REQUESTED

34. For the reasons given above, certain Affected Users seek an Order, substantially in the form of the draft provided, appointing Osler and Patterson as Representative Counsel. The proposed Order will facilitate the provision of necessary legal expertise, an effective communications strategy, and effective representation for the class of Affected Users. These goals will support the efforts of the Applicants and the Monitor and facilitate the ultimate objectives of efficiency, transparency, order and fairness in this CCAA proceeding.

February 11, 2019

for OSLER, HOSKIN & HARCOURT LLP

PATTERSON LAW

Lawyers for Certain Affected Users

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Fraser Papers*, 2009 CarswellOnt 6169
2. *Re League Assets Corp*, 2013 BCSC 2043
3. *Re Nortel Networks Corp*, 2009 CarswellOnt 3028
4. *David v Loblaw*, 2018 ONSC 1298
5. *Re Canwest Publishing Inc.*, 2010 ONSC 1328

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act **(RSC 1985, c. C-36 as amended)**

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.

[…]

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.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Nova Scotia Civil Procedure Rules (N.S. Civ Pro Rules 2009)

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.
(2) An order in a proceeding in which a person is represented under this Rule 36.10 binds the represented person.

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