

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 OF AUTHORITIES

February 11, 2019

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TAB 1

2018 ONSC 1298

Ontario Superior Court of Justice

David v. Loblaw; Breckon v. Loblaw

2018 CarswellOnt 3172, 2018 ONSC 1298, 289 A.C.W.S. (3d) 253

**Marcy David (Plaintiff) and Canada Bread Company, Limited,
Orupo Bimbo, S.A.B. De C.V., George Weston Limited, Loblaw
Companies Limited, Weston Foods (Canada) Inc., Empire Company
Limited, Sobeys Inc., Metro Inc., Wal-Mart Canada Corp., Wal-
Mart Stores, Inc. and Giant Tiger Stores Limited (Defendants)**

Irene Breckon (Plaintiff) and Loblaw Companies Limited, George Weston Limited, Weston Foods (Canada), Incorporated, Weston Bakeries Ltd., Canada Bread Company, Limited, Wal-Mart Canada Corporation, Sobeys Incorporation, Metro Incorporated, Giant Tiger Stores Limited (Defendants)

E.M. Morgan J.

Heard: February 9, 2018

Judgment: March 1, 2018

Docket: CV-17-586063-00CP, CV-17-00005494-00CP

Counsel: David Wingfield, Jay Strosberg, for Plaintiff, Marcy David

David Sterns, Charles Wright, Linda Visser, for Plaintiff, Irene Breckon

James Orr, Kyle Taylor, for Plaintiff in Balodis v George Weston Limited, Fed Ct File No. T-2117-17

Davit Akman, Denes Rothschild, for Canada Bread Company, Limited, Grupo Bimbo, S.A.B. De C.V., George Weston Limited, Loblaw Companies Limited, Weston Foods (Canada) Inc., Empire Company Limited

Eliot Kolers, for Sobeys Inc.

Kristine Spence, for Wal-Mart Canada Corp.

Michael Brown, Eric Lefebvre, for Metro Inc.

Adam Fanaki, Derek Ricci, for Giant Tiger Stores Limited

Subject: Civil Practice and Procedure; Corporate and Commercial

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Conduct of class proceeding — Stay of other proceedings

Defendants were sellers of packaged bread who were facing several proposed class actions across Canada for allegedly engaging in price fixing — Plaintiffs D and B were consumers who brought separate proposed class proceedings against defendants in Ontario — D was represented by first group of class counsel while B was represented by second group of class counsel — Plaintiffs brought motion for determination as to which group of class counsel would have carriage of proceeding — Motion granted — First group was to have carriage of D's proceeding, and B's proceeding was stayed — Number of truly important factors was relatively limited since many factors did not favour one group over other — In terms of preparation and readiness, first group appeared to be taking each step as it came up and advancing position of proposed class, while second group appeared to be contemplating taking each step at some future point — In terms of interrelationship of actions across jurisdictions, first group was coordinating its efforts with other class counsel while second group only had involvement in B's proceeding — Second group's inclusion of "umbrella purchasers" who had not purchased directly or indirectly from defendants but rather indirectly from upstream non-defendants was neutral factor due to uncertainty in applicable law — There was no substance to alleged conflicts of interest raised in relation to first group.

Table of Authorities**Cases considered by E.M. Morgan J.:**

Agnew-Americano v. Equifax Canada (2018), 2018 ONSC 275, 2018 CarswellOnt 837 (Ont. S.C.J.) — considered

Arizona Dairy Products Litigation, Re (1985), 627 F. Supp. 233 (U.S. Dist. Ct. D. Ariz.) — considered

Attis v. Ontario (Minister of Health) (2011), 2011 ONCA 675, 2011 CarswellOnt 13940, 285 O.A.C. 333, 343 D.L.R. (4th) 263, 18 C.P.C. (7th) 77 (Ont. C.A.) — referred to

Beef Industry Antitrust Litigation, Re (1979), 600 F.2d 1148 (U.S. C.A. 5th Cir.) — considered

Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, Re (1982), 691 F.2d 1335 (U.S. C.A. 9th Cir.) — considered

Godfrey v. Sony Corporation (2017), 2017 BCCA 302, 2017 CarswellBC 2245, 1 B.C.L.R. (6th) 319, [2017] 12 W.W.R. 448 (B.C. C.A.) — considered

Holloway v. State of Florida (1980), 66 L.Ed.2d 137, 101 S.Ct. 281, 449 U.S. 905 (U.S. Sup. Ct.) — referred to

Kowalyshyn v. Valeant Pharmaceuticals International, Inc. (2016), 2016 ONSC 3819, 2016 CarswellOnt 9329 (Ont. S.C.J.) — considered

Mancinelli v. Barrick Gold Corp. (2016), 2016 ONCA 571, 2016 CarswellOnt 11222, 400 D.L.R. (4th) 550, 89 C.P.C. (7th) 225, 131 O.R. (3d) 497, 30 C.C.L.T. (4th) 188, 350 O.A.C. 389 (Ont. C.A.) — considered

Mid-west Paper Products Co. v. Continental Group, Inc. (1979), 596 F.2d 573 (U.S. C.A. 3rd Cir.) — considered

Roberts v. R. (2003), 2003 SCC 45, 2003 CarswellNat 2822, 2003 CarswellNat 2823, 231 D.L.R. (4th) 1, 19 B.C.L.R. (4th) 195, (sub nom. *Wewayakum Indian Band v. Canada*) 309 N.R. 201, [2004] 2 W.W.R. 1, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, (sub nom. *Wewayakum Indian Band v. Canada*) [2004] 1 C.N.L.R. 342, (sub nom. *Wewayakum Indian Band v. Canada*) [2003] 2 S.C.R. 259 (S.C.C.) — considered

Shah v. LG Chem, Ltd. (2015), 2015 ONSC 2628, 2015 CarswellOnt 5769, 125 O.R. (3d) 773, 42 B.L.R. (5th) 42 (Ont. S.C.J.) — referred to

Simmonds v. Armtec Infrastructure Inc. (2013), 2013 ONSC 331, 2013 CarswellOnt 1252, 303 O.A.C. 299, 46 C.P.C. (7th) 427 (Ont. Div. Ct.) — referred to

Tiboni v. Merck Frosst Canada Ltd. (2009), 2009 CarswellOnt 1248, (sub nom. *Mignacca v. Merck Frosst Canada Ltd.*) 247 O.A.C. 322, (sub nom. *Mignacca v. Merck Frosst Canada Ltd.*) 95 O.R. (3d) 269, 71 C.P.C. (6th) 350 (Ont. Div. Ct.) — considered

VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. (2000), 2000 CarswellOnt 4681, 4 C.P.C. (5th) 169 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 12 — considered

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

MOTION by plaintiffs in competing proposed class proceedings for determination as to which group of class counsel would have carriage of proceeding.

E.M. Morgan J.:

1 This carriage motion pits against each other two very experienced counsel groups for the putative class: the consortium led by Strosberg Sasso Sutts LLP ("Strosberg" or the "Strosberg Consortium") and the team of Sotos LLP and Siskinds LLP ("Sotos" or the "Sotos Team").

2 The underlying case entails claims of price fixing and conspiracy brought by consumers against sellers of packaged bread across the country. It involves putative class actions commenced in at least 5 provinces as well as the Federal Court. Strosberg and Sotos have each commenced actions in Ontario (respectively, the "David Action" and the "Breckon Action"). This motion is brought simultaneously in both of those actions, asking the court to make an order under

section 12 of the *Class Proceedings Act*, 1992, SO 1992, c. 6 ("*CPA*") to ensure a fair and expeditious procedure for the conduct of the litigation.

3 The stakes are significant for each counsel group. Generally speaking, there should not be multiple class actions in respect of the same putative class asserting what are for the most part the same causes of action. Although carriage motions arise as a choice between competing counsel, a determination of carriage will effectively determine which action will proceed: *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.).

I. The carriage test

4 As my colleague Perell, J. pointed out in *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 (Ont. S.C.J.), at para 139, "Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise." Certainly in a case such as this one, where some of the most highly qualified class action counsel in the country are competing for carriage, the point of the exercise is to take the measure not of the lawyers or law firms themselves, but the cases they have prepared — i.e. to engage in a "qualitative analysis of all of the factors" in the competing actions and the advantages of the steps taken in each: *Simmonds v. Armtec Infrastructure Inc.*, 2013 ONSC 331 (Ont. Div. Ct.), at para 27.

5 In *Mancinelli v. Barrick Gold Corp.*, 2016 ONCA 571 (Ont. C.A.), at para 13, Chief Justice Strathy confirmed the threefold criteria for determination of a carriage motion: "(a) the policy objectives of the *CPA*, namely, access to justice, judicial economy for the parties and the administration of justice, and behaviour modification; (b) the best interests of all putative class members; and, at the same time, (c) fairness to defendants." Of these, it is the best interests of the class that is dominant, *Tiboni v. Merck Frosst Canada Ltd.* (2009), 95 O.R. (3d) 269 (Ont. Div. Ct.), at paras 8, 26, since the carriage motion will result in the class being assigned representation by one set of counsel over another.

6 In analysing the above criteria, the courts have developed an expanding list of factors to consider. I hasten to add that this list is not exhaustive, and that what is of central importance in one case may be of only peripheral importance, or not important at all, in another: *Barrick Gold*, *supra*, at para 17. In any case, at latest count the tally was up to 16, as set out in *Valeant Pharmaceuticals*, *supra*, at para 143:

The factors tend to overlap and interconnect. The sixteen factors for the immediate case are:

- (1) The Quality of the Proposed Representative Plaintiffs
- (2) Funding
- (3) Fee and Consortium Agreements
- (4) The Quality of Proposed Class Counsel
- (5) Disqualifying Conflicts of Interest
- (6) Preparation and Readiness of the Action
- (7) Relative Priority of Commencement of the Action
- (8) Case Theory
- (9) Scope of Causes of Action
- (10) Selection of Defendants
- (11) Correlation of Plaintiffs and Defendants

- (12) Class Definition
- (13) Class Period
- (14) Prospect of Success: (Leave and) Certification
- (15) Prospect of Success against the Defendants
- (16) Interrelationship of Class Actions in More than one Jurisdiction

7 In the present case, the number of truly important factors is relatively limited. The funding, quality of representative plaintiffs, fees, quality of counsel, selection of defendants, correlation of plaintiffs and defendants, class definition, class period, and several other factors are very similar (or have only minor differences) when Strosberg and the David Action are held up against Sotos and the Beckon Action. For the most part, I therefore see these as neutral factors for the sake of the analysis here.

II. The central factors

8 The preparation and readiness of the action, the interrelationship of the Ontario actions to those in other jurisdictions, to a limited extent the differences in the causes of action pleaded, and the potential for any disqualifying conflicts of interest are matters that require consideration here. In analyzing the carriage question, it should be kept in mind that the selection of class counsel is likely to go a far way toward determining the efficiency and manageability of the action.

a) Preparation and readiness

9 Counsel for Strosberg submits that by any measure, his group is at a far more advanced state of preparedness than Sotos. Counsel for Sotos submits that while his group is no more advanced than Strosberg, they have taken a more prudent and responsible course in preparing the case. It is the Strosberg view that they have advanced the cause of the class measurably in the time since the price fixing conspiracy first hit the press in October 2017; it is the Sotos view that the two firms are roughly equal to date but that Sotos is in a strong position to proceed ahead.

10 It is fair to say that both firms have issued pleadings, both have arranged for a case management judge, and both have obtained documents pertinent to the price fixing allegation from the federal Competition Bureau. Both firms concede that Strosberg was earlier off the mark in pursuing the case. Strosberg sees itself as more energetic and effective as class counsel; Sotos sees Strosberg's early lead as a sign of a rash flight into the unknown.

11 Both law firms have acknowledged that they saw the Competition Bureau's press release in late October 2017 indicating that it was conducting an industry-wide investigation in respect of possible price fixing by large retailers of packaged bread. Strosberg went into action and issued a Notice of Action setting out the essence of the present claim on November 7, 2017. It retained investigators and experts, and secured evidence from people who are knowledgeable about the Competition Bureau's investigation. In the Notice of Action, Strosberg alleged vertical and horizontal price fixing among the Defendants.

12 It is true, of course, that "[t]he relative priority of the commencement of the action is typically a trivial factor": *Valeant Pharmaceuticals*, *supra*, at para 192. It can become meaningful, however, depending upon the context. For example, Perell J. indicated in *Valeant Pharmaceuticals* that being first to commence an action may be meaningful in a negative way if it appears that class counsel has issued a *pro forma* Notice of Action in an effort to simply stake a claim for a piece of the action. By the same logic, being first to file can be meaningful in a positive way if a law firm does so in order to promptly identify the wrongdoing of the defendants and to gain some ground for the class in framing the issues up front.

13 Sotos took a more cautious approach than Strosberg. Mr. Sterns states that his firm wanted to wait and see how the evidence came out before making far reaching allegations. It is Sotos' view that by waiting before jumping into the litigation arena, they avoided the potential for serious embarrassment and serious costs for the plaintiff. Sotos has interviewed the Ontario organization of independent grocers, who happen to be Sotos clients, to get their input. However, they have not yet identified or retained any experts.

14 On December 19, 2017, Loblaw issued its own press release disclosing that it had participated fully in the Bureau's investigation and conceding that it had indeed engaged in price fixing. Fortunately for Strosberg — and, in terms of its position on this motion, unfortunately for Sotos — the fast, upfront judgment of Strosberg that the case was one of vertical and horizontal price fixing turned out to be correct.

15 Sotos, as indicated, was more sober in its exercise of judgment and in waiting to verify the evidentiary base of its allegations before issuing any claim. In many contexts that approach would be prudent and commendable, but not here. Rash and impetuous as Sotos wants to portray the Strosberg approach, it is, as they say, hard to argue with success. Sotos is now compelled to argue that their competitor could have looked bad even if they now look good. It turns out that Strosberg did the class a great service by alerting them early on that the major retailers had engaged in the type of anti-competitive behaviour which Loblaw eventually conceded in its press release.

16 Strosberg finalized and issued its Statement of Claim on December 20, 2017. Sotos also issued a Statement of Claim shortly thereafter. Both firms have a retainer agreement with their client. Mr. Sterns complains that the Strosberg retainer agreement is dated December 20, 2017 — the date of the Statement of Claim — and not November 7, 2017 — the date of the Notice of Action. He points out that the Sotos retainer agreement is dated the same date as its Statement of Claim, which was its originating document for its action. Mr. Sterns goes on to observe that in *Agnew-Americanano v. Equifax Canada*, [2018] O.J. No. 361 (Ont. S.C.J.), at para 60, Glustein J. criticized the practice of commencing an action without a written retainer agreement.

17 Under the circumstances, I see this argument as raising more of a quibble than anything. While the Strosberg retainer agreement is indeed dated more than a month after the issuance of the Notice of Action, it expressly states that it is "effective as of November 7, 2017". In other words, the agreement itself was in place on November 7th, but the written version did not get signed by all parties until December 20th. I am hesitant to allow others to look beyond the face of this solicitor-client agreement. The Court of Appeal has advised that only in "exceptional circumstances" should one party in litigation be able to question the authority and related discussions flowing between another party and their solicitors: *Attis v. Ontario (Minister of Health)*, 2011 ONCA 675 (Ont. C.A.), at para 16.

18 What is important is that the Plaintiff, Marcy David, was already named as Plaintiff on November 7th, indicating that she was prepared at that date to go on record as putative class representative. I would, of course, be far more concerned had a different plaintiff's name appeared on the Notice of Action than on the Statement of Claim, as that might be a red flag for the kind of exceptional circumstances that the Court of Appeal had in mind — i.e. that the David Action was commenced without a client that was fully prepared to take on the class action. Since that is not the case, and Ms. David was obviously on board with Strosberg all along, the fact that the written agreement is signed on December 20th but effective as of November 7th satisfies me that the law firm was properly instructed and retained when it commenced the David Action.

19 In the same December 19, 2017 press release, Loblaw announced its gift card program which was designed as a public relations measure to win back any customer confidence that had eroded as a result of the announcement of the Bureau's investigation. Strosberg made arrangements with the court for a motion to be heard challenging the gift card program, and brought that motion in early January 2018.

20 Again, Sotos took a more cautious approach. It did have representatives attend at the gift card motion for the purpose of maintaining a watching brief. Counsel from Sotos indicated at the hearing of the motion that they concurred with counsel from Stosberg, who shouldered the effort in its entirety.

21 It is Strosberg's view that although I upheld the gift card program and found there to be nothing improper about Loblaw's approach to its customers, the result of the motion was of benefit to the class. They specifically stress the fact that in my endorsement I reserved to a future time the question of the enforceability of the release that accompanies the gift card: *David v. Loblaw*, 2018 ONSC 198 (Ont. S.C.J.), at paras 23-24. Messrs Wingfield and Strosberg submit that in calling this to the court's attention they have taken a significant step in preserving the right of the class to challenge the release in the event of an eventual settlement or at trial.

22 Sotos dismisses this argument, and submits that it is little more than marketing spin. Mr. Sterns takes particular issue with the Strosberg statement to the press on January 9, 2018 — the same date as my endorsement — to the effect that the ruling (and, parenthetically, Strosberg's advocacy), "sided with millions of Canadian consumers". It is Sotos' position, which has been echoed in argument by counsel for Loblaw, that the Strosberg statement is, if not misleading, at the very least flamboyant and exaggerated. It intimates that the January 9, 2018 ruling represents a victory for consumers that the Strosberg firm obtained on their behalf by bringing the motion.

23 It seems to me the objection is more one of style and taste than one of substance. The Strosberg public relations effort attempts to underscore and highlight in bold the fact that the viability of the release has been held in abeyance. Loblaw's customers would have to read my endorsement, or have it explained to them, in order to know that. It is perhaps the case that other counsel would phrase the matter more delicately; and, indeed, Mr. Sterns has pointed me to his own firm's website in which the January 9th ruling is announced in far more fastidious legalese.

24 The point of the Strosberg statement, however, was not to impress a court but to attract the attention of the average Loblaw customer. That customer is presumed to have heard about a 'free' gift card without having focused on the release that goes with it. Strosberg, together with a public relations firm that they retained, assessed that a more audacious approach was called for in explaining the situation to consumers more interested in groceries than legalities. The criticism of the Strosberg press statement, reminiscent of popular portrayals of class action lawyering, is a critique of the 'classiness' of the public relations and class awareness campaign that ignores its effectiveness: see *Better Call Saul*, Season 2, Episode 4.

25 The motion in respect of the gift card was a major undertaking at the very outset of the action, and it did advance the position of the class, or at this stage putative class. It put the David Action ahead of the Breckon Action in terms of moving the claim forward, and is one more sign of Strosberg being out front in the effort to advance the case for the class.

26 As a final matter, on January 31, 2018 the Competition Bureau released new documents from its investigation that shed additional light on the price fixing and conspiracy allegations leveled against the Defendants. Strosberg has amended its Statement of Claim in order to reflect this new information. Sotos has not amended its Statement of Claim, but has indicated that it intends to do so in the future. This, of course, is similar to Sotos' response to Strosberg indicating that it has hired an expert who is already working on the complicated task of assessing damages. Sotos has indicated that it has not yet retained an expert, but that it intends to do so in the future.

27 In my view, this is indicative of the relative state of preparedness of the two firms competing for carriage of this case. Both firms have the experience to know what needs to be done to advance the case for the class. Strosberg appears to be taking each step as it comes up, while Sotos appears to be contemplating taking each step at some future point.

b) Interrelationship of actions across jurisdictions

28 The Strosberg Consortium is composed of 4 law firms who in total have filed actions in 6 Canadian jurisdictions. There is a Consortium Agreement among them which divides up their responsibilities and gives each a defined amount

of input into strategy and settlement prospects. The Consortium Agreement provides for all of the other jurisdictions except for Quebec agreeing to stay their actions in favor of certifying the David Action as a national class action. With respect to the Quebec action, the Consortium Agreement sets out a coordination mechanism for working with the rest of the Strosberg Consortium.

29 The Sotos Team consists of 2 law firms whose only action is the Breckon Action. It has no agreement with any firms who have commenced actions in another jurisdiction cross Canada. Mr. Sterns indicated at the hearing that if the Sotos Team is awarded carriage of this case, it will enter negotiations with those other firms and attempt to strike an agreement with them.

30 What the Sotos Team has given, and the Strosberg Consortium has refused to give, is an undertaking to the Defendants that it will not pursue similar cases against these Defendants in any other jurisdiction but Ontario. The Defendants contend that this undertaking represents a means of containing the multijurisdictional nature of the litigation, and they commend Sotos for having agreed to this initiative. They are of the view that the refusal of the members of the Strosberg Consortium to provide a similar undertaking should count against them in the carriage contest. Needless to say, the Sotos Team concurs with the Defendants in this regard.

31 The idea of this type of undertaking was endorsed by Chief Justice Strathy in *Barrick Gold*, *supra*, at para 73, as being a mechanism that ensures fairness to the Defendants. In that case, which entailed allegations of misrepresentations in public filings by a publicly traded company, the two law firms contending for carriage had between them started the only actions in Canada. Unlike in the present situation, there were no parallel actions in other jurisdictions to deal with. Under those circumstances, Strathy CJO, at para 74, described the undertaking to refrain from commencing actions in other provinces as "an innovative and practical solution to the problem of overlapping or duplicative class actions."

32 When it comes to evaluating practical solutions, context is everything. The record here indicates that there are more than the two counsel groups before me bringing claims against the same group of Defendants. Although Strosberg and Sotos are the only ones with actions on behalf of the putative class in Ontario, the Merchant Law Group ("Merchant") has commenced parallel actions in several provinces in western Canada. Merchant is not a member of either the Strosberg Consortium or the Sotos Team.

33 I gather that the Merchant actions are framed regionally and do not aspire to become national class actions. They have been characterized as predatory in the sense that they are designed to extract a piece of the national action ultimately carried by others.

34 The existence of actions by unrelated counsel in other jurisdictions is, of course, a burden to the Defendants as it requires them to duplicate the steps they take in defending their position. At the same time, the parallel actions are a nuisance to counsel for the Plaintiff in a national class action in that they compete for class members and may thus restrict overall recovery. Nevertheless, the parallel actions in western Canada exist and the Merchant claims cannot be ignored.

35 As already indicated, the only action commenced by the Sotos Team is the Breckon Action in Ontario. The Strosberg firm commenced the David Action in Ontario, and members of the Strosberg Consortium have commenced actions in Quebec, three western provinces, and the Federal Court. As Strosberg explains it, the actions in Quebec, Manitoba, and the Federal Court were all commenced independently by the respective counsel in each of those jurisdictions, and were then brought into the Strosberg Consortium one at a time as the Consortium Agreement was negotiated across the country. In other words, Strosberg did not commence the parallel actions strategically with a view to simply "staking a claim", as Perell J. has described the practice: *Valeant Pharmaceuticals*, *supra*, at para 92.

36 Strosberg did commence two of the western Canada actions — the Alberta and British Columbia actions — in a specific effort to occupy the field in those jurisdictions. The idea was to have a stake in those jurisdictions where Merchant was likely to file so that the actions there could be coordinated with the proposed national class action in Ontario. In my view, there is nothing wrong or overly aggressive in that approach; indeed, Perell J. has pointed out that,

"... it is acceptable that there be actions brought by the same counsel in Ontario and British Columbia (and by other counsel in Quebec) and the court's case management jurisdiction could be exercised to make appropriate directions to avoid unnecessary duplication and to ensure that the actions proceed efficiently": *Ibid.*, at para 267.

37 The Strosberg approach to the multijurisdictional problem is to accomplish in advance what the Sotos Team says that it will eventually do if it is awarded carriage. That is, in forming the Strosberg Consortium it has negotiated with counsel for the other existing actions. Mr. Sterns has likewise indicated that the counsel in other jurisdictions will "get a call" if the Sotos Team has carriage, as they will be anxious to negotiate a coordinated strategy.

38 In the meantime, the undertaking requested by the Defendants and given by Sotos has prevented Sotos from being proactive in other jurisdictions. Accordingly, the Sotos Team has been hamstrung in a way that the Strosberg Consortium has not been. While the undertaking may be an innovative, practical solution in some contexts, it is an impediment to a solution in others.

39 An undertaking such as that given in *Barrick Gold*, where all of the law firms involved in the matter give the same undertaking, is potentially helpful as it puts a halt to the competition arising out of filings in multiple jurisdictions. By contrast, in the present situation, where Merchant is not part of the conversation and will not be bound by any of the undertakings requested by the Defendants, the undertaking only serves to augment the problem of multijurisdictional filings. The firm that gives this kind of undertaking cannot compete with Merchant in other provinces, whereas the firm that does not give the undertaking can compete and help ensure the uniformity of actions across the country.

40 It is curious to me that the Defendants prefer the Sotos Team, with their undertaking but otherwise passive approach to the other jurisdictions, to the Strosberg Consortium, with their proactive efforts to head off a multiplicity of actions in other jurisdictions. Counsel for the non-Loblaw related Defendants submits that the Defendants want to encourage the undertaking as a mechanism that should in an optimal world be given by all class counsel in every case. They state that they are as concerned about the development of the law in this field as they are about this particular case.

41 I take Defendants' counsel at their word, but the embrace of a mechanism that is unlikely to aid their clients here is an unusual approach. A more cynical person might think that the Defendants simply prefer the more passive of the two competing class counsel groups over the more proactive group.

42 I am convinced that the problem of multijurisdictional filings is more likely to be handled efficiently by the Strosberg Consortium. They already bring in counsel from most of the parallel actions across Canada, and have started actions in the western provinces where the Merchant cases constitute a competitive presence.

43 The Sotos Team, by contrast, is only Ontario-based and has taken a wait-and-see position with respect to the rest of the country. The Strosberg approach seems to me to be not only in the best interest of the potential national class, but — much as they don't want to admit it — fairer to the Defendants as well.

c) The umbrella purchasers' claim

44 Sotos has included in the Breckon Action the claims of so-called "umbrella purchasers" of packaged bread — i.e. purchasers who did not purchase directly or indirectly from the [Defendants] but rather who purchased indirectly from upstream non-defendants" and who allegedly incurred higher prices than otherwise due to the market effects of the Defendants' price fixing: *Gainer v. Vos*, 2015 ONSC 2586 (Ont. S.C.J.), at para 17. Strosberg has not included umbrella purchaser claims in its David Action. Each says the other's strategic choice in this regard is a problem for its leadership of the class action.

45 The case law is mixed as to whether umbrella purchasers have a cause of action against allegedly conspiring Defendants under the *Competition Act* or otherwise. Courts in the United States have gone both ways, with some federal circuit courts rejecting any cause of action for umbrella purchasers, see *Mid-west Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (U.S. C.A. 3rd Cir. 1979); *Coordinated Pretrial Proceedings in Petroleum Products Antitrust*

Litigation, Re, 691 F.2d 1335 (U.S. C.A. 9th Cir. 1982), and some federal circuits accepting that they do have a cause of action: see *Beef Industry Antitrust Litigation, Re*, 600 F.2d 1148 (U.S. C.A. 5th Cir. 1979), cert. denied [*Holloway v. State of Florida*] 449 U.S. 905 (U.S. Sup. Ct.); and *Arizona Dairy Products Litigation, Re*, 627 F. Supp. 233 (U.S. Dist. Ct. D. Ariz. 1985).

46 In Canada, the British Columbia Supreme Court has said that umbrella purchasers have a claim and can be included in the class, *Godfrey v. Sony Corporation*, 2017 BCCA 302 (B.C. C.A.), at para 247, while the Ontario Divisional Court has said that they do not have a claim and should be excluded: *Shah, supra*, at para 53. Both sets of counsel concede that the Ontario Court of Appeal has yet to rule on the subject, and it is considered to still be in a state of flux.

47 Mr. Wingfield, on behalf of the Strosberg Consortium, submits that the fact that the Breckon Action includes umbrella purchasers is a problematic distraction that will threaten to derail that case when it is inevitably challenged by the Defendants. Mr. Wright, on behalf of the Sotos Team, submits that the fact that the David Action does not include umbrella purchasers is problematic and will cause a distracting obstacle when class counsel inevitably try to add them to the class later.

48 Both of these arguments are potentially correct, depending on how the law develops in this area. If umbrella purchasers are eventually confirmed by the Ontario Court of Appeal as having a valid claim, Sotos will have guessed right; and if umbrella purchasers are eventually confirmed as excluded from any claim by the Ontario Court of Appeal, Strosberg will have guessed right. At the moment, however, it seems to be anybody's guess as to which direction the law will take.

49 Indeed, these alternative directions are so evenly weighted that it is difficult to see one approach being today preferable to the other. Each has its up side and down side. An approach which includes the umbrella purchaser claims can be said to be a better or worse strategy than one that excludes them. Although the debate is a legally interesting one, the choice does not represent an important factor in assessing the carriage issue. Each set of counsel here has made a decision informed by the law; it is neither side's fault that the law could in the future go either way.

50 Accordingly, I regard the inclusion or exclusion of umbrella purchasers in the class as a neutral factor. It does not favour either Strosberg or Sotos.

d) Allegations of conflict

51 Mr. Akman, on behalf of Loblaw and its related Defendants raises two distinct issues of conflict of interest, both levelled at the Strosberg Consortium.

52 The first of the allegations is that a member of Mr. Orr's law firm, who are counsel to the plaintiff in the Federal Court action, represented a former employee of Loblaw's. Mr. Akman apparently wrote to Mr. Orr about this and indicated that it was improper for the firm to continue to act in this matter without some resolution of this alleged conflict of interest.

53 Mr. Orr advised the court that in response he wrote a strongly worded letter explaining the situation, and has filed an affidavit repeating this explanation for the court's benefit. Mr. Orr explains that a member of his firm had 1.4 hours of docketed time with respect to a meeting with a former employee of Loblaw who sought advice on a matter unrelated to the packaged bread price fixing claim. Mr. Orr submits that this is not a conflict as the matter was not connected to any issues contained in the present class action. He points out that in any case the former employee was, like the plaintiff in the Federal Court action that Mr. Orr's firm represents, adverse to Loblaw.

54 I agree with Mr. Orr that this allegation is a tempest in a teapot. There is nothing wrong with a law firm representing two different people who are adversaries of the same party in unrelated matters. Indeed, when I heard the explanation I was somewhat surprised that the allegation of conflict was even made. Mr. Akman then advised that in his letter, Mr.

Orr had indicated that the law firm had arranged it so that the lawyer in question would in any case have nothing to do with the class action file, and that this assurance satisfied Mr. Akman's concerns.

55 I was pleased to hear that the concerns expressed about a firm involved in this case have been addressed to the satisfaction of the party that raised them. However, learning that the matter had been addressed and resolved before anyone got to court made me even more surprised that the matter had been raised before me at all. I frankly do not understand what it was meant to accomplish.

56 The second allegation of conflict was pursued with more vigour by Mr. Akman. He states that for a number of years Mr. Wingfield held the position of executive director of the Competition Bureau Legal Services, and that he was in that position at the time that the Competition Bureau investigated the merger of Loblaw with Shoppers Drug Mart. Mr. Akman submits that although the Loblaw-Shoppers transaction was unrelated to the present price fixing issue, that investigation by the Bureau must have contained a great deal of financial information about Loblaw. As Loblaw's counsel, he contends that this inside knowledge created a conflict of interest not just for Mr. Wingfield but for the entire Strosberg Consortium.

57 Mr. Wingfield indicated in response that he had written to Mr. Akman denying the suggestion of any conflict, and that he was surprised that the matter was still being raised. He explained that his position at the Competition Bureau was an administrative one, not a legal supervisory one, and that he had nothing whatsoever to do with the Loblaw-Shoppers file. Indeed, he indicated that his own previous law firm, Weir and Foulds, had acted for Shoppers and so he made a point of staying away from the file.

58 More to the point, Mr. Wingfield noted that an administrative position in a public sector department or institution is not equivalent to a partner in a law firm. That is, the administrator is not liable for the acts of the other staff in the department, and is not deemed to have the knowledge of the other staff the way one partner of a firm is deemed to be liable for and have knowledge of what the other partners are working on. This point about public sector management was acknowledged by the Supreme Court of Canada in *Roberts v. R.*, [2003] 2 S.C.R. 259 (S.C.C.). The Court confirmed, at para 79, that Justice Binnie's "past status as Associate Deputy Minister [of Justice] is by itself insufficient to justify his disqualification" from cases of which he had no personal knowledge but that were worked on by the Department of Justice during his term in that office.

59 Given this state of the law as it applies to public sector positions, Mr. Wingfield's explanation of his former position with the Competition Bureau should have sufficed to put this allegation to rest. There is no substance to the conflict of interest complaint.

III. Disposition

60 Carriage of the class action in Ontario is hereby awarded to the Strosberg Consortium.

61 The Breckon Action is stayed. No other class action may be commenced in Ontario against the Defendants, or any other entities, in respect of the facts pleaded in the David Action without leave of the court.

62 By agreement of the parties, there is no award of costs.

Motion granted.

TAB 2

2010 ONSC 1328

Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 1344, 2010 ONSC 1328, [2010] O.J. No. 943, 185 A.C.W.S. (3d) 865, 65 C.B.R. (5th) 152

**IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED**

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF CANWEST PUBLISHING INC. / PUBLICATIONS
CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: March 5, 2010

Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb for Canwest LP Entities

Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

Hilary Clarke for Bank of Nova Scotia, Administrative Agent for Senior Secured Lenders' Syndicate

Janice Payne, Thomas McRae for Canwest Salaried Employees and Retirees (CSER) Group

M.A. Church for Communications, Energy and Paperworkers' Union

Anthony F. Dale for CAW-Canada

Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

In January 2010 LP Entities obtained order pursuant to Companies' Creditors Arrangement Act staying all proceedings and claims against them — Order permitted, but did not require, payments to employees and pension plans — There were approximately 45 non-unionized employees who were still owed termination and severance payments, as well as accrual of pensionable service — There were further nine employees who were, or would be, entitled pursuant to executive pension plan to pension benefits in excess of those under main pension plan — Moving parties sought order permitting them to represent those employees, for appointment of counsel, and for funding of counsel — Respondents did not object to appointment representatives or counsel, but opposed funding of counsel — Motion granted — All four proposed representatives had claims against LP Entities that were representative of claims that would be advanced by former employees — Individuals at issue were unsecured creditors whose recovery expectations might be non-existent, however they found themselves facing legal proceedings of significant complexity — Evidence was that members of group had little means to pursue representation and were unable to afford proper legal representation at this time — Employees were vulnerable group and there was no other counsel available to represent their interests — Canadian courts did not typically appoint unsecured creditors committees — It would be of considerable benefit to have representatives and representative counsel who could represent interests of salaried employees and retirees — There were three possible sources of funding: LP Entities, Monitors, or senior secured lenders — Court had power to compel senior secured lenders to fund or alternatively to compel LP Administrative Agent to consent to funding — Source of funding other than salaried employees themselves should be identified now — Funding would be prospective in nature and would not extend to investigation of or claims against directors — Counsel were directed to communicate with one another to ascertain how best to structure funding and report back to court by certain date.

Table of Authorities

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

MOTION by group of employees for funding for appointment of representatives, appointment of counsel, and funding of counsel.

Pepall J.:

Reasons for Decision

Relief Requested

1 Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried employees or retirees including beneficiaries and surviving spouses ("the Salaried Employees and Retirees"). They also seek an order that Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.

2 On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker's Union of Canada ("CEP") to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested participants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

3 On January 8, 2010 the LP Entities obtained an order pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") staying all proceedings and claims against the LP Entities. The order permits but does not require the LP Entities to make payments to employee and retirement benefit plans.

4 There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

5 Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned

under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the *Income Tax Act*. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately \$14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.

6 Since January 8, 2010, the LP Entities have been pursuing the sale and investor solicitation process ("SISP") contemplated by the Initial Order. Throughout the course of the CCAA proceedings, the LP Entities have continued to pay:

- (a) salaries, commissions, bonuses and outstanding employee expenses;
- (b) current services and special payments in respect of the active registered pension plan; and
- (c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the LP Entities.

7 The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders, AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA proceeding. This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.

8 All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations. In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

9 No issue is taken with the proposed Representatives nor with the experience and competence of the proposed law firms, namely Nelligan O'Brien Payne LLP and Shibley Righton LLP, both of whom have jointly acted as court appointed representatives for continuing employees in the Nortel Networks Limited case.

10 Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

The LP Entities shall not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee.

11 The LP Administrative Agent does not consent to the funding request at this time.

12 On October 6, 2009, the CMI Entities applied for protection pursuant to the provisions of the CCAA. In that restructuring, the CMI Entities themselves moved to appoint and fund a law firm as representative counsel for former employees and retirees. That order was granted.

13 Counsel were urged by me to ascertain whether there was any possibility of resolving this issue. Some time was spent attempting to do so, however, I was subsequently advised that those efforts were unsuccessful.

Issues

14 The issues on this motion are as follows:

(1) Should the Representatives be appointed?

(2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?

(3) If so, should the request for funding be granted?

Positions of Parties

15 In brief, the moving parties submit that representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding; there is a social benefit to be derived from assisting vulnerable creditors; and a benefit would be provided to the overall CCAA process by introducing efficiency for all parties involved. The moving parties submit that all of these principles have been met in this case.

16 The LP Entities oppose the relief requested on the grounds that it is premature. The amounts outstanding to the representative group are prefiling unsecured obligations. Unless a superior offer is received in the SISP that is currently underway, the LP Entities will implement a support transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As such, there is no current need to carry out a claims process. Although a superior offer may materialize in the SISP, the outcome of the SISP is currently unknown.

17 Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not authorize any such payment.

18 The LP Senior Lenders support the position of the LP Entities.

19 In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

20 No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

21 Factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;

- 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
- the position of other stakeholders and the Monitor.

22 The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

23 The primary objection to the relief requested is prematurity. This is reflected in correspondence sent by counsel for the LP Entities to counsel for the Senior Lenders' Administrative Agent. Those opposing the relief requested submit that the moving parties can keep an eye on the Monitor's website and depend on notice to be given by the Monitor in the event that unsecured creditors have any entitlement. Counsel for the LP Entities submitted that counsel for the proposed representatives should reapply to court at the appropriate time and that I should dismiss the motion without prejudice to the moving parties to bring it back on.

24 In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

25 The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.

26 I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31 (i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.

27 In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here are somewhat different. Staged payments commencing with the sum of \$25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.

28 Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to make the structuring order on March 22, 2010 on a nunc pro tunc basis. Ottawa counsel may participate by telephone but should alert the Commercial List Office of their proposed mode of participation.

Motion granted.

TAB 3

2009 CarswellOnt 6169
Ontario Superior Court of Justice [Commercial List]

Fraser Papers Inc., Re

2009 CarswellOnt 6169, [2009] O.J. No. 4287, 181 A.C.W.S. (3d) 256

**IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, C-36. AS AMENDED**

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT
TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER
LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

Pepall J.

Judgment: September 17, 2009
Docket: CV-09-8241-OOCL

Counsel: M. Barrack, D.J. Miller for Applicants

R. Chadwick, C. Costa for Monitor

D. Wray, J. Kugler for Communications, Energy and Paper Workers Union of Canada

D. Wray, J. Kugler (Agent) for Pink Larkin

C. Sinclair for United Steelworkers

T. McRae, S. Levitt for Steering Committee of Fraser Papers' Salaried Retirees Committee

M.P. Gottlieb, S. Campbell for Committee for Salaried Employees and Retirees

M. Sims for Her Majesty the Queen in Right of the Province of New Brunswick as represented by the Minister of Business
of New Brunswick

Chriss Burr for CIT Business Credit Canada Inc.

D. Chernos for Brookfield Asset Management Inc.

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Table of Authorities

Cases considered by Pepall J.:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J.
[Commercial List]) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R.
(4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally — referred to

Chapter 15 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — referred to

Employee Retirement Income Security Act, 1974, 29 U.S.C.

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

Pepall J.:

Relief Requested

1 There are four motions before me that request the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of the Applicants ("Fraser Papers"). With the exception of the motion of the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (the "USW"), all motions include a request that Fraser Papers pay the fees and disbursements of representative counsel.

2 The motions are brought by the following moving parties:

(a) the USW who seeks to represent its former members. It already represents its current members.

(b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.

(c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.

(d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.

3 A third union, the CMAW, did not bring a motion but Mr. Wray, counsel for the CEP, acted as agent for CMAW's counsel, Pink Larkin on these motions. He advised that the CMAW will represent its current members but not its retirees who are approximately 25 in number.¹ These retirees therefore would only be encompassed by the Davies proposed retainer.

Discussion

4 The Applicants employ approximately 2,500 personnel. They are located in Canada and the U.S. A substantial majority is unionized. Of the 2,500, 1,729 employees participate in five defined benefit pension plans. In addition, 3,246 retirees receive benefits from these plans. Fraser Papers maintains certain other plans and benefits including supplementary employee retirement programmes ("SERPs").

5 On June 18, 2009, the Applicants obtained an Initial Order pursuant to the provisions of the *CCAA*. On July 13, 2009, the U.S. Bankruptcy Court for the District of Delaware designated these proceedings as foreign main proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code.

6 Fraser Papers is insolvent and is under significant financial pressure. Absent the DIP financing, a restructuring would be impossible. The Applicants have not generated positive cash flow from operations for three years. Their largest unsecured claims relate to the pension plans and the SERPs. Their accrued pension benefit obligations in these plans and the SERPs exceed the value of the plan assets by approximately USD \$171.5 million as at December 31, 2008.

7 Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. 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. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(A) USW and CEP Motions

8 Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin- Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* ("ERISA")². The evidence filed by the USW suggests that a labour organization that negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

9 In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.

10 Although CEP plays no role in Fraser Papers' U.S. operations, with that exception, for similar reasons and in the interests of consistency, the CEP should be appointed as the representative for its former members who are retirees subject to the aforementioned opt out provision. The Monitor and the Applicants are supportive of this position. Counsel for the CEP indicated that while it is unclear as a matter of law that the union is bound to represent former members in circumstances such as those facing Fraser Papers, the CEP would represent them with or without funding. Given Fraser Papers' insolvency, it seems to me that funding by the Applicants should only be provided for the benefit of those who otherwise would have no legal representation. The request for funding by CEP is refused.

(b) Nelligan/Shibley and Davies

11 Turning to the requests of the Steering Committee of Fraser Papers Salaried Retirees Committee which favours the appointment of Nelligan/Shibley and the Committee for Salaried Employees and Retirees which favours Davies, firstly commonality of interest should be considered. In *Nortel Networks Corp., Re*³, Morawetz J. applied the Court of Appeal's decision in *Stelco Inc., Re*⁴ and the decision of *Canadian Airlines Corp., Re*⁵ to enumerate the following principles applicable to an assessment of commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.

4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.

5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

12 Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: 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.

13 Davies is proposing to represent all unrepresented employees, former employees and their successors. In my view, there is a commonality of interest amongst the members of this group. In essence, they engage unsecured obligations. Arguably those proposed to be represented by the unions could also be included, and indeed absent a change of position by the CMAW, former members of the CMAW will be. That said, for the reasons outlined above, I am satisfied in this case that it is desirable to have the unions act for their members and former members if so willing. Indeed, no one took an opposing position.

14 I am not persuaded that there is a need for separate representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only Davies avoids excessive fragmentation and duplication and minimizes costs. In addition, no one will be excluded unless he or she so desires. Davies is also the only counsel whose retainer would extend to the CMAW retirees.

15 Davies has already received a broad mandate in that it has close to 700 retainers from employees in each facet of Fraser Papers' operations and from all current and former employee groups. It has the necessary legal expertise and has offices in Toronto, Montreal and New York. It also has the necessary language capability.

16 In contrast, Nelligan/Shibley is only proposing to represent retirees. It has a mandate of approximately 211 retirees. Clearly it has the requisite legal and language expertise but does not have the benefit associated with having offices in as many relevant jurisdictions. One may reasonably conclude from the evidence before me that the proposed fee structure would be less than that advanced by Davies although the scope of the retainer is more limited. Davies' appointment is not diminished because initially they were identified by the Applicants as appropriate counsel unlike Nelligan/Shibley whose group grew organically to use its counsel's terminology. Nor am I persuaded that Davies will be enfeebled as a result of the composition of the Steering Committee or due to past unrelated retainers by Brookfield Asset Management Inc. The Monitor supports the appointment of Davies as do the Applicants and the DIP lenders.

17 In the event that a real as opposed to a hypothetical or speculative conflict arises at some point in the future, parties may seek directions from the Court. As with the unions, the order appointing Davies will allow anyone to opt out of the representation.

18 Unlike the unions, absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding is ordered to be provided by Fraser Papers. Again, the funding request is supported by the Monitor, the Applicants and the DIP lenders.

19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the

insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

Summary

20 In summary, the USW, CEP and Davies representation requests are granted. Only the Davies funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

Footnotes

- 1 This is contrary to the contents of paragraph 24 of the Monitor's 4th Report but, being more recent, I accept counsel's oral representation as being accurate.
- 2 29 U.S.C.
- 3 (Ont. S.C.J. [Commercial List]).
- 4 (2005), 15 C.B.R. (5th) 307 (Ont. C.A.)
- 5 (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

TAB 4

2013 BCSC 2043
British Columbia Supreme Court

League Assets Corp., Re

2013 CarswellBC 3408, 2013 BCSC 2043, [2013] B.C.W.L.D. 9463,
[2013] B.C.W.L.D. 9464, 234 A.C.W.S. (3d) 837, 7 C.B.R. (6th) 74

**In the Matter of the Companies' Creditors
Arrangement Act, R.S.C., 1985, c. C-36, As Amended**

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, As Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, As Amended

In the Matter of A Plan of Compromise and Arrangement of League
Assets Corp. and Those Parties Listed on Schedule "A" Petitioners

Fitzpatrick J.

Heard: October 25, 2013
Judgment: November 8, 2013
Docket: Vancouver S137743

Counsel: D.E. Gruber, T.M. Tomchak, R. Morse, T.C. Louman-Gardiner for Petitioners
J.R. Sandrelli, T.R.M. Jeffries for PricewaterhouseCoopers Inc. as Monitor
C.D. Brousson for Quest Mortgage Corp., Quest Capital Management Corp.
K.E. Siddall for BCMP Mortgage Investment Corporation and Interior Savings Credit Union
Geoffrey Thompson, R.B. Dawkins for TCC Mortgage Holdings Inc. FCC Mortgage Associates Inc., Citizens Bank of
Canada, First Calgary Financial Credit Union Limited, Firm Capital Mortgage Fund Inc.
A. Frydenlund for Canadian Western Bank
S.H. Stephens for Romspen Investment Corporation
D.B. Hyndman for Business Development Bank of Canada
William C. Kaplan, Q.C., H. Sevenoaks, for Timbercreek Mortgage Investment Corporation
W.E.J. Skelly for Ad Hoc Committee of Convertible Promissory Noteholders of League Opportunity Fund Ltd.
H. Ferris for Export Development Canada, Bank of Montreal and Churchill Real Estate Inc.
G.J. Gehlen for Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (Proposed DIP
Lenders)
P.J. Reardon for Maxium Financial Services
D.K. Fitzpatrick for Roynat Inc.
J. Grieve for Proposed Representative / Investors

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court —
Miscellaneous

League Group obtained protection under Companies' Creditors Arrangement Act and initial order was granted —
Majority of League Group entities were owned by IGW Assets Limited Partnership — League Group sought approval of
debtor in possession (DIP) facility from DIP Lenders for operating funding, payment of tax arrears, mortgage payments
and to payout existing mortgage lenders — League Group brought application for DIP financing claiming it urgently
needed interim funding until comeback hearing — Notice of application for DIP financing was given to secured creditors

and secured creditors objected — Proposed DIP lender's charge was to rank after administration charge but before director's charge and any representative counsel charge — Most of assets owned by League Group were complex real estate holdings — Application for DIP facility granted to extent of \$1.6 million needed to time of comeback hearing — DIP financing sought on application was urgently needed in order to fund operations within proceedings until comeback hearing — Funding would enhance prospects of arrangement by League Group to creditors — Nature of assets of League Group was such that even if secured creditors were to take steps to realize on their security, they would inevitably be incurring some of same types of expenses as were being proposed to be paid in accordance with cash flow forecast — Secured creditors would suffer some prejudice in terms of delay in realization of their security in event of failure to restructure by League Group — Beyond that there was no material prejudice to secured creditors given debt levels disclosed — Allocation provision proposed would alleviate many of secured creditors' concerns as to how DIP lender's charge might be borne.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Appointment of representative counsel — League Group obtained protection under Companies' Creditors Arrangement Act and initial order was granted — Majority of League Group entities were owned by IGW Assets Limited Partnership — League Group sought approval of debtor in possession (DIP) facility from DIP Lenders for operating funding, payment of tax arrears, mortgage payments and to payout existing mortgage lenders — League Group brought application for DIP financing claiming it urgently needed interim funding until comeback hearing — Notice of application for DIP financing was given to secured creditors and secured creditors objected — Proposed DIP lender's charge was to rank after administration charge but before director's charge and any representative counsel charge — Most of assets owned by League Group were complex real estate holdings — Monitor brought application to appoint representative counsel for investor group — Monitor's application granted — Appointment of representative counsel was appropriate — Monitor was not able to assist any further in alerting investors to proceedings, organizing investor group and advising them of issues that may affect them either as group or individually — Investor group was significant one and it was important that they be properly represented so they could take appropriate positions in insolvency proceedings — It was somewhat imperative that investors obtain legal representation in respect of comeback hearing — Investor group had sufficient commonality of interest that could best be served by one counsel — Appointment of representative counsel would allow their positions to be advanced in efficient manner to benefit of stakeholders.

Table of Authorities

Cases considered by Fitzpatrick J.:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 9398 (Ont. S.C.J. [Commercial List]) — considered

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — referred to

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — followed

Catalyst Paper Corp., Re (2012), 2012 CarswellBC 883, 2012 BCSC 451, 89 C.B.R. (5th) 292, 98 C.C.P.B. 1, 2012 C.E.B. & P.G.R. 8481 (B.C. S.C.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — followed

Eron Mortgage Corp., Re (1998), 56 B.C.L.R. (3d) 220, [1999] 4 W.W.R. 375, 1998 CarswellBC 1851 (B.C. S.C.) — referred to

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — considered

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — considered

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — considered

TBS Acquireco Inc., Re (2013), 3 C.B.R. (6th) 261, 2013 CarswellOnt 9481, 2013 ONSC 4663 (Ont. S.C.J. [Commercial List]) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 1466, 2012 ONSC 948, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 (Ont. S.C.J. [Commercial List]) — followed

Timminco Ltd., Re (2012), 2 C.B.R. (6th) 332, 2012 CarswellOnt 9633, 2012 ONCA 552 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2 "debtor company" — considered

s. 3 — considered

s. 11 — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.52(1)(c) [en. 2007, c. 36, s. 66] — considered

s. 11.52(2) [en. 2007, c. 36, s. 66] — considered

APPLICATION by group of companies for debtor in possession financing; APPLICATION by monitor for appointment of representative counsel for investor group.

Fitzpatrick J.:

Introduction

1 This proceeding was recently commenced, on October 17, 2013, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). On October 18, 2013, an Initial Order (the "Initial Order") was granted by Madam Justice Brown of this court. That Initial Order included an Administration Charge of \$750,000 and a Directors' Charge of \$500,000. PricewaterhouseCoopers Inc. was appointed as Monitor (the "Monitor").

2 The organization of the petitioner group of companies (the "League Group") is exceedingly complex, as I will describe in more detail below. In broad terms, there is a complicated corporate structure comprised of real estate investment

trusts, limited partnerships and corporations involved in the development and/or management of various real estate projects in British Columbia, Alberta, Ontario and Quebec. The assets of the League Group include certain securities and income producing and development properties which have been said to have an "implied" equity of over \$210 million. Liabilities of the League Group are in excess of \$410 million, including claims from approximately 3,200 investors who paid approximately \$352 million for various interests.

3 The comeback hearing has been scheduled for November 18, 2013. Following the granting of the Initial Order, various secured creditors on individual projects have consolidated their opposition to these proceedings. It is expected that they will raise substantial issues at the comeback hearing.

4 In the meantime, the League Group has brought this application for debtor in possession or "DIP" financing, given its contention that it urgently needs interim funding until the comeback hearing. The Monitor has also brought an application to appoint representative counsel for the investor group.

5 On October 25, 2013, I heard both applications and granted both orders, although on somewhat different terms than those sought. I indicated at that time that my reasons would follow. These are those reasons.

Background

6 Emanuel Arruda and Adam Gant started the League Group in 2005 with two projects. Further properties were acquired on the same basis as before, namely using traditional bank financing and individual investor contributions.

7 At present, the majority of the League Group entities are owned by IGW Assets Limited Partnership ("LALP"). The general partner of this limited partnership is owned by two numbered companies, which are owned or controlled by Mr. Arruda and Mr. Gant's family trusts respectively.

8 The League Group, which has sought and obtained protection under the *CCAA* and related entities, and their general business activities can be generally summarized as follows:

a) IGW Real Estate Investment Trust ("IGW REIT"): IGW REIT does business mainly through the IGW REIT Limited Partnership ("IGW LP") which undertakes certain project development directly or through separate limited partnerships located in B.C., Alberta, Quebec and Ontario. IGW REIT has issued various notes totalling approximately \$10 million. In addition, there are numerous unsecured loans outstanding and outstanding mortgages in respect of various projects;

b) LALP project specific limited partnerships: LALP also operates another set of such limited partnerships designed for short term investments, located in B.C., Alberta and Ontario. Each project general partner is owned by LALP with investors buying units in the limited partnership. Some of the project entities are said to be solvent and not financially tied to the filing petitioners (such as through guarantees) and are therefore not filing parties themselves;

c) League Assets Corp. ("LAC"): LAC owns various general partners of a number of limited partnerships which are involved in various projects, the main ones being Redux Duncan, Colwood Development and Fort St. John, all located in B.C. There are other entities owned by LAC with diverse, but it seems mostly inactive, operations. As with LALP, a number of LAC related entities (and hence projects) are said to be solvent and not financially tied to the filing petitioners. They are therefore not filing parties themselves;

d) "Other" project limited partnerships: these have a similar structure to that of LAC and LALP, save that Mr. Gant and Mr. Arruda own the general partners for the project specific limited partnerships in B.C., Quebec and Ontario. This is said to be an oversight and in any event, these "other" limited partnerships are managed within the League Group, with LAC providing management services for these projects;

e) League Opportunity Fund ("LOF"): LOF is wholly owned by LALP. It is a vehicle for investors and it has issued promissory notes of approximately \$13.5 million. The money was loaned by LOF to other members of the League Group. IGW LP (majority owned by IGW REIT) and LAC have guaranteed these notes;

f) investment and wealth management: there are a number of entities within the League Group's investment division which relate to investment and wealth management, including the Harris Fraser Group Limited which was recently acquired in July 2013; and

g) asset management: LAC is retained by IGW REIT, IGW LP and various project limited partnerships to provide asset management, for which it charges fees.

9 The causes of the League Group's financial difficulties have been attributed to a number of factors. Firstly, the 2008 worldwide financial crisis caused a number of delays to certain projects; reduced demand resulted in increased borrowing costs in the long term. Secondly, the recovery from the financial downturn has resulted in many investors seeking to redeem their investments with the League Group to look for higher risk/higher return investments. Thirdly, financing difficulties have been experienced on some projects, such as Redux Duncan and Colwood Development. Generally speaking, Mr. Gant states that the League Group has outgrown both its current corporate structure, which is too complex, and also its project by project funding model.

10 The League Group currently has approximately 105 employees in various roles in Victoria, Vancouver, Toronto and Calgary. The fairly recent acquisition of the Harris Group is adding a further 20 employees in Hong Kong.

11 There has been substantial evidence introduced in Mr. Gant's affidavits regarding the value of the various assets and projects and the secured debt against them. Aside from some Marketable Securities, there are 17 income producing properties and four development properties, for a total of 21 properties.

12 There are 34 mortgage lenders and some have charges on multiple properties. Exhibit "E" to Mr. Gant's affidavit #2 sets out a summary of the various properties or projects, including the appraised values (\$395.6 million), the outstanding mortgage debt (\$184.6 million) and the "implied equity" in those properties or projects. I will revisit the reliability of this document in further detail below, but it will suffice at this stage to refer to the indicated "implied equity" in the Marketable Securities (\$5.8 million), Income Producing Properties (\$76.2 million) and Development Properties (\$128.9), for a total of approximately \$211 million.

13 Unsecured creditors include the note holders in the various project limited partnerships and IGW REIT, inter-corporate debt primarily between IGW LP and other members of the League Group, trade creditors (mostly relating to Colwood Development) and professional service firms (although some of them recently obtained security for their debts just before the filing).

14 Mr. Gant indicates that government remittances are substantially up to date, including those owed to Canada Revenue Agency and the British Columbia government. Income taxes are paid in full for 2012. All of these amounts continue to be paid in the ordinary course of business. However, property taxes are substantially in arrears.

15 Finally, the investor group is comprised mostly of individuals and Mr. Gant believes that some of them have invested a significant portion of their net worth in the League Group. There are also some institutional investors. As of September 2013, IGW REIT ceased making distributions to its investors.

16 Mr. Gant states that the League Group has already taken steps to attempt a restructuring but has been hampered by the lack of funds. He states that any restructuring would likely involve: simplifying the corporate structure, divesting underperforming projects, seeking a stable and comprehensive funding for the various projects, changing the IGW loan process and finally, a potential public offering to increase equity and reduce credit requirements.

Secured Creditor's Objections

17 It quickly became apparent during this hearing that a substantial number of the secured creditors were opposed to these proceedings generally and also specifically opposed to the relief sought on these applications. The secured creditors appearing on these applications included BCMP Mortgage Investment Corporation, Interior Savings Credit Union, Firm Capital Mortgage Fund Inc., Citizens Bank of Canada, First Calgary Financial Credit Union Limited, Canadian Western Bank, Romspen Investment Corporation, Business Development Bank of Canada, Timbercreek Mortgage Investment Corporation, Export Development Canada, Bank of Montreal, Churchill Real Estate Inc., Maxium Financial Services and Roynat Inc.

18 I will not address the complaints or arguments of each individual secured creditor. Many of the arguments are interrelated. Those arguments can be generally summarized in the broad categories as follows:

a) Service/notice: despite the preamble to the Initial Order stating that the court was advised "that the secured creditors and others who are likely to be affected by the charges created herein were given notice", many of the secured creditors state that they did not receive any notice of that hearing or that notice was sent directly to the general offices of the secured creditors which inevitably meant that it was not addressed by them after the hearing had taken place.

No evidence was before me concerning service/notice to the secured creditors. It is apparent that many of the secured creditors intend to argue at the comeback hearing that the Initial Order was granted on an *ex parte* basis and is therefore subject to being set aside for material non-disclosure, including that there was no true urgency in hearing the matter on an *ex parte* basis. It is now generally agreed that the comeback hearing will be heard on a *de novo* basis with the League Group having the onus of justifying to the court the continuation of the provisions in the Initial Order in accordance with the *CCAA*, s. 11.02(3).

b) Statutory Prerequisites: it is argued that individual entities within the League Group do not meet the definition of "debtor company" in s. 2 of the *CCAA* (i.e. they are not "insolvent") and therefore, those entities do not qualify to file for protection under s. 3. I note, however, that this particular issue was addressed before Brown J. prior to the granting of the Initial Order.

In addition, at least one secured creditor intends to argue that the Initial Order should be set aside because the plan of arrangement was doomed to fail (see for example, *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, [1990] B.C.J. No. 2384 (B.C. C.A.));

c) The Enforcing Mortgagees: The secured creditors argue that there was no justification for two of the secured creditors, being TCC Mortgage Holdings Inc. ("TCC") and Quest Mortgage Corp. ("Quest"), being exempted from the stay under the Initial Order (para. 18).

TCC had commenced foreclosure proceedings in May 2013 in respect of the Redux Duncan property. An Order Nisi of foreclosure was granted in August 2013 with the redemption period due to expire in January 2014. Apparently, TCC had brought an application for the appointment of a receiver about the time that the Initial Order was granted. In addition, Quest's mortgages over the Colwood Development property were in default and demands for payment were served in early October 2013. The time for enforcement of those demands would have expired just before the granting of the Initial Order. It is my understanding that Quest has now also commenced a foreclosure proceeding against the Colwood Development.

Unfortunately, the exclusion of these "Enforcing Mortgagees" has engendered a response by the other secured creditors who, not surprisingly, wish to be treated in the same fashion. The fact that they are being treated differently has given rise to the other secured creditors taking the position that these proceedings are, unfairly, affecting only them in terms of their ability to enforce their security. In addition, it is only their security which is being primed by the various charges granted in these proceedings, since the security of the Enforcing

Mortgagees has been exempted from the Administration Charge and the Directors' Charge and it is also proposed to be exempted from any DIP Lender's Charge or Representative Counsel Charge.

In many *CCAA* proceedings, foreclosing mortgagees are stayed in a variety of circumstances including when they have already begun enforcement proceedings. Although it was described as an "Enforcing Mortgagee" in the Initial Order, Quest had not yet commenced any foreclosure proceeding or at best, had only recently filed the action. Reasons for the exclusion of these parties were said to be not only that there were monetary defaults under their security, but also to avoid arguments by them as to the appropriateness of this *CCAA* proceeding, based on well-known British Columbia authorities such as *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.). Accordingly, while the League Group may have avoided that argument from the Enforcing Mortgagees, the decision to exempt them has resulted in the other secured creditors now being resolved to make those same arguments, in addition to arguing that the League Group was not acting in good faith by agreeing to that exemption.

My only preliminary comment on the issue at this point is that while the court strives to achieve fairness in the proceedings, the task of the court in imposing the stay is in part to ensure that it is "appropriate": *CCAA*, s. 11.02(3)(a). As Deschamps J. stated in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), appropriateness in part extends to treating stakeholders "as advantageously and fairly as the circumstances permit": para. 70. Often there are good reasons to depart from a blanket stay affecting various stakeholders, as is evidenced from the provisions of the model order. Typical examples would include payment of employees and critical suppliers. However, in respect of stakeholders having what seems to be a commonality of interest (and commonality of potential prejudice), I would expect that there would be cogent and compelling evidence to support an order that treated them differently.

d) The "White Boxes" Entities: The secured creditors also make certain arguments in respect of certain members of the League Group who are *not* part of the petitioning group. I have already referred to the extremely complex structure of the League Group. The organizational chart includes various entities marked in yellow which are part of the League Group and who are also petitioning debtors. Many other entities are identified in what have been called the "white boxes" on the organization chart which include those entities that were not part of the petitioning debtor group. I have already referred to some of these "white box" entities above, but it is said by Mr. Gant that they also generally include firstly, shell companies where there are no assets and secondly, entities where the sole liability is to investors and as such, they are not insolvent.

The secured creditors argue that the exclusion of these "white box" entities is suspicious in that there has been inadequate disclosure of the financial circumstances relating to them. In particular, the suggestion has been made that there may be sufficient income or assets in those other entities to support the operations of the League Group in these proceedings without the necessity of priming charges which prejudice their security. If these entities are indeed solvent, then this argument would appear to be diametrically opposed to the other argument of some secured creditors (discussed above) that only *insolvent* entities should be petitioning debtors.

Despite these objections, and for the purposes of these applications, I am satisfied that the materials generally disclose the circumstances relating to these "white box" entities and why these entities have not been included in the *CCAA* filing. I do, however, appreciate that the stakeholders, including the secured creditors, may require further information about these "white box" entities beyond what is contained in Mr. Gant's affidavits. I expect that the League Group, possibly with the assistance of the Monitor, can provide reasonable and relevant material to them so that they might explore this matter. At present, I simply acknowledge that this may be the basis for arguments to be advanced by the secured creditors at the comeback hearing in respect of whether the League Group is operating in a *bona fide* manner.

e) Conflicts: Last, but not least, the secured creditors have raised a number of conflicts on the part of counsel involved in these proceedings. It is clear to me that these conflicts have significantly coloured the perceived

fairness of these proceedings from the outset. The original counsel for the League Group (who has since withdrawn) disclosed, after the Initial Order was granted, that she has also acted in the past for Quest. Some of the secured creditors intend to argue at the comeback hearing that there was material nondisclosure of this conflict to Brown J. and that this relationship between the law firm and Quest may have affected the League Group's decision to exclude Quest from the stay.

In addition, in the days following the granting of the Initial Order and in the face of the League Group's application for DIP financing, it was disclosed that the law firm acting for the Monitor (who ceased to act at the end of this hearing) had also undertaken to act for the DIP Lenders in respect of the preparation of financing documents. The explanation is that the DIP Lenders urgently required counsel to address the League Group's pressing need for this DIP financing. Although screens were put in place between the individual lawyers at the law firm, it has unfortunately resulted in the perception that the Monitor's support of the DIP financing, or at least the legal advice relating to the Monitor's support, has been influenced by that relationship. This turn of events was extremely unfortunate, particularly in light of the unquestioned duties of the Monitor as an officer of this court and its overriding duty to act fairly in respect of all stakeholders, whether they are in support of or opposed to the DIP financing.

Finally, current counsel for the League Group has disclosed that his law firm is an unsecured creditor. I am not aware of any objections arising from this fact. However, it does appear that the law firm was giving legal advice to the DIP Lenders at one point.

19 I am advised that all of the issues above may be raised at the comeback hearing. In addition, the secured creditors raised these issues on this application arguing that, in these circumstances, the court should be extremely reluctant to authorize DIP financing and grant a DIP charge or any other charge based on the substantial attacks that will be made on the Initial Order and on the continuation of this proceeding. It is no doubt the strategy of the secured creditors at this time to attempt to inject sufficient uncertainty into these proceedings such that any DIP lender will be reluctant to advance monies to the League Group.

20 It not my intention or role at this time to revisit the basis upon which the Initial Order was granted. Presumably, the Initial Order was granted having regard to the statutory requirements under the *CCAA* and based on well-known principles applicable on such applications, including those set out in *Century Services Inc.* at paras.15-18, 57-71. I appreciate that the issues raised by the secured creditors are significant and if substantiated, may have serious consequences. Nevertheless, I am not convinced that these arguments are sufficient to dissuade the court from granting interim relief at this time, simply to see the League Group through to the comeback hearing, some 24 days away at the time of this hearing.

21 Accordingly, it is my intention to proceed to hear and decide these applications before me based on the Initial Order being extant and based on the updated and current circumstances of the League Group. I have specifically rejected the suggestion of one of the secured creditors to grant these orders on a "without prejudice" basis.

DIP Financing

22 In its application materials, the League Group sought approval of a DIP facility in the amount of \$31.5 million from Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (whom I will collectively call the "DIP Lenders"). This proposed facility was not only for what was said to be operating funding for the next 13 weeks (\$5 million), but for other purposes such as payment of tax arrears (\$3.5 million), mortgage payments for 13 weeks (\$5 million) and to payout one of the existing mortgage lenders, TCC (\$18 million).

23 Despite this, the League Group only sought a DIP Lender's Charge of \$1.6 million which was said to be the amount of emergency funding that was urgently needed to get to the comeback hearing on November 18. The DIP Lenders supported this restricted charge, based on their submissions that they had no intention of funding, save and except with

a DIP Lender's Charge. I understand that given the urgency, and despite the objections of the secured creditors, the DIP Lenders are prepared to immediately fund this amount and in doing so, waive the following conditions: that advances would only be made after expiry of the appeal period and that certain administrative matters, such as insurance, be in place.

24 The test for DIP funding is now mandated by the *CCAA*, s. 11.2:

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

25 In accordance with the *CCAA*, s. 11.2(1), the League Group has filed a cash flow forecast to the date of the comeback hearing.

26 As a preliminary matter, no one has challenged the adequacy of the efforts by the League Group to obtain satisfactory interim financing. Nor is there any challenge to the appropriateness of the business terms arranged with the DIP Lenders, including the term, interest rate and level of various fees for monitoring the commitment itself and professionals. The Monitor comments favourably on the process by which the DIP financing was sought by the League Group and the reasonableness of the terms proposed by the DIP Lenders.

27 It is proposed that the DIP Lender's Charge would rank after the Administration Charge but before the Directors' Charge and any Representative Counsel Charge.

28 Notice of this application for DIP financing has been given to secured creditors likely to be affected, as required by the *CCAA*, s. 11.2(1). The secured creditors attending on this application object to the financing for a variety of reasons (as discussed above), and also on the basis that this funding is not urgent, there is an insufficient evidentiary basis for the relief sought and that they will be prejudiced by the DIP Lender's Charge ranking ahead of their security.

29 I will address each of the factors identified in *CCAA*, s.11.2(4).

(a) The period during which the League Group is expected to be subject to proceedings under the CCAA

30 The DIP financing that is sought today is simply to allow the League Group to continue its operations until the comeback hearing on November 18 by allowing it to make certain core payments.

(b) How the League Group's business and financial affairs are to be managed during the proceedings

31 Mr. Gant states in his affidavit that the League Group has been working closely with the Monitor regarding its financial affairs, including reviewing all payments made by the League Group. The Monitor similarly says that it has been working cooperatively with the League Group in terms of preparing the cash flow forecast and other financial documentation.

32 In addition, the League Group had already made certain efforts to reduce operating expenses in anticipation of the *CCAA* filing.

(c) Whether the League Group's management has the confidence of its major creditors

33 Not surprisingly, most of the counsel for the secured creditors appearing on this application voiced their clients' lack of confidence in the League Group's management. However, these types of bald assertions, without more, and without evidence, do little to provide the court with a satisfactory basis upon which to assess this factor. In addition, the position of the secured creditors must be considered in the context of other evidence that suggests that they are fully secured and that payments owed to them by the League Group are current: *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]) at para. 49(c).

34 Counsel for certain noteholders of LOF raised the matter of governance of the League Group during his submissions. While supporting the application for DIP financing, it appears that those stakeholders are considering whether an application for a chief restructuring officer (CRO) might be appropriate in the circumstances. I do not wish or need to predict what might happen at the comeback hearing or any later court application but presumably, if an application for such relief is brought, it will be based on evidence as to the willingness and/or ability of the current management of the League Group to proceed with its restructuring efforts.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made by the League Group

35 Substantial arguments were advanced, by a number of the secured creditors, that the DIP funding was not necessary or urgent. With respect, I disagree.

36 The cash flow forecast indicates that in the period leading up to November 18, approximately \$1.6 million will be required in respect of corporate operating expenses. A large portion of that amount, \$1.1 million, will be required for payroll, with the first payroll of approximately \$550,000 due the very date of the hearing and the second payroll being due on November 8, 2013. The cash flow forecast indicates proposed payments of \$339,000 for "project funding" which I am advised relates to supporting certain income producing properties which are operating on a negative cash flow basis. Notwithstanding that the evidence on the project operating expenditures is somewhat thin, in my view, it is reasonable

to expect that the League Group has some ongoing operations in the specific projects that require support in this interim period. Again, I would emphasize that it is the overarching intention of the League Group to conduct business in the ordinary course, at least in the initial period of the restructuring until a longer term strategy can be formulated.

37 The anticipated cash receipts of approximately \$1.9 million over this time frame are clearly not sufficient to fund the anticipated costs of approximately \$3.5 million. Nor is the timing of some of those receipts during the week of October 28 certain in terms of making the payroll as soon as possible after it was due on October 25.

38 Finally, the cash flow forecast anticipates restructuring and financing costs of \$1.45 million until the comeback hearing. There are strenuous objections to payment of these amounts; however, it cannot be argued that professionals who are assisting in the restructuring of these proceedings should be denied payment of their reasonable remuneration on an ongoing basis, if such payments are possible: *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para. 66. The amounts are large but not unusual given the complexity of these proceedings and the issues raised. These professionals should not be required to simply rely on a court ordered charge to protect their outstanding fees. The Administration Charge in any event would not have been sufficient to cover the amounts expected to be incurred to the date of the comeback hearing.

39 Further, if they wish, the stakeholders will have the opportunity to review all professional fees at the end of this matter. In particular, paragraph 34 of the Initial Order provides that the Monitor and its legal counsel will pass their accounts before this court. Paragraphs 6 and 7 of the Initial Order provide for the payment of *reasonable* fees and disbursements to the League Group's counsel.

40 Without the proposed DIP funding, the League Group readily admits that it will be unable to continue. The Monitor states:

... If the financing is not approved, the current liquidity situation is such that League will not be able to fund payroll on Friday, October 25th, which will require an immediate cessation of operations and the accompanying liquidation of its assets in a forced and distressed manner.

41 I am satisfied that the DIP financing sought on this application is urgently needed in order to fund operations within these proceedings until the comeback hearing. Accordingly, I agree that such funding will enhance the prospects of an arrangement by the League Group to its creditors.

(e) The nature and value of the League Group's property

42 As I have stated numerous times, many of the secured creditors oppose the continuation of this proceeding and wish to take steps to realize on their security.

43 Most of the assets owned by the League Group are complex real estate holdings including income producing properties and development properties, some of which are not yet completed.

44 The Monitor points out what might be said to be fairly obvious; namely, that such a realization scenario is not in the interests of the creditors, including even these secured creditors, or the numerous other stakeholders in these proceedings:

A forced and distressed liquidation is clearly not in the interests of the creditors or Investors, nor is it in the interests of many of the mortgage lenders who do not enjoy first mortgage security and whose security is spread across multiple properties and assets. Such lenders will then be compelled to deal with complicated scenarios where their recovery on one property will determine the extent to which they must rely on another property for the recovery of their loans. If a liquidation of League's assets is to occur, it is imperative that such a liquidation should occur on an orderly and controlled basis.

45 In addition, as pointed out by counsel for the League Group, the nature of the assets is such that even if the secured creditors were to take steps to realize on their security, they would inevitably be incurring some of the same

types of expenses, including professional fees, as are currently being proposed to be paid in accordance with the cash flow forecast: *Pacific Shores Resort & Spa Ltd.* at para. 49(f).

(f) Whether any creditor would be materially prejudiced as a result of the DIP Lender's Charge

46 The issue of material prejudice to the secured creditors was largely focused on the evidence as to the value of the secured assets and the "implied equity" which was calculated based on certain mortgage amounts stated to be outstanding.

47 Again, I do not intend to focus on each individual secured creditor. Many of the secured creditors take issue with what has been described as the appraised value of the various projects over which they hold security and also with what is calculated to be the mortgage debt outstanding on those projects.

48 The League Group and the Monitor do not dispute that this calculation of \$210.9 million of "implied equity" is not a certain calculation. In particular, the Monitor emphasizes that it has only, to this time, performed a "high level review" of the calculation of equity in the various projects. The Monitor notes:

a) Marketable Securities: those amounts are based on recent trading prices of units in the Partners REIT, which are publicly traded;

b) The Income Producing Properties: the ascribed values of these properties are supported by appraisals, although it is apparent that some of those appraisals are dated. In addition, the Monitor notes that most of the appraisals have been prepared for financing purposes which in their experience, tend to be higher than values recoverable in the market. Nevertheless, the Monitor concludes that there appears to be "significant positive equity available in these properties"; and

c) The Development Properties: the values ascribed are based on book values which represent the monies the League Group has spent to date to develop the properties. Again, based on the Monitor's experience, if the development is not completed, the recovery for these projects will be substantially less than the costs incurred to date. With respect to the Colwood Development specifically, the Monitor is of the view that even if the League Group completes the project, it is unlikely that the project costs will be fully recovered. Accordingly, the Monitor states that the \$129.9 million "implied" equity in the development properties is overstated, although it is unclear at this time to what degree.

49 I agree that the exact financial position of the League Group in the income producing and development properties is unknown to some extent. These proceedings have only begun and the Monitor is no doubt continuing its investigation and analysis of the various projects. I anticipate that the equity position in these properties will be further clarified in the near future and that this further information can be communicated to the stakeholders. The Monitor points to the fact that after the granting of the Initial Order, the mortgage lenders needed "time and a better understanding of League's complexity and possible restructuring plan to consider supporting this refinancing".

50 In the meantime, despite the shortcomings in the financial calculations, there appears to be substantial equity in those properties. Most of the secured creditors appearing on the application did not have any more reliable information towards a calculation of the equity in the projects. When asked about their own specific secured positions, most were not able to state convincingly or conclusively that their loans were in jeopardy, although some submissions were made that certain loan positions were "on the bubble". Even if any of the secured creditors are in or close to a deficit position, the intention of the League Group is to continue funding the mortgage payments, subject to obtaining further DIP financing to do so. In that event, any further prejudice will be lessened. None of the secured creditors were able to say that their loans were subject to any financial defaults, although I am assuming that given the *CCAA* filing, there are likely to be many non-financial defaults in accordance with the usual security documentation.

51 As I noted in *Pacific Shores Resort & Spa Ltd.* at para. 49(f), material prejudice to secured creditors is only one factor to be considered in equal measure with the others listed in the *CCAA*, s. 11.2(4).

52 On the basis of the evidence presented, I am satisfied that at the very least, the secured creditors will suffer some prejudice in terms of delays in realization of their security in the event of a failure to restructure by the League Group. Beyond that, I am not satisfied that there is *material* prejudice to the secured creditors given the asset/debt levels disclosed to date. Further prejudice may arise in the event that the "implied equity" amounts are reduced or perhaps eliminated.

53 Based on the current values disclosed, it is, as Mr. Gant suggests, really the unsecured creditors and the investor group who are facing the material prejudice at this time and any prejudice to the secured creditors must also be considered in light of that material prejudice. As I have noted above, there are also a substantial number of employees.

54 In light of the concerns expressed by the secured creditors, the League Group, with the support of the Monitor, has proposed certain allocation provisions in the order authorizing DIP financing, should an allocation issue arise in the future. In accordance with these provisions, costs that may be specifically attributed to a certain asset shall be allocated to that asset. Costs that are not attributable to any asset are to be allocated as follows: firstly, to unencumbered or not fully encumbered assets and secondly, to assets generally based on a *pro rata* allocation based on the actual value of an asset.

55 I agree that this allocation provision should alleviate many of the secured creditors concerns as to how the DIP Lender's Charge may be borne. It remains to be seen, of course, whether any allocation issues will in fact arise as that will be dependent on the success of the restructuring.

(g) The Monitor's report

56 The Monitor's first report to the court is dated October 23, 2013. The Monitor supports the proposed DIP financing and the granting of a DIP Lender's Charge, having reviewed the financial terms of the DIP Lenders and being satisfied that those are reasonable terms and the best available in the marketplace.

57 The Monitor is also satisfied that the restriction of the DIP Lender's Charge to \$1.6 million will allow for the minimum cash requirements for the League Group to meet its operating and restructuring obligations until the time of the comeback hearing.

58 Finally, the Monitor has expressed the view that it supports both the DIP Lender's Charge and the Representative Counsel Charge referred to below to a total of \$1.85 million notwithstanding that those charges would prime the existing secured creditors, other than the Enforcing Mortgagees. The Monitor states that it is sensitive to concerns being raised by the mortgage lenders as a result of the priming but that it supports the priming on the basis that there appears to be equity in the properties such that it is unlikely the mortgage lenders will ultimately be impacted by these priority charges.

59 As the Monitor notes, it is usual in these types of cases that a DIP Lender will advance monies into those proceedings only where the loans are supported by a court ordered priority charge over existing charge holders. All of the parties who submitted offers to the League Group to provide DIP financing required such a priority charge. In *Timminco Ltd., Re*, 2012 ONSC 948 (Ont. S.C.J. [Commercial List]), aff'd 2012 ONCA 552 (Ont. C.A.), Mr. Justice Morawetz stated:

[49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders ...

60 The same considerations discussed in *Timminco Ltd.* are at play here. It is unreasonable to expect that any DIP lender would advance the required DIP financing, save and except with a charge having priority over existing creditors. As stated by the League Group and as confirmed by the Monitor, this DIP financing is necessary and urgently required to continue the operations of the League Group for a very short period of time until the comeback hearing. Failure to obtain that financing will result in a liquidation scenario - one which, given the different stakeholder groups and the

complexity of the assets, will no doubt result in a multiplicity of realization proceedings at great cost. In that liquidation scenario, there will likely be prejudice to those who are said, at this time, to be the stakeholders who have significant equity in the assets.

61 It is a fundamental objective of the *CCAA* to avoid such an outcome if at all possible.

62 In conclusion, the DIP financing is urgently required by the League Group and is necessary to fund the operations for a very short period of time to the comeback hearing. The order approving the DIP facility is granted. However, in my view, there is no need to approve any DIP facility beyond the \$1.6 million financing needed to the time of the comeback hearing. The League Group is at liberty to bring a further application in respect of any further DIP financing.

Representative Counsel

63 The Monitor applies for the appointment of Fasken Martineau DuMoulin LLP ("Faskens") as representative counsel for the investor group. In addition, the Monitor seeks an order that Faskens be granted a charge in the amount of \$250,000 in respect of its fees and disbursements. The proposed ranking of that charge is that it will stand in priority to all of the security and charges (including the Director's Charge) but be subordinate to the Administration Charge, the DIP Lender's Charge and the security of the Enforcing Mortgagees.

64 As noted above, the investor group has been identified as comprising approximately 3,200 individuals and some institutional investors who have supplied approximately \$352 million to the League Group to fund its real estate properties and business operations. Generally speaking, these investors have contributed funds in the form of secured notes, unsecured notes and equity to IGW REIT, LOF and to individual project limited partnerships, either directly or through an RRS Eligible investment vehicle. I understand that the various investment vehicles have different conversion, redemption or retraction features.

65 The Monitor advises that while there are certain common attributes amongst the investor group, there are other circumstances relating to the various investments that would suggest that some individuals or sub-groups may have positions that may differ from others within the overall group. For example, it may be such that different project specific investments have equity, while others do not.

66 The Monitor has already fielded over 100 enquiries from various investors. On October 23, 2013, the Monitor scheduled and held a conference call for the purpose of informing investors of the *CCAA* proceedings and the anticipated process and also to answer any questions. I am advised that over 460 investors participated in that call. At that time, the investors were introduced to counsel from Faskens and the concept of a representative counsel was discussed.

67 If representative counsel is to be appointed, there is no opposition to the appointment of Faskens given their extensive experience in insolvency matters and in particular, matters involving large and disparate stakeholder groups where representative counsel were appointed, such as in the Eron Mortgage Corporation proceedings.

68 The Monitor states that it is unlikely that many of the individual investors will either have the financial wherewithal or means to engage legal counsel to provide for their meaningful participation in these insolvency proceedings. In addition, if a number of separate law firms are retained by investors, a multiplicity of representation by those having a commonality of interest will add to the cost and therefore the complexity of the proceedings. Finally, the Monitor notes that these investors are the stakeholders to be "most keenly affected by this restructuring" and representation of their interests may be beneficial so as to ensure that all stakeholders have adequate input into the course of these proceedings.

69 I am satisfied that the Monitor is not in a position to assist any further in alerting the investors to these proceedings, organizing the investor group and advising them of issues that may affect them either as a group or individually.

70 The statutory jurisdiction upon which such representative charges are considered is found in the *CCAA*, s. 11, which provides that the court may make any order that it considers "appropriate" in the circumstances:

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.

71 The appropriateness of such orders has been considered numerous times by the Ontario Superior Court of Justice (Commercial List): see *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]), *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]), *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398 (Ont. S.C.J. [Commercial List]), and *TBS Acquireco Inc., Re*, 2013 ONSC 4663 (Ont. S.C.J. [Commercial List]) and by this court: *Catalyst Paper Corp., Re*, 2012 BCSC 451 (B.C. S.C.).

72 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 1328 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) summarized many of the factors that have been considered in granting these types of order:

[21] Factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- 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
- the position of other stakeholders and the Monitor.

73 The stakeholder groups for which representative counsel were appointed in *Nortel Networks Corp.*, *Fraser Papers Inc.*, *Canwest Global Communications Corp.* and *Canwest Publishing Inc.* were current and former employees of the debtors. In those cases, the Ontario court noted the particular vulnerability of certain of those stakeholders. The vulnerability of the investor group here has not yet been fully investigated, but the Monitor and Mr. Gant certainly suggest that similar concerns arise in relation to the individuals who have invested a significant portion of their net worth in the League Group. In addition, the indications of equity in the League Group's assets would also suggest that their interests in these proceedings are real and not merely illusory.

74 In *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]), Mr. Justice D.M. Brown appointed representative counsel in those CCAA proceedings for some 1,200 clients who were investors in one of the debtor companies (para. 38). Representative counsel were also appointed in the Eron Mortgage Corporation proceedings for certain investor groups: see *Eron Mortgage Corp., Re* (1998), [1999] 4 W.W.R. 375 (B.C. S.C.) at para. 3.

75 I am satisfied that the appointment of representative counsel in this case is appropriate for the reasons stated by the Monitor. As matters stand, the investor group is a significant one and it is important that they be properly represented so that they can take appropriate positions in these insolvency proceedings. From a timing perspective, it is somewhat imperative that the investors obtain some legal representation in respect of the comeback hearing which, as I have alluded to, is expected to be highly contentious principally from the perspective of the secured creditors.

76 At this point in time, the investor group has a sufficient "commonality of interest" that can be best served by one counsel: *Nortel Networks Corp.* at paras. 62-63, *Fraser Papers Inc.* at paras. 11-12. The appointment of representative counsel will allow their positions to be advanced in an efficient manner, to the benefit of all stakeholders. Separate representation may be required at a later time once Faskens has had an opportunity to investigate the claims of the investors and determine what positions might be advanced in these proceedings. That matter can be addressed if and when it arises.

77 The statutory jurisdiction to order that the fees and disbursements of any representative counsel be secured by a charge is found in the *CCAA*, s. 11.52(1)(c):

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

...

(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.

78 Having forecast to the secured creditors my conclusions with respect to the DIP financing, I encouraged the parties to discuss what interim accommodations could be agreed upon in order that representative counsel could be retained for the investors in the short period of time leading up to the comeback hearing.

79 As a result of those discussions, it was generally agreed and subsequently ordered that Faskens would be appointed as representative counsel with authorized fees of \$125,000. The League Group was authorized to pay a retainer of \$75,000. It was also recognized that a charge would be necessary in order to allow for Faskens' "effective participation" in the proceedings and a Representative Counsel Charge was ordered to the extent of \$50,000, with priority save and except with respect to the Administration Charge, the DIP Lender's Charge and the security of the Enforcing Mortgagees.

80 This modest cost for representative counsel at this stage is fair and reasonable and is intended to benefit the proceedings generally. Therefore, the Representative Counsel Charge is properly borne by stakeholders based on the proposed priority: *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 54.

81 It is anticipated that the Representative Counsel will have met at least to some degree with the investor group prior to the comeback hearing and will be in a position to report to the court on what efforts have been made to organize the group. It is also hoped that by then, the Representative Counsel will have assessed the investor group's interests so as to be able to advise, if possible, what issues might be raised by the investor group. Finally, it is anticipated that Faskens will make efforts to determine whether it is possible to raise retainer funds within the investor group itself for any representation beyond the comeback hearing, rather than securing further amounts from the League Group.

Disposition

82 The Initial Order is amended and restated on the terms proposed with respect to the DIP financing and the DIP Lender's Charge, save and except that the authorized credit facility shall not exceed \$1.6 million. The League Group and the DIP Lenders are to file a copy of the amended commitment letter in this court once that is signed.

83 The order is granted appointing Faskens as Representative Counsel for the investor group on the terms proposed. The authorized fees for the Representative Counsel will be \$125,000, to be secured by a retainer of \$75,000 paid by the League Group and a Representative Counsel Charge of \$50,000 with the indicated priority.

84 The remainder of the applications, including the applications of FCC Mortgage Associates Inc. and Export Development Canada, are adjourned to November 18, 2013 to be heard at the same time as the comeback hearing.

Order accordingly.

TAB 5

2009 CarswellOnt 3028
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3028, [2009] O.J. No. 2166, 177 A.C.W.S. (3d) 634, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

**IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: April 20, 2009

Judgment: May 27, 2009 *

Docket: 09-CL-7950

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees

Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor

Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Alan Mersky, Derrick Tay for Applicants

Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay

M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Guarantee Fund

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.

Gail Misra for Communication, Energy and Paperworkers Union of Canada

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services

Mark Zigler, S. Philpott for Certain Former Employees of Nortel

G.H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Appointment of representative counsel — Telecommunication company entered protection under Companies' Creditors Arrangement Act — Telecommunications company ceased paying former employees with unsecured claims — Several groups of employees claimed entitlement to assets of company, including current working employees, and pensioners — Several law firms maintained that different classes should be established representing employees with different interests, with different legal representatives for each — Five law firms brought motions regarding representation — Law firm KM appointed representative for all potential classes of employee — Court has broad power to appoint representative counsel

— Employees and retirees were vulnerable creditors, and had little means to pursue claims beyond representative counsel — No party denied choice of counsel as employees entitled to obtain individual counsel — No current conflict of interest between pensioned and non-pensioned employees — Many classes of employee had similar interest in pension plan — Claims under pension, to extend it was funded, not affected by CCAA proceedings — Pension claims by terminated employees creating conflict with other claims was only hypothetical — All former employees had community of interest.

Table of Authorities

Cases considered by Morawetz J.:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered
Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 10 — referred to

R. 10.01 — considered

R. 12.07 — considered

MOTIONS regarding appointment of counsel in proceedings under *Companies' Creditors Arrangement Act*.

Morawetz J.:

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

(i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.

(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

(iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.

(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

5 Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

6 The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

7 The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

11 Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension,

termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

- (a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission;

- (b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and

- (c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

21 J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

- (a) unpaid termination pay;

- (b) unpaid severance pay;

- (c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

22 Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

23 The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

24 Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

25 Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

26 Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

27 As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

28 At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

29 Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

30 Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

31 Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

33 The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

- (a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;
- (b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;
- (c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;
- (d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and
- (e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

34 The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

- (a) the basic Pension Plan as a deferred member or a member entitled to transfer value;
- (b) the Health Care Plan;
- (c) the Pension Plan and Health Care Plan as a survivor of a former employee;
- (d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;
- (e) severance and termination pay ; and
- (f) TRA payments.

36 The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict

in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

39 The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

40 They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

42 The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

43 The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

- (a) TRA;
- (b) 2008 bonuses; and
- (c) amendments to the Nortel Pension Plan

44 Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

46 Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

48 KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

51 Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

52 With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

53 To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

54 It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

55 A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

57 The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

58 In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

60 Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Stelco Inc., Re*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Stelco Inc., Re*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Canadian Airlines Corp., Re* and articulated the following factors to be considered in the assessment of the "commonality of interest".

In summary, the case has established the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

Stelco Inc., Re (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31.

63 I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

64 As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

65 The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

66 The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

67 I would ask that counsel prepare a form of order for my consideration.

Order accordingly.

Footnotes

- * Additional reasons at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3530 (Ont. S.C.J. [Commercial List]).

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*

Hfx No: 484742

IN THE SUPREME COURT OF NOVA SCOTIA

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