2019 Hfx No. 484742

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF:	**Application by Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies"), for relief under the Companies' Creditors Arrangement Act**

BOOK OF AUTHORITIES
OF THE COMPANIES,
QUADRIGA FINTECH SOLUTIONS CORP., WHITESIDE CAPITAL CORPORATION and 0984750 B.C. LTD. DBA QUADRIGA CX and QUADRIGA COIN EXCHANGE

Motion Date – February 14, 2019 at 9:30 a.m.

February 12, 2019

Maurice P. Chiasson, Q.C.
Stewart McKelvey
Barristers & Solicitors
Suite 900 - Purdy's Wharf Tower One
1959 Upper Water Street
Halifax, NS B3J 3N2
Telephone: 902.420.3300
Facsimile: 902.420.1417
Email: mchiasson@stewartmckelvey.com
Counsel for the Companies

INDEX

Tab	Caselaw
1	*Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138
2	*Canwest Publishing*, 2010 ONSC 222
3	*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299
4	*Fraser Papers Inc., Re*, 2009 CarswellOnt 6169
5	*Homburg Invest Inc. (Arrangement relatif à)*, 2014 QCCS 980
6	*League Assets Corp., Re*, 2013 BCSC 2043
7	*Nortel Networks Corp., Re*, 2009 CarswellOnt 3028
8	*Nortel Networks Corp., Re*, 2009 CarswellOnt 3530
9	*Target Canada Co., Re*, 2015 ONSC 1028
10	*Urbancorp Toronto Management Inc., Re,* 2016 ONSC 5426
	Other
11	Order (October 6, 2017), Doc. 31-2278725 (Ont. S.C.J. [Commerical List])
	Legislation
12	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s. 11, 11.52

TAB 1

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

MINUTES OF THE HEARING

DATE: January 27, 2017

THE HONOURABLE NICHOLAS KASIRER, J.A.

No: **500-09-026460-162**
(500-11-050680-160, 500-11-050681-168, 500-11-050682-166)

APPLICANT	COUNSEL
BRIDGING FINANCE INC.	Mtre LUC BÉLIVEAU (*Fasken Martineau DuMoulin SENCRL, s.r.l.*)
RESPONDENTS	COUNSEL
BÉTON BRUNET 2001 INC. **BÉTON BRUNET LTÉE** **BRUNEAU ÉLECTRIQUE INC.**	Mtre ALAIN TARDIF *(McCarthy Tétrault s.e.n.c.r.l., s.r.l.)*

2017 QCCA 138 (CanLII)

IMPLEADED PARTIES	COUNSEL
GROUPE HEXAGONE S.E.C. **INVESTISSEMENTS HEXAGONE INC.** **LOCATION HEXAGONE S.E.C.** **LES ENTREPRISES COMMERCIALES HEXAGONE INC.** **9324-9928 QUÉBEC INC.** **9328-5021 QUÉBEC INC.** **9325-0041 QUÉBEC INC.**	Mtre BERTRAND GIROUX Mtre MARC-ETIENNE BOUCHER (*BCF s.e.n.c.r.l.*)
AVIVA COMPAGNIE D'ASSURANCE DU CANADA	Mtre MARC DUCHESNE *(Borden Ladner Gervais, s.e.n.c.r.l., s.r.l.)*
PRICEWATERHOUSECOOPERS INC.	Mtre MICHEL LA ROCHE (*Miller Thomson SENCRL / LLP*)

No: **500-09-026464-164**
(500-11-050680-160, 500-11-050681-168, 500-11-050682-166)

APPLICANTS	COUNSEL
GROUPE HEXAGONE S.E.C. **INVESTISSEMENTS HEXAGONE INC.** **LOCATION HEXAGONE S.E.C.**	Mtre BERTRAND GIROUX Mtre MARC-ETIENNE BOUCHER (*BCF s.e.n.c.r.l.*)
RESPONDENTS	COUNSEL
BÉTON BRUNET 2001 INC. **BÉTON BRUNET LTÉE** **BRUNEAU ÉLECTRIQUE INC.**	Mtre ALAIN TARDIF *(McCarthy Tétrault s.e.n.c.r.l., s.r.l.)*

2017 QCCA 138 (CanLII)

IMPLEADED PARTIES	COUNSEL
LES ENTREPRISES COMMERCIALES HEXAGONE INC. **9324-9928 QUÉBEC INC.** **9328-5021 QUÉBEC INC.** **9325-0041 QUÉBEC INC.**	Mtre BERTRAND GIROUX Mtre MARC-ETIENNE BOUCHER (*BCF s.e.n.c.r.l.*)
AVIVA COMPAGNIE D'ASSURANCE DU CANADA	Mtre MARC DUCHESNE *(Borden Ladner Gervais, s.e.n.c.r.l., s.r.l.)*
PRICEWATERHOUSECOOPERS INC.	Mtre MICHEL LA ROCHE (*Miller Thomson SENCRL / LLP*)
BRIDGING FINANCE INC.	Mtre LUC BÉLIVEAU (*Fasken Martineau DuMoulin SENCRL, s.r.l.*)

DESCRIPTION : **500-09-026460-162**
Application for leave to appeal of a judgment rendered on October 28, 2016 by the Honourable Brian Riordan of the Superior Court, District of Montreal (section 13 of the *Companies' Creditors Arrangement Act*)

500-09-026464-164
Application for leave to appeal of a judgment rendered on October 28, 2016 by the Honourable Brian Riordan of the Superior Court, District of Montreal (section 13 of the *Companies' Creditors Arrangement Act*)

Clerk: Adam Scott	Courtroom: RC.18

2017 QCCA 138 (CanLII)

HEARING

	Continuation of January 24, 2017 hearing.
16:32	Commencement of the hearing. Counsel had been advised that judgment would be rendered on the minutes of the hearing and their presence in Court was not required.
16:33	**BY THE JUDGE:** Judgment – see page 5.
	Conclusion of the hearing.

(s) Adam Scott

Clerk

2017 QCCA 138 (CanLII)

BY THE JUDGE

JUDGMENT

2017 QCCA 138 (CanLII)

[1] I am seized of two applications for leave to appeal from a judgment rendered in the course of proceedings by the Superior Court, District of Montreal, (the Honourable Brian Riordan), on October 28, 2016, in a matter relating to the *Companies' Creditors Arrangement Act*.[1] The judge granted a motion pursuant to sections 11 and 11.52(1)(c) CCAA brought by the respondents, subcontractors of the debtors, asking that they be named representatives of the whole group of subcontractors, that their fees and disbursements for legal counsel as representatives be paid from the patrimonies of the debtors, and that those fees and disbursements be secured by a first-ranking charge up to an amount of $100,000.

[2] Virtually identical in substance, the applications for leave have been filed, respectively, by Bridging Finance Inc., the lender, and by Les Investissements Hexagone inc., Location Hexagone inc. and Groupe Hexagone s.e.c., the debtors, and are governed by section 13 CCAA.

***

[3] In his reasons, the judge provided a useful account of the debtors' restructuring proceedings for which he is the named supervising judge under section 9(2) CCAA. For present purposes, it is sufficient to note that the debtors are construction companies that undertook contracts with government entities, including the cities of Montreal and Laval. The debtors have been unable to collect amounts receivable and, as a result, have not paid certain of their subcontractors. The latter have no real security against the clients' property because that property forms part of the public domain. The subcontractors subsequently claimed payment from the debtors' sureties who have been slow or refused to pay.

[4] Some 140 subcontractors are owed what the judge estimated to be a total amount of $25 million.

[5] The respondents Béton Brunet 2001 inc., Béton Brunet ltée and Bruneau électrique inc. filed the application before the judge to be appointed representatives of all unpaid subcontractors, including subcontractors who had filed claims with certain of the debtors' sureties. They argued that it was neither practical nor fair to oblige all of the subcontractors to retain separate legal counsel in order to attend each CCAA hearing when, in most respects, their position in the proceedings was similar if not identical. The respondents described the group as dispersed and vulnerable. Furthermore, they asked that, after verification by the monitor, the debtors pay reasonable fees and disbursements of their legal counsel and that those amounts be secured by a $100,000 charge with priority over all other hypothecs and securities, including that of the lender,

---

[1] RSC 1985, c C-36 (CCAA).

Bridging Finance Inc., which has the first-ranking charge, with the exception of the administrative charge granted by the initial order.

[6] The debtors and the sureties opposed the respondents' motion on the grounds that the request was premature and, as the dossier evolved, might well not be necessary. Moreover, they contended that the applicable criteria for granting a charge on the debtors' assets were not satisfied. The monitor also took the view that the order sought by the respondents was premature.

[7] The judge granted the respondents' request to be named representatives of the subcontractor and to have their legal fees and disbursements paid by the debtors as part of the restructuring, on conditions. He also granted a first-ranking security for the legal fees up to a fixed amount.

[8] Citing the leading case of *Canwest*,[2] he set out the factors that courts have considered in deciding motions for representation and payment. The judge rejected arguments brought by the debtor and the sureties that the criterion of vulnerability of the group seeking representation had not been satisfied. He noted that it was plain, considering the amounts of their respective claims and the costs of legal fees, that each subcontractor was not likely to invest the time and money to retain individual counsel through the proceedings. It was, however, in the interest of justice that they participate in the file, especially given that the subcontractors are likely to be the most affected by the outcome. He saw representation by the subcontractors as advantageous to the debtors. He found the balance of inconvenience favoured granting the order.

[9] The judge went on to consider whether it was necessary to order a charge to protect payment of the legal fees.

[10] After noting that such a measure was only ordered when essential to the success of the proceedings, the judge concluded that there were aspects of the file that justified granting the priority in the circumstances. These include the fact that one of the goals of the CCAA process here was, by the debtors' own account, that the subcontractors be paid as much as possible. Moreover, he was of the view that the presence of the representatives would save time and money for all parties, including the debtors.

[11] After weighing factors considered by the courts in the jurisprudence, he decided that the priority would be justified if the questions which the representatives would take up and the amount of the priority were limited. He also indicated that the fees would be limited to what was reasonable in the circumstances, and charged the monitor with reviewing the amounts, subject to oversight by the court.

***

[12] Firstly, the petitioners argue that the judge erred in law in issuing the order under section 11 CCAA. Specifically, they submit that there was no proof presented to establish the vulnerability or limited resources of the subcontractors and no evidence

[2] *Canwest Publishing Inc. (Re),* 2010 ONSC 1328, paras 20 and 21.

2017 QCCA 138 (CanLII)

was adduced to show of any benefit to the debtors resulting from the representation and payment order. In the petitioners' view, the lack of evidence in respect of the factors identified as relevant to this kind of order means the judgment should be reversed.

[13] Secondly, in respect of the first-ranking security of $100,000 ordered by the judge pursuant to section 11.52(1)(c), the petitioners say that no evidence was adduced to show that the representatives' priority charge was, for the subcontractors, "necessary for the effective participation in the proceedings / nécessaire pour assurer [leur] participation efficace aux procedures". Indeed, in the petitioners' view, the judge justified his decision to grant the representatives' priority charge based on the wrong criteria.

***

[14] The parties agree that test to be applied by a judge in chambers in deciding whether to exercise his or her discretion to grant leave pursuant to section 13 CCAA is four-pronged and that each of the four factors must be satisfied for leave to be granted.[3] They are:

(i) Whether the point on appeal is of significance to the practice;

(ii) Whether the point is of significance to the action or proceedings;

(iii) Whether the appeal is *prima facie* meritorious or frivolous;

(iv) Whether the appeal will unduly hinder the progress of the proceedings.

[15] In applying this test, judges in this Court and elsewhere in Canada have underscored that leave is granted sparingly given the nature of the powers afforded the judge presiding over the CCAA matter.[4]

***

[16] I turn immediately to the third criterion for leave, which was the principal point of disagreement before me. Is the proposed appeal *prima facie* meritorious?

[17] The question should be addressed in respect both of the representation and payment order, issued under section 11 CCAA, and the order that the fees be secured by a first-ranking charge under section 11.52(1)(c).

[18] The petitioners insist that the judge misapplied the relevant factors to the subcontractors' motion brought under section 11. They do not suggest that he erred in his identification of the relevant factors, but contend that he wrongly concluded that the subcontractors were vulnerable in the absence of any evidence to that end.

---

[3] See, e.g., *Re Stomp Pork Farm Ltd.*, 2008 SKCA 73, para. [15].

[4] See, e.g., *Aviva compagnie d'assurance du Canada* v. *Béton Brunet 2001*, 2016 QCCA 1837, para. [2] (per Schrager, J.A., in chambers) ; *Statoil Canada Ltd. (Arrangement relatif à),* 2012 QCCA 665, para. [4] (per Hilton, J.A., in chambers).

2017 QCCA 138 (CanLII)

2017 QCCA 138 (CanLII)

[19] A careful examination of the reasons for judgment suggests the judge made no such mistake.

[20] The judge had in hand, as he noted in paragraphs [18] and [19], a list of the subcontractors' claims in order of their importance. He explained that they ranged from $1,011.78 to over $3 million and that they benefitted from no security over the assets of the debtors or the governmental clients. On that basis, he concluded that the vulnerability of the subcontractors was "apparent" when one compared the cost, for most of them, of participating in the proceedings and the benefit that, individually, they might secure through being present.

[21] It cannot therefore be said that there was no evidence of vulnerability. It is true that the specifics of each subcontractor's patrimonial circumstances were not alleged. But it seems reasonable to consider that, in some cases, the vulnerability of a stakeholder, as this factor is relevant to a representation and payment order, cannot be reduced to impecuniosity. Section 11 representation orders are not limited to widows and orphans; indeed stakeholders in a variety of circumstances, with different kinds of claims and resources – employees, retirees, investors, subcontractors and others – are possible beneficiaries of such an order. It was not unreasonable for the judge to consider that the subcontractors' claims were vulnerable, given the cost of individual participation, as opposed to a focus on the wherewithal of each of the 140 subcontractors. Moreover, the fact that the judge chose not to insist that the subcontractors band together to engage counsel to represent them, appropriate in some cases,[5] does not impugn his decision here. As he explained, requiring them to agree on such an arrangement would have been impractical.

[22] In any event, "vulnerability" is only one of a series of factors to be weighed in deciding whether representation is appropriate. As noted, the judge took into account the benefit of representation to the efficiency of the proceedings and found, as well, that the debtors too would be helped by the subcontractors' representation. Contrary to what the petitioners argued before me, the judge did cite evidence of this advantage in paragraphs [27] to [31]. The relevance and weight attributed to other factors were carefully explained.

[23] The order appointing representatives and order payment is indeed one that required the judge to weigh the relevant factors and decide which of them, based on the facts at hand, justified or not the order.[6] As such, the order is discretionary in nature. Judges seized of applications for leave under section 13 CCAA have regularly refused leave given that discretionary decisions of this type are understood to deserve a high degree of deference on appeal. As Newbury, J.A. wrote for the British Columbia Court of Appeal in one case, "an appellate court should not interfere with the exercise of discretion in the present context where the question is one of weight or degree of importance to be given to particular factors, rather than a failure such factors or the

---

5 As in *Ubancorp Inc. (Re)*, 2016 ONSC 5426, para. [24].

6 See Janis P. Sarra, ***Rescue! The Companies' Creditors Arrangement Act***, 2nd ed. (Toronto : Carswell, 2013) 606 *et seq*. It bears noting that Professor Sarra identifies the same factors cited and weighed by the judge.

correctness, in the legal sense, of the conclusion".[7] Similarly, the Court of Appeal for Ontario has explained that, once it has been determined that factors have been properly identified by a CCAA judge in respect of a discretionary decision, an appeal court should not intervene, noting that "[t]he weight to be assigned to these various factors was a matter for the motion judge".[8] In this light, considering the discretionary character of the order, an appeal on this point would have no reasonable prospect of success.

2017 QCCA 138 (CanLII)

[24] It bears mentioning that the judge not only placed a cap on the amount of the security but, no doubt mindful that fees and disbursements can be substantial in contentious proceedings, he took care to limit the questions in respect for which the representatives could seek advice that would be paid by the debtors. As noted, he placed the reasonability of the fees under the watch of the monitor. If the event of disputes, the judge retained the final word. The petitioners were wrong to complain before me that the judge had incautiously approved "unlimited" fees – he consciously did not give a blank cheque to the representative, but took care, after balancing interests, to create a regime for payment of fees that he felt was fair in the circumstances. This was a highly fact-driven determination and, rightly so, judges of this court have declined to grant leave in respect of this kind of decision except in rare circumstances of palpable and overriding errors.[9] Here again, an appeal would, in my view, be destined to fail.

[25] In a similar way, an appeal of the judge's decision to order security in the amount of $100,000 would have no reasonable chance of success.

[26] There is no question that the judge cited the right standard in law under section 11.25(1)(c) CCAA: that the court be satisfied that the charge is necessary for the effective participation of the subcontractors in the proceedings. The CCAA specifies that the charge be set "in an amount that the court considers appropriate", signalling the discretionary character of the decision.

[27] Again, the judge weighed the relevant factors and decided, based on the evidence before him and his knowledge of the file as CCAA supervising judge, that the first-ranking charge – with the $100,000 cap – was appropriate. The petitioners' argument that he did so without evidence of it being necessary does not address the logistical reasons that the judge invoked to explain his decision in paragraphs [43] and [44]. Those were based, in particular, on the number and diversity of the claims, and the fact that they were dispersed, all of which was made out in proof.

[28] His choice to have the charge rank ahead even of the security of the lender was not manifestly wrong, and was predicated, in part, on his view that the effective participation of the subcontractors is essential to the restructuring. His view that the order was to the advantage of all parties, who would profit from the economy of scale of dealing with one legal counsel rather than dozens of lawyers, is reasonable. Fixing the

---

7 *New Skeena Forest Products Inc*. v. *Kitwanga Lumber Co*., 2005 BCCA 192, para. [26] (in chambers).

8 *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No 4583, para. 9.

9 See, e.g., *8901341 Canada inc.* v. *Bloom Lake, g.p.l.*, 2015 QCCA 754, para. [4] (per Doyon, J.A., in chambers).

cap on the amount of the security at $100,000 was prudent, taking into account interests of others, including those of the lender. Again, this is a matter that falls within the discretionary authority of the judge who, given his on-going supervision, is best placed to make a fair order. His decision is therefore deserving of deference.

[29] The aspect of the decision relating to the charge has also been viewed as fact-driven and discretionary by judges who have been called upon to decide leave applications. In this setting too, judges have declined to see appeals on the matter as having sufficient *prima facie* merit to justify leave under section 13 CCAA.[10]

[30] I would add that appeals on discretionary decisions such as these, where the presiding judge made no apparent error in identifying the applicable law and weighed the appropriate factors in coming to a decision, rarely evince sufficient merit to secure leave. This is in large part because appellate courts understand that a judge who presides over a CCAA file is called on to make numerous discretionary decisions like the ones at issue here in the course of proceedings as part of the restructuring. The courts recognize that a judge in a like position is entitled to a degree of latitude and deference. In *Edgewater Casino Inc. (Re)*,[11] the B.C. Court of Appeal wrote of the sufficient *prima facie* merit criterion as follows:

> [19] The third of the above factors involves a consideration of the merits of the appeal. In non-CCAA proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A. Chambers). Most orders made in CCAA proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane J.A.
>
> [20] First, one of the principal functions of the judge supervising the CCAA proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, CCAA proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that "[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).

---

[10] See, e.g., *Canadian Imperial Bank of Commerce* v. *Endurance Energy Ltd*., 2016 ABCA 217, esp. Para. [11] to [13] (per Berger, J.A., in chambers).

[11] 2009 BCCA 40.

2017 QCCA 138 (CanLII)

[31] The judge here was in a similar circumstance and this dictum of the B.C. Court, transposed to the present case, suggests strongly that no viable appeal lies from the judgment *a quo*.

[32] This is sufficient to dismiss the appeal. I would add, in closing, that the practice would learn little from an appeal here. The dispute turns on the judge's appreciation of facts specific to the case, the probative value of the evidence, the exercise of discretion and the peculiarities of the contractual arrangements between the parties. No point of principle is involved. This is a further reason not to grant leave.

FOR THE FOREGOING REASONS, the undersigned:

[33] **DISMISSES** the application for leave to appeal of Bridging Finance Inc., with legal costs;

[34] **DISMISSES** the application for leave to appeal of Les investissements Hexagone inc., Location Hexagone inc. and Groupe Hexagone, s.e.c., with legal costs.

NICHOLAS KASIRER, J.A.

2017 QCCA 138 (CanLII)

TAB 2

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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.

2010 ONSC 222 (CanLII)

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

Companies' Creditors Arrangement Act[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2010 ONSC 222 (CanLII)

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

---

[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

2010 ONSC 222 (CanLII)

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

2010 ONSC 222 (CanLII)

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

2010 ONSC 222 (CanLII)

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

---

[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

2010 ONSC 222 (CanLII)

Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

2010 ONSC 222 (CanLII)

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

2010 ONSC 222 (CanLII)

LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

2010 ONSC 222 (CanLII)

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

2010 ONSC 222 (CanLII)

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

2010 ONSC 222 (CanLII)

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

---

[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6]and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

[6] 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

2010 ONSC 222 (CanLII)

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

[8] 1999 CarswellOnt 4673 (S.C.J.).

2010 ONSC 222 (CanLII)

secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

---

[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

2010 ONSC 222 (CanLII)

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

[12] Supra, note 7 at paras. 31-35.

2010 ONSC 222 (CanLII)

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

2010 ONSC 222 (CanLII)

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

2010 ONSC 222 (CanLII)

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

2010 ONSC 222 (CanLII)

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

2010 ONSC 222 (CanLII)

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> 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 the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[13] This exception also applies to the other charges granted.

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

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

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

2010 ONSC 222 (CanLII)

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

[14] Supra note 7 at paras. 44-48.

2010 ONSC 222 (CanLII)

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

2010 ONSC 222 (CanLII)

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

---

[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

2010 ONSC 222 (CanLII)

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

[19] Supra, note 7 at para. 52.

2010 ONSC 222 (CanLII)

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

2010 ONSC 222 (CanLII)

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

2010 ONSC 222 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

TAB 3

CITATION: First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299
COURT FILE NO.: CV-12-9617-00CL
DATE: 20120226

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

2012 ONSC 1299 (CanLII)

RE: IN THE MATTER OF a Plan of Compromise or Arrangement of First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2019418 Ontario Inc., FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc., Applicants

BEFORE: D. M. Brown J.

COUNSEL: J. Birch and D. Ward, for the Applicants

P. Huff and C. Burr, for the proposed Monitor, Grant Thornton Limited

D. Bish, for the Independent Directors

B. Empey, for Investment Industry Regulatory Organization of Canada

J. Grout, for the Ontario Securities Commission

R. Oliver, for Kenaidan Contracting Limited

J. Dietrich, the proposed Representative Counsel for the investors

E. Garbe, for Structform International Limited

N. Richter, for Gilbert Steel Limited

M. Sanford, for Janick Electrick Limited

M. Konyukhova, for Midland Loan Services Inc.

C. Prophet, for the Canadian Imperial Bank of Commerce

HEARD: February 23, 2012

2012 ONSC 1299 (CanLII)

REASONS FOR DECISION

I. Overview: *CCAA* Initial Order

[1] On Thursday, February 23, 2012, I granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, in respect of the Applicants. These are my Reasons for that decision.

II. The applicant corporations

[2] The Applicants are members of the First Leaside group of companies. They are described in detail in the affidavit of Gregory MacLeod, the Chief Restructuring Officer of First Leaside Wealth Management ("FLWM"), so I intend only refer in these Reasons to the key entities in the group. The parent corporation, FLWM, owns several subsidiaries, including the applicant, First Leaside Securities Inc. ("FLSI"). According to Mr. MacLeod, the Group's operations centre on FLWM and FLSI.

[3] FLSI is an Ontario investment dealer that manages clients' investment portfolios which, broadly speaking, consist of non-proprietary Marketable Securities as well as proprietary equity and debt securities issued by First Leaside (the so-called "FL Products"). All segregated Marketable Securities are held in segregated client accounts with Penson Financial Services Canada Inc.

[4] First Leaside designed its FL Products to provide investors with consistent monthly distributions. First Leaside acts as a real estate syndicate, purchasing real estate through limited partnerships with a view to rehabilitating the properties for lease at higher rates or eventual resale. First Leaside incorporated special-purpose corporations to act as general partners in the various LPs it set up. The general partners of First Leaside's Canadian LPs – i.e. those which own property in Canada – are applicants in this proceeding. First Leaside also seeks to extend the benefits of the Initial Order to the corresponding LPs.

[5] First Leaside has two types of LPs: individual LPs that acquire and operate a single property or development, and aggregator LPs that hold units of multiple LPs. Investors have invested in both kinds of LPs. In paragraph 49 of his affidavit Mr. MacLeod detailed the LPs within First Leaside. While most First Leaside LPs hold interests in identifiable properties, for a

few, called “Blind Pool LPs”, clients invest funds without knowing where the funds likely were to be invested. Those LPs are described in paragraph 51 of Mr. MacLeod’s affidavit.

[6] The applicant, First Leaside Finance Inc. (“FL Finance”), acted as a “central bank” for the First Leaside group of entities.

2012 ONSC 1299 (CanLII)

III. The material events leading to this application

[7] In the fall of 2009 the Ontario Securities Commission began investigating First Leaside. In March, 2011, First Leaside retained the proposed Monitor, Grant Thornton Limited, to review and make recommendations about First Leaside’s businesses. Around the same time First Leaside arranged for appraisals to be performed of various properties.

[8] Grant Thornton released its report on August 19, 2011. For purposes of this application Grant Thornton made several material findings:

(i) There exist significant interrelationships between the entities in the FL Group which result in a complex corporate structure;

(ii) Certain LPs have been a drain on the resources of the Group as a result of recurring operating losses and property rehabilitation costs; and,

(iii)The future viability of the FL Group was contingent on its ability to raise new capital:

> “If the FL Group was restricted from raising new capital, it would likely be unable to continue its operations in the ordinary course, as it would have insufficient revenue to support its infrastructure, staffing costs, distributions, and to meet their funding requirements for existing projects.”

[9] As a result of the report First Leaside hired additional staff to improve accounting resources and financial planning. Last November the Board appointed an Independent Committee to assume all decision-making authority in respect of First Leaside; the Group’s founder, David Phillips, was no longer in charge of its management.

[10] FLSI is regulated by both the OSC and the Investment Industry Regulatory Organization of Canada (“IIROC”). In October, 2011, IIROC issued FLSI a discretionary early warning level 2 letter prohibiting the company from reducing capital and placing other restrictions on its activities. At the same time the OSC told First Leaside that unless satisfactory arrangements were made to deal with its situation, the OSC almost certainly would take regulatory action, including seeking a cease trade order.

[11] First Leaside agreed to a voluntary cease trade, retained Grant Thornton to act as an independent monitor, informed investors about those developments, and made available the August Grant Thornton report.

[12] Because the cease trade restricted First Leaside's ability to raise capital, the Independent Committee decided in late November to cease distributions to clients, including distributions to LP unit holders, interest payments on client notes/debts, and dividends on common or preferred shares.

[13] In December the Independent Committee decided to retain Mr. MacLeod as CRO for First Leaside and asked him to develop a workout plan, which he finalized in late January, 2012. Mr. MacLeod deposed that the downturn in the economy has resulted in First Leaside realizing lower operating income while incurring higher operational costs. In his affidavit Mr. MacLeod set out his conclusion about a workout plan:

> After carefully analyzing the situation, my ultimate conclusion was that it was too risky and uncertain for First Leaside to pursue a resumption of previous operations, including the raising of capital. My recommendation to the Independent Committee was that First Leaside instead undertake an orderly wind-down of operations, involving:
>
> (a) Completing any ongoing property development activity which would create value for investors;
>
> (b) Realizing upon assets when it is feasible to do so (even where optimal realization might occur over the next 12 to 36 months);
>
> (c) Dealing with the significant inter-company debts; and,
>
> (d) Distributing proceeds to investors.

Mr. MacLeod further deposed:

> [T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues – especially the numerous investor and creditor claims and inter-company claims – can be dealt with in one forum under the supervision of the court.

The Independent Committee approved Mr. MacLeod's recommendations. This application resulted.

IV. Availability of *CCAA*

A. The financial condition of the applicants

[14] According to Mr. MacLeod, First Leaside has over $370 million in assets under management. Some of those, however, are Marketable Securities. First Leaside is proposing that clients holding Marketable Securities (which are held in segregated accounts) be free to transfer them to another investment dealer during the *CCAA* process. As to the value of FL Products, Mr. MacLeod deposed that "it remains to be determined specifically how much value will be realized for investors on the LP units, debt instruments, and shares issued by the various First Leaside entities."

2012 ONSC 1299 (CanLII)

[15] First Leaside's debt totals approximately $308 million: $176 million to secured creditors (mostly mortgagees) and $132 million to unsecured creditors, including investors holding notes or other debt instruments.

[16] Mr. MacLeod summarized his assessment of the financial status of the First Leaside Group as follows:

> [S]ince GTL reported that the aggregate value of properties in the First Leaside exceeded the value of the properties, there will be net proceeds remaining to provide at least some return to subordinate creditors or equity holders (i.e., LP unit holders and corporation shareholders) in many of the First Leaside entities. The recovery will, of course, vary depending on the entity. At this stage, however, it is fair to conclude that there is a material equity deficit both in individual First Leaside entities and in the overall First Leaside group.

[17] In his affidavit Mr. MacLeod also deposed, with respect to the financial situation of First Leaside, that:

(i) The cease trade placed severe financial constraints on First Leaside as almost every business unit depended on the ability of FLWM and its subsidiaries to raise capital from investors;

(ii) There are immediate cash flow crises at FLWM and most LPs;

(iii) FLWM's cash reserves had fallen from $2.8 million in November, 2011 to $1.6 million at the end of this January;

(iv) Absent new cash from asset disposals, current cash reserves would be exhausted in April;

(v) At the end of December, 2011 Ventures defaulted by failing to make a principal mortgage payment of $4.25 million owing to KingSett;

(vi) Absent cash flow from FLWM a default is imminent for Investor's Harmony property;

(vii) First Leaside lacks the liquidity or refinancing options to rehabilitate a number of the properties and execute on its business plan; and,

(viii) First Leaside generally has been able to make mortgage payments to its creditors, but in the future it will be difficult to do so given the need to expend monies on property development and upgrading activities

2012 ONSC 1299 (CanLII)

[18] In his description of the status of the employees of the Applicants, Mr. MacLeod did not identify any issue concerning a pension funding deficiency.[1] The internally-prepared 2010 FLWM financial statements did not record any such liability. Grant Thornton did not identify any such issue in its Pre-filing Report.

[19] First Leaside is not proposing to place all of its operations under court-supervised insolvency proceedings. It does not plan to seek Chapter 11 protection for its Texas properties since it believes they may be able to continue operations over the anticipated wind-up period using cash flows they generate and pay their liabilities as they become due. Nor does First Leaside seek to include in this *CCAA* proceeding the First Leaside Venture LP ("Ventures") which owns and operates several properties in Ontario and British Columbia. On February 15, 2012 Ventures and Bridge Gap Konsult Inc. signed a non-binding term sheet to provide some bridge financing for Ventures. First Leaside decided not to include certain Ventures-related limited partnerships in the *CCAA* application at this stage,[2] while reserving the right to later bring a motion to extend the Initial Order and stay to these Excluded LPs. The Initial Order which I signed reflected that reservation.

[20] As noted above, over the better part of the past year the proposed Monitor, Grant Thornton, has become familiar with the affairs of the First Leaside Group as a result of the review it conducted for its August, 2011 report. Last November First Leaside retained Grant Thornton as an independent monitor of its business.

[21] In its Pre-filing Report Grant Thornton noted that the last available financial statements for FLWM were internally prepared ones for the year ended December 31, 2010. They showed a net loss of about $2.863 million. The Pre-filing Report contained a 10-week cash flow projection (ending April 27, 2012) prepared by the First Leaside Group. The Cash Flow Projection does not contemplate servicing interest and principal payments during the projection period. On that basis the Cash Flow Projection showed the Group's combined closing bank balance declining from $6.97 million to $4.144 million by the end of the projection period. Grant Thornton reviewed the Cash Flow Projection and stated that it reflected the probable and hypothetical assumptions on which it was prepared and that the assumptions were suitably supported and consistent with the plans of the First Leaside Group and provided a reasonable basis for the Cash Flow Projection.

[22] Grant Thornton reported that certain creditors, specifically construction lien claimants, had commenced enforcement proceedings and it concluded:

> Given creditors' actions to date and due to the complicated nature of the FL Group's business, the complex corporate structure and the number of competing stakeholders, it is unlikely that the FL Group will be able to conduct an orderly wind-up or continue to

[1] MacLeod Affidavit, paras. 104 to 106.
[2] The Excluded LPs were identified in paragraph 134 of Mr. MacLeod's affidavit.

2012 ONSC 1299 (CanLII)

> rehabilitate properties without the stability provided by a formal Court supervised restructuring process.
>
> …
>
> As the various stakeholder interests are in many cases intertwined, including intercompany claims, the granting of the relief requested would provide a single forum for the numerous stakeholders of the FL Group to be heard and to deal with such parties' claims in an orderly manner, under the supervision of the Court, a CRO and a Court-appointed Monitor. In particular, a simple or forced divestiture of the properties of the FL Group would not only erode potential investor value, but would not provide the structure necessary to reconcile investor interests on an equitable and ratable basis.
>
> A stay of proceedings for both the Applicants and the LPs is necessary if it is deemed appropriate by this Honourable Court to allow the FL Group to maintain its business and to allow the FL Group the opportunity to develop, refine and implement their restructuring/wind-up plan(s) in a stabilized environment.

2012 ONSC 1299 (CanLII)

B. Findings

[23] I am satisfied that the Applicants are "companies" within the meaning of the *CCAA* and that the total claims against the Applicants, as an affiliated group of companies, is greater than $5 million.

[24] Are the Applicant companies "debtor companies" in the sense that they are insolvent? For the purposes of the *CCAA* a company may be insolvent if it falls within the definition of an insolvent person in section 2 of the *Bankruptcy and Insolvency Act* or if its financial circumstances fall within the meaning of insolvent as described in *Re Stelco Inc.* which include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".[3]

[25] When looked at as a group the Applicants fall within the extended meaning of "insolvent": as a result of the cease trade their ability to raise capital has been severely restricted; cash reserves fell significantly from November until the time of filing, and the Cash Flow Projection indicates that cash reserves will continue to decline even with the cessation of payments on mortgages and other debt; Mr. MacLeod estimated that cash reserves would run out in April; distributions to unit holders were suspended last November; and, some formal mortgage defaults have occurred.

---

[3] (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.).

[26] However, a secured creditor mortgagee, Midland Loan Services Inc., submitted that to qualify for *CCAA* protection each individual applicant must be a "debtor company" and that in the case of one applicant, Queenston Manor General Partner Inc., that company was not insolvent. In his affidavit Mr. MacLeod deposed that the Queenston Manor LP is owned by the First Leaside Expansion Limited Partnership ("FLEX"). Queenston owns and operates a 77-unit retirement complex in St. Catherines, has been profitable since 2008 and is expected to remain profitable through 2013. Queenston has been listed for sale, and management currently is considering an offer to purchase the property. Midland Loan submitted that in light of that financial situation, no finding could be made that the applicant, Queenston Manor General Partner Inc., was a "debtor company".

[27] Following that submission I asked Applicants' counsel where in the record one could find evidence about the insolvency of each individual Applicant. That prompted a break in the hearing, at the end of which the Applicants filed a supplementary affidavit from Mr. MacLeod. Indicating that one of the biggest problems facing the Applicants was the lack of complete and up-to-date records, in consultation with the Applicants' CFO Mr. MacLeod submitted a chart providing, to the extent possible, further information about the financial status of each Applicant. That chart broke down the financial status of each of the 52 Applicants as follows:

Insolvent	28
Dormant	15
Little or no realizable assets	5
More information to be made available to the court	3
Other: management revenue stopped in 2010; $70,000 cash; $270,000 in related-company receivables	1

Queenston Manor General Partner Inc. was one of the applicants for which "more information would be made available to the court".

[28] As I have found, when looked at as a group, the Applicants fall within the extended meaning of "insolvent". When one descends a few levels and looks at the financial situation of some of the aggregator LPs, such as FLEX, Mr. MacLeod deposed that FLEX is one of the largest net debtors – i.e. it is unable to repay inter-company balances from operating cash flows and lacks sufficient net asset value to settle the intercompany balances through the immediate liquidation of assets. The evidence therefore supports a finding that the corporate general partner of FLEX is insolvent. Queenston Manor is one of several assets owned by FLEX, albeit an asset which uses the form of a limited partnership.

[29] If an insolvent company owns a healthy asset in the form of a limited partnership does the health of that asset preclude it from being joined as an applicant in a *CCAA* proceeding? In the

2012 ONSC 1299 (CanLII)

circumstances of this case it does not. The jurisprudence under the *CCAA* provides that the protection of the Act may be extended not only to a "debtor company", but also to entities who, in a very practical sense, are "necessary parties" to ensure that that stay order works. Morawetz J. put the matter the following way in *Priszm Income Fund (Re)*:

> The *CCAA* definition of an eligible company does not expressly include partnerships. However, *CCAA* courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehndorff, supra*, and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 (S.C.J.).
>
> The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.[4]

2012 ONSC 1299 (CanLII)

[30] Although section 3(1) of the *CCAA* requires a court on an initial application to inquire into the solvency of any applicant, the jurisprudence also requires a court to take into account the relationship between any particular company and the larger group of which it is a member, as well as the need to place that company within the protection of the Initial Order so that the order will work effectively. On the evidence filed I had no hesitation in concluding that given the insolvency of the overall First Leaside Group and the high degree of inter-connectedness amongst the members of that group, the protection of the *CCAA* needed to extend both to the Applicants and the limited partnerships listed in Schedule "A" to the Initial Order. The presence of all those entities within the ambit of the Initial Order is necessary to effect an orderly winding-up of the insolvent group as a whole. Consequently, whether Queenston Manor General Partner Inc. falls under the Initial Order by virtue of being a "debtor company", or by virtue of being a necessary party as part of an intertwined whole, is, in the circumstances of this case, a distinction without a practical difference.

[31] In sum, I am satisfied that those Applicants identified as "insolvent" on the chart attached to Mr. MacLeod's supplementary affidavit are "debtor companies" within the meaning of the *CCAA* and that the other Applicants, as well as the limited partnerships listed on Schedule "A" of the Initial Order, are entities to which it is necessary and appropriate to extend *CCAA* protection.

C. "Liquidation" *CCAA*

[32] While in most circumstances resort is made to the *CCAA* to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets" and to create "conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all", the

---

[4] 2011 ONSC 2061, paras. 26-27.

reality is that "reorganizations of differing complexity require different legal mechanisms." [5] That reality has led courts to recognize that the *CCAA* may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership,[6] or to wind-up or liquidate it. In *Lehndorff General Partner Ltd. (Re)*[7] Farley J. observed:

> It appears to me that the purpose of the *CCAA* is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Assoc. Investors, supra*, at p. 318; *Re Amirault Co*. (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

[33] In the decision of *Associated Investors of Canada Ltd. (Re)* referred to by Farley J., the Alberta Court of Queen's Bench stated:

> The realities of the modern marketplace dictate that courts of law respond to commercial problems in innovative ways without sacrificing legal principle. In my opinion, the Companies' Creditors Arrangement Act is not restricted in its application to companies which are to be kept in business. Moreover, the Court is not without the ability to address within its jurisdiction the concerns expressed in the Ontario cases. The Act may be invoked as a means of liquidating a company and winding-up its affairs but only if certain conditions precedent are met:
>
> > 1. It must be demonstrated that benefits would likely flow to Creditors that would not otherwise be available if liquidation were effected pursuant to the Bankruptcy Act or the Winding-Up Act.
> >
> > 2. The Court must concurrently provide directions pursuant to compatible legislation that ensures judicial control over the liquidation process and an effective means whereby the affairs of the company may be investigated and the results of that investigation made available to the Court.
> >
> > 3. A Plan of Arrangement should not receive judicial sanction until the Court has in its possession, all of the evidence necessary to allow the Court to properly

2012 ONSC 1299 (CanLII)

---

[5] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, paras. 15, 77 and 78.
[6] *Nortel Networks Corp. (Re)*, 2009 ONCA 833, para. 46; see Kevin P. McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), pp. 284 et seq.
[7] [1993] O.J. No. 14 (Gen. Div.). In *Brake Pro, Ltd. (Re)*, [2008] O.J. No. 2180 (S.C.J.), Wilton-Siegel J. stated, at paragraph 10: "While reservations are expressed from time to time regarding the appropriateness of a "liquidating" *CCAA* proceeding, such proceedings are permissible under the *CCAA*."

> exercise its discretion according to standards of fairness and reasonableness, absent any findings of illegality.[8]

The editors of *The 2012 Annotated Bankruptcy and Insolvency Act* take some issue with the extent of those conditions:

> With respect, these conditions may be too rigorous. If the court finds that the plan is fair and reasonable and in the best interests of creditors, and there are cogent reasons for using the statute rather than the *BIA* or *WURA*, there seems no reason why an orderly liquidation could not be carried out under the *CCAA*.[9]

[34] Mr. MacLeod, the CRO, deposed that no viable plan exists to continue First Leaside as a going concern and that the most appropriate course of action is to effect an orderly wind-down of First Leaside's operations over a period of time and in a manner which will create the opportunity to realize improved net asset value. In his professional judgment the *CCAA* offered the most appropriate mechanism by which to conduct such an orderly liquidation:

> [T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues – especially the numerous investor and creditor claims and the inter-company claims – can be dealt with in one forum under the supervision of the court.

In its Pre-filing Report the Monitor also supported using the *CCAA* to implement the "restructuring/wind-up plan(s) in a stabilized environment".

[35] Both the CRO and the proposed Monitor possess extensive knowledge about the workings of the Applicants. Both support a process conducted under the *CCAA* as the most practical and effective way in which to deal with the affairs of this insolvent group of companies. No party contested the availability of the *CCAA* to conduct an orderly winding-up of the affairs of the Applicants (although, as noted, some parties questioned whether certain entities should be included within the scope of the Initial Order). Given that state of affairs, I saw no reason not to accept the professional judgment of the CRO and the proposed Monitor that a liquidation under the *CCAA* was the most appropriate route to take.

[36] Moreover, I saw no prejudice to claimant creditors by permitting the winding-up of the First Leaside Group to proceed under the *CCAA* instead of under the *BIA* in view of the convergence which exists between the *CCAA* and *BIA* on the issue of priorities. As the Supreme Court of Canada pointed out in *Century Services*:

---

[8] *First Investors Corp. (Re)* (1987), 46 D.L.R. (4th) 669 (Alta. Q.B.), para. 36.
[9] Houlden, Morawetz & Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act*, N§1, p. 1099.

2012 ONSC 1299 (CanLII)

> Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful.[10]

As the British Columbia Court of Appeal observed in *Caterpillar Financial Services Ltd. v. 360networks corp.* interested parties also use that priorities backdrop to negotiate successful *CCAA* reorganizations:

> While it might be suggested that *CCAA* proceedings may require those with a financial stake in the company, including shareholders and creditors, to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless. The right of creditors to realize on any security may be suspended pending the final approval of the court, but this does not render their potential priority nugatory. Priorities are always in the background and influence the decisions of those who vote on the plan.[11]

[37] I therefore concluded that the *CCAA* was available to the Applicants in the circumstances, and I so ordered.

V. Representative Counsel, CRO and Monitor

[38] The Applicants sought the appointment of Fraser Milner Casgrain ("FMC") as Representative Counsel to represent the interests of the some 1,200 clients of FLSI in this proceeding, subject to the right of any client to opt-out of such representation. The proposed Monitor expressed the view that it would be in the best interests of the FL Group and its investors to appoint Representative Counsel. No party objected to such an appointment. I reviewed the qualifications and experience of proposed Representative Counsel and its proposed fees, and I was satisfied that it would be appropriate to appoint FMC as Representative Counsel on the terms set out in the Initial Order.

[39] The Applicants sought the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside. No party objected to that appointment. The Applicants included a copy of the CRO's December 21, 2011 Retention Agreement in their materials. The proposed Monitor stated that the appointment of a CRO was important to ensure an adequate level of senior corporate governance leadership. I agree, especially in light of the withdrawal of Mr. Phillips last November from the management of the Group. The proposed Monitor reported that the terms and conditions of the Retention Agreement were consistent with similar arrangements approved by other courts in *CCAA* proceedings and the remuneration payable was reasonable in the circumstances. As a result, I confirmed the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside.

---

[10] *Century Services, supra.*, para. 23.
[11] (2007), 279 D.L.R. (4th) 701 (B.C.C.A.), para. 42.

2012 ONSC 1299 (CanLII)

[40] Finally, I appointed Grant Thornton as Monitor. No party objected, and Grant Thornton has extensive knowledge of the affairs of the First Leaside Group.

VI. Administration and D&O Charges and their priorities

A. Charges sought

[41] The Applicants sought approval, pursuant to section 11.52 of the *CCAA*, of an Administration Charge in the amount of $1 million to secure amounts owed to the Estate Professionals – First Leaside's legal advisors, the CRO, the Monitor, and the Monitor's counsel.

[42] They also sought an order indemnifying the Applicants' directors and officers against any post-filing liabilities, together with approval, pursuant to section 11.51 of the *CCAA*, of a Director and Officer's Charge in the amount of $250,000 as security for such an indemnity. Historically the First Leaside Group did not maintain D&O insurance, and the Independent Committee was not able to secure such insurance at reasonable rates and terms when it tried to do so in 2011.

[43] The Monitor stated that the amount of the Administration Charge was established based on the Estate Professionals' previous history and experience with restructurings of similar magnitude and complexity. The Monitor regarded the amount of the D&O Charge as reasonable under the circumstances. The Monitor commented that the combined amount of both charges ($1.25 million) was reasonable in comparison with the amount owing to mortgagees ($176 million).

[44] In its Pre-filing Report the Monitor did note that shortly before commencing this application the Applicants paid $250,000 to counsel for the Independent Committee of the Board. The Monitor stated that the payment might "be subject to review by the Monitor, if/when it is appointed, in accordance with s. 36.1(1) of the *CCAA*". No party requested an adjudication of this issue, so I refer to the matter simply to record the Monitor's expression of concern.

[45] Based on the evidence filed, I concluded that it was necessary to grant the charges sought in order to secure the services of the Estate Professionals and to ensure the continuation of the directors in their offices and that the amounts of the charges were reasonable in the circumstances.

B. Priority of charges

[46] The Applicants sought super-priority for the Administration and D&O Charges, with the Administration Charge enjoying first priority and the D&O Charge second, with some modification with respect to the property of FLSI which the Applicants had negotiated with IIROC.

[47] In its Pre-filing Report the proposed Monitor stated that the mortgages appeared to be well collateralized, and the mortgagees would not be materially prejudiced by the granting of the proposed priority charges. The proposed Monitor reported that it planned to work with the

2012 ONSC 1299 (CanLII)

Applicants to develop a methodology which would allocate the priority charges fairly amongst the Applicants and the included LPs, and the allocation methodology developed would be submitted to the Court for review and approval.

[48] In *Indalex Limited (Re)*[12] the Court of Appeal reversed the super-priority initially given to a DIP Charge by the motions judge in an initial order and, instead, following the sale of the debtor company's assets, granted priority to deemed trusts for pension deficiencies. In reaching that decision Court of Appeal observed that affected persons – the pensioners – had not been provided at the beginning of the *CCAA* proceeding with an appropriate opportunity to participate in the issue of the priority of the DIP Charge.[13] Specifically, the Court of Appeal held:

> In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".
>
> While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.[14]

[49] In his recent decision in *Timminco Limited (Re)*[15] ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:

> In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of

---

[12] 2011 ONCA 265.
[13] *Ibid*., para. 155.
[14] *Ibid*., paras. 178 and 179.
[15] 2012 ONSC 506.

2012 ONSC 1299 (CanLII)

> the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.[16]

[50] In its Pre-filing Report the proposed Monitor expressed the view that if the priority charges were not granted, the First Leaside Group likely would not be able to proceed under the *CCAA*.

[51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.

[52] Accordingly I raised that issue at the commencement of the hearing last Thursday and requested submissions on the issues of priority and paramountcy from any interested party. Several parties made submissions on those points: (i) the Applicants, proposed Monitor and proposed Representative Counsel submitted that the Court should address any priority or paramountcy issues raised; (ii) IIROC advised that it did not see any paramountcy issue in respect of its interests; (iii) counsel for Midland Loan submitted that a paramountcy issue existed with respect to its client, a secured mortgagee, because it enjoyed certain property rights under provincial mortgage law; she also argued that the less than full day's notice of the hearing given by the Applicants was inadequate to permit the mortgagee to consider its position, and her client should be given seven days to do so; and, (iv) counsel for a construction lien claimant, Structform International, who spoke on behalf of a number of such lien claimants, made a similar submission, contending that the construction lien claimants required 10 days to determine whether they should make submissions on the relationship between their lien claims and any super-priority charge granted under the *CCAA*.

[53] I did not grant the adjournment requested by the mortgagee and construction lien claimants for the following reasons. First, the facts in *Indalex* were quite different from those in the present case, involving as they did considerations of what fiduciary duty a debtor company owed to pensioners in respect of underfunded pension liabilities. I think caution must be exercised before extending the holding of *Indalex* concerning *CCAA*-authorized priority charges to other situations, such as the one before me, which do not involve claims involving pension

---

[16] *Ibid*., para. 66.

2012 ONSC 1299 (CanLII)

deficiencies, but claims by more "ordinary" secured creditors, such as mortgagees and construction lien claimants.

[54] Second, I have some difficulty seeing how constitutional issues of paramountcy arise in in a *CCAA* proceeding as between claims to the debtor's property by secured creditors, such as mortgagees and construction lien claimants, and persons granted a super-priority charge by court order under sections 11.51 and 11.52 of the *CCAA*. At the risk of gross over-simplification, Canadian constitutional law places the issue of priorities of secured creditors in different legislative balliwicks depending on the health of the debtor company. When a company is healthy, secured creditor priorities usually are determined under provincial laws, such as personal property security legislation and related statutes, which result from provincial legislatures exercising their powers with respect to "property and civil rights in the province".[17] However, when a company gets sick - becomes insolvent - our *Constitution* vests in Parliament the power to craft the legislative regimes which will govern in those circumstances. Exercising its power in respect of "bankruptcy and insolvency",[18] Parliament has established legal frameworks under the *BIA* and *CCAA* to administer sick companies. Priority determinations under the *CCAA* draw on those set out in the *BIA*, as well as the provisions of the *CCAA* dealing with specific claims such as Crown trusts and other claims.

[55] As it has evolved over the years the constitutional doctrine of paramountcy polices the overlapping effects of valid federal and provincial legislation: "The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers."[19] Since 1960 the Supreme Court of Canada has travelled a "path of judicial restraint in questions of paramountcy".[20] That Court has not been prepared to presume that, by legislating in respect of a matter, Parliament intended to rule out any possible provincial action in respect of that subject,[21] unless (and it is a big "unless"), Parliament used very clear statutory language to that effect.[22]

[56] I have found that the Applicants have entered the world of the sick, or the insolvent, and are eligible for the protection of the federal *CCAA*. The federal legislation *expressly* brings mortgagees and construction lien claimants within its regime – the definition of "secured creditor" contained in section 2 of the *CCAA* specifically includes "a holder of a mortgage" and "a holder of a …lien…on or against…all or any of the property of a debtor company as security for indebtedness of the debtor company". The federal legislation also *expressly* authorizes a court to grant priority to administration and D&O charges over the claims of such secured

---

[17] *Constitution Act, 1867*, s. 92 ¶13.
[18] *Ibid*., s. 91 ¶21.
[19] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, para. 69.
[20] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, para. 21
[21] *Canadian Western Bank, supra.*, para. 74.
[22] *Rothmans, supra.*, para. 21.

2012 ONSC 1299 (CanLII)

creditors of the debtor.[23] In light of those express provisions in sections 2, 11.51 and 11.52 of the *CCAA*, and my finding that the Applicants are eligible for the protection offered by the *CCAA*, I had great difficulty understanding what argument could be advanced by the mortgagees and construction lien claimants about the concurrent operation of provincial and federal law which would relieve them from the priority charge provisions of the *CCAA*. I therefore did not see any practical need for an adjournment.

2012 ONSC 1299 (CanLII)

[57] Finally, sections 11.51(1) and 11.52(1) of the *CCAA* both require that notice be given to secured creditors who are likely to be affected by an administration or D&O charge before a court grants such charges. In the present case I was satisfied that such notice had been given. Was the notice adequate in the circumstances? I concluded that it was. To repeat, making due allowance for the unlimited creativity of lawyers, I have difficulty seeing what concurrent operation argument could be advanced by mortgagee and construction lien claims against court-ordered super-priority charges under sections 11.51 and 11.52 of the *CCAA*. Second, as reported by the proposed Monitor, the quantum of the priority charges ($1.25 million) is reasonable in comparison with the amount owing to mortgagees ($176 million) and the mortgages appeared to be well collateralized based on available information. Third, the Applicant and Monitor will develop an allocation methodology for the priority charges for later consideration by this Court. The proposed Monitor reported:

> It is the Proposed Monitor's view that the allocation of the proposed Priority Charges should be carried out on an equitable and proportionate basis which recognizes the separate interests of the stakeholders of each of the entities.

The secured creditors will be able to make submissions on any proposed allocation of the priority charges. Finally, while I understand why the secured creditors are focusing on their specific interests, it must be recalled that the work secured by the priority charges will be performed for the benefit of all creditors of the Applicants, including the mortgagees and construction lien claimants. All creditors will benefit from an orderly winding-up of the affairs of the Applicants.

[58] In the event that I am incorrect that no paramountcy issue arises in this case in respect of the priority charges, I echo the statements made by Morawetz J. in *Timminco I* which I reproduced in paragraph 49 above. In *Indalex* the Court of Appeal accepted that "the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation".[24] I find that it is both necessary and appropriate to grant super priority to both the Administration and D&O Charges in order to ensure that the objectives of the *CCAA* are not frustrated.

---

[23] *CCAA* ss. 11.51(2) and 11.52(2).
[24] *Indalex, supra.*, para. 176.

[59] For those reasons I did not grant the adjournment requested by Midland Loan and the construction lien claimants, concluding that they had been given adequate notice in the circumstances, and I granted the requested Administration and D&O Charges.

VII. Other matters

[60] At the hearing counsel for one of the construction lien claimants sought confirmation that by granting the Initial Order a construction lien claimant who had issued, but not served, a statement of claim prior to the granting of the order would not be prevented from serving the statement of claim on the Applicants. Counsel for the Applicants confirmed that such statements of claim could be served on it.

[61] At the hearing the Applicants submitted a modified form of the model Initial Order. Certain amendments were proposed during the hearing; the parties had an opportunity to make submissions on the proposed amendments.

VIII. Summary

[62] For the foregoing reasons I was satisfied that it was appropriate to grant the *CCAA* Initial Order in the form requested. I signed the Initial Order at 4:08 p.m. EST on Thursday, February 23, 2012.

_____

D. M. Brown J.

Date: February 26, 2012

2012 ONSC 1299 (CanLII)

TAB 4

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
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
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

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.).

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 5

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: 500-11-041305-117

DATE: March 17, 2014

2014 QCCS 980 (CanLII)

PRESIDING: THE HONOURABLE LOUIS J. GOUIN, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

HOMBURG INVEST INC. & et als.

Debtors

- and -

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP & et als.

Mises-en-cause

- and -

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

Monitor

- and -

STICHTING HOMBURG BONDS and **1028167 ALBERTA LTD.**

Petitioners

- and -

HOMBURG CANADA INC.

Mise-en-cause

JUDGMENT

---

1. CONTEXT AND STICHTING MOTIONS

[1] On September 9, 2011, an initial order (the "**Initial Order**") was issued by the Court pursuant to the *Companies' Creditors Arrangement Act*[1] (the "***CCAA***") granting court protection to the Debtors (the "**HII Group**") and the Mises-en-cause.

[1] R.S.C. 1985 c. C-36.

JG2270

[2] Samson Bélair/Deloitte & Touche Inc. was appointed as monitor (the « **Monitor** ») under the *CCAA* and the Initial Order.

[3] The undersigned was then charged with the court supervision of the HII Group's restructuring under the *CCAA* (the "**Restructuring**").

[4] As of the date hereof, 52 court orders have been issued, and the HII Group is presently working on implementing the plans approved by its creditors, and sanctioned by the Court on June 5, 2013 (the "**Plans**").

[5] The Court is now seized with three motions presented by the Petitioners Stichting Homburg Bonds ("**SHB**") and 1028167 Alberta Ltd. ("**Alberta**"), namely:

a. "*Motion in Appeal of a Disallowance of a Proof of Claim, pursuant to the "Claims Process Order" issued on April 30, 2012*" (Cote #154), dated February 14, 2013 and filed by SHB (the "**First Appeal Motion**");

b. "*Motion in Appeal of the Disallowance of Proofs of Claim filed pursuant to the "Claims Process Order" issued on April 30, 2012*" (Cote #212), dated May 17, 2013 and filed by SHB and Alberta (the "**Second Appeal Motion**"); and

c. "*Amended Motion for the Payment of the Fees and Expenses of Stichting Homburg Bonds and Other Relief*" (Cote #228), dated February 4, 2014 (initially dated October 9, 2013) and filed by SHB (the "**Expenses Payment Motion**");

(the First Appeal Motion, the Second Appeal Motion and the Expenses Payment Motion collectively called the "**Stichting Motions**").

[6] Essentially, by the Expenses Payment Motion, SHB requests payment of 100% of its fees and expenses incurred since the issuance of the Initial Order, on the basis of its "substantial contribution" to the successful Restructuring, without being compromised under the Plans.

[7] Subsidiarily, by the First Appeal Motion and the Second Appeal Motion, SHB and Alberta request that such fees and expenses be included in their respective claims filed pursuant to the *Claims Process Order* issued by this Court on April 30, 2012 (the "**CPO**"), the "*Order for the convening, holding and conduct of the HII/Shareco creditors' meeting and granting other relief*" issued on April 29, 2013 (the "**HII/Shareco Meeting Order**"), and the "*Order for the convening, holding and conduct of a creditors' meeting in respect of Homco Realty Fund (61) Limited Partnership* ("**Homco 61**") *and granting other relief*" issued on April 29, 2013 (the "**Homco 61 Meeting Order**") (the HII/Shareco Meeting Order and Homco 61 Meeting Order collectively called the "**Meeting Orders**") and the Plans, and that such claims be accepted as "*Proven Claims*" as defined in the

2014 QCCS 980 (CanLII)

Meeting Orders (the "**Stichting Proven Claims**") and compromised under the Plans.

[8] The First Appeal Motion covers such Stichting's and Alberta's fees and expenses for the period between the Initial Order and December 3, 2011, namely $2.1 million (the "**Pre-December 3 Expenses**").

[9] The Second Appeal Motion covers such Stichting's and Alberta's fees and expenses for the period after December 3, 2011, namely an amount of approximately $7.6 million (the "**Post-December 3 Expenses**").

[10] Somehow, the Expenses Payment Motion encompasses all SHB's and Alberta's requests under the Stichting Motions, and they claim thereunder both the Pre-December 3 Expenses and the Post-December 3 Expenses (collectively called the "**Stichting Expenses**").

[11] To facilitate the reading of this judgment, SHB and/or Alberta, as petitioners under one or the other of the Stichting Motions, and/or SHCS (defined hereinafter), are referred to herein as "**Stichting**".

[12] During the hearing, Stichting renounced to its subsidiary conclusions appearing at pages 20 and 21 of the Expenses Payment Motion and dealing with the setting aside of a "reserve" for the Pre-December 3 Expenses, including related requests thereto.

2. RELEVANT FACTS

2.1 Trust Indentures

[13] Stichting is the indenture trustee under, *inter alia*, the following trust indentures:

a. a trust indenture made as of December 15, 2002 between the debtor Homburg Shareco Inc. ("**Shareco**") and Stichting Homburg Mortgage Bond (now SHB), as supplemented by several supplemental indentures (the "**Mortgage Bonds Indenture**")[2];

b. a trust indenture made as of May 31, 2006, between the debtor Homburg Invest Inc. ("**HII**") and SHB, as supplemented by several supplemental indentures (the "**Corporate Bonds Indenture**")[3];

(the Mortgage Bonds Indenture and the Corporate Bonds Indenture collectively called the "**Indentures**")

c. a trust indenture made as of February 28, 2009, between HII and Stichting Homburg Capital Securities ("**SHCS**").

[2] Exhibit R-2.
[3] Exhibit R-1.

2014 QCCS 980 (CanLII)

[14] HII has unconditionally and irrevocably guaranteed all amounts payable by Shareco under the Mortgage Bonds Indenture pursuant to a guarantee agreement dated December 15, 2002 and supplemental guarantee agreements under each supplemental indenture to the Mortgage Bonds Indenture (collectively the "**Guarantee**")[4].

[15] Under the Indentures, Stichting is the representative of approximately 9,500 holders of bonds (the "**Bonds**") issued thereunder (the "**Bondholders**").

[16] While questions with respect to the status of Sitchting as "representative" of the Bondholders have been raised in the past, this was not an issue at the time the Stichting Motions were heard before the Court.

[17] The Bondholders under the Indentures hold in excess of $593 million in claims, representing approximately 75% of the unsecured unconsolidated proven claims against HII under the Plans.

2.2 Pre-Initial Order agreements involving HII, HCI and Stichting

[18] On July 6, 2011, a *Voting power of attorney agreement* ("**VA**") was entered into between Richard Homburg ("**RH**"), Homburg Finance A.G. ("**Finance**") and HII, pursuant to which RH and Finance, as shareholders of HII, appointed the Attorney (as defined therein) to vote their shares in respect of the electing and removing of directors of HII[5].

[19] RH controls, directly or indirectly, Finance.

[20] On September 8, 2011, a *Heads of Agreement* ("**HOA**")[6] was entered into between, *inter alia*, RH, Finance, Homburg Canada Inc. ("**HCI**"), Homburg L.P. Management inc. ("**Management**"), SHB and SHCS (HII was not a party thereto) in order, *inter alia*, to address control issues (the "**Control Issues**") raised by the Dutch Authority for the Financial Markets (the "**AFM**") with respect to RH's, Finance's, HCI's and related entities' holdings in HII and related entities[7], and to provide for the transfer of their shares in HII to Stichting, subject to the terms and conditions therein.

[21] RH controls, directly or indirectly, HCI and Management.

[22] Concurrently, on September 8, 2011, a *Voting Power of Attorney and Standstill Agreement* ("**POA**")[8] was entered into between RH, Finance and Stichting, and it replaced the VA[9].

[4] Exhibit R-2, Appendix D and Appendixes C to the supplemental Mortgage Bonds Indenture.
[5] HOA (Exhibit R-4), art. 3.1.1.
[6] Exhibit R-4, filed under confidential seal.
[7] HOA (Exhibit R-4), paragr. (A) and art. 4.
[8] Exhibit R-3, filed under confidential seal.
[9] POA (Exhibit R-3), art. 3.1.1.

2014 QCCS 980 (CanLII)

[23] The POA provided that Stichting was to vote on behalf of RH and Finance their voting shares held in HII, and it included the following indemnification clause agreed to by RH and Finance:

> "[…] [RH and Finance] shall jointly and severally indemnify and hold the Attorneys [Stichting] harmless from and against any and all actions and suits whether groundless or otherwise and from and against any and all losses, damages, costs, charges, counsel fees, payments, expenses and liabilities arising directly or indirectly out of the duties of the Attorneys […] ".[10]
>
> (the " **POA Indemnity**")

[24] The HOA and the POA gave rise to a "proxy battle" in the early days of the Restructuring, starting with HII's annual general meeting held in Montréal on the morning of September 9, 2011.

2.3 Proceedings filed by Stichting

[25] In addition to contesting the issuance of the Initial Order in the afternoon and evening of September 9, 2011, Stichting filed immediately thereafter the following proceedings:

a. a "*De Bene Esse Motion for an Order Lifting the Stay of Proceedings for the Purposes of Seeking Relief in respect of Homburg Invest Inc.'s Annual General Meeting*" dated September 16, 2011;

b. a "*Motion for Amendments to the Initial Order*" dated September 16, 2011, and amended on October 4, 2011; and

c. a "*Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief*" dated October 4, 2011 (the "**Original Motion for Funding**"),

(collectively the "**Stichting Proceedings**").

[26] Concurrently, the Monitor filed a "*Motion to Obtain Lists of Registered Bondholders*" further to Stichting's refusal to provide same, the whole resulting in the Court issuing, on October 7, 2011, the "*Bondholders Listing Order*".

[27] Also, the Court issued a number of "*Case Management Orders*" specifically requesting that the parties make all reasonable efforts to settle their outstanding issues.

[28] Amongst those issues were Stichting's involvement in the Restructuring and Stichting's fees and expenses:

[10] POA (Exhibit R-3), art. 4.

2014 QCCS 980 (CanLII)

a. In the "*Case Management Order #1*" issued on September 26, 2011, the Court declared and ordered, *inter alia*, the following:

> [7] **DECLARES** that the Monitor shall act as the "conductor of orchestra" ("chef d'orchestre") in coordinating efforts with the AFM and the DNB [De Nederlandsche Bank] to protect any licence issued by the AFM to HII and in determining the Steps, including when it will be advisable to involve a duly authorized representative of the Trustees [Stichting];
>
> [8] **ORDERS** the Monitor, when necessary, to keep informed the duly authorized representative of the Trustees as to the Steps and their enforcement, and as to the involvement of such representative in the enforcement of the Steps;"

b. In the "*Case Management Order #3*" issued on October 7, 2011, the Court declared:

> **"C. MOTION FOR FEES [Original Motion for Funding]**
>
> [12] **DECLARES** that the Court may be prepared to consider a request by an interested person under Section 11.52(1) of the CCAA [request for indemnification of certain fees and expenses], subject to a favourable recommendation from the Monitor, the "conductor of orchestra" as referred to in the CMO #1 [Case Management Order #1], and subject to such interested person playing in the same orchestra, i.e. being an effective participant in the orchestra;"

[29] The Monitor has always maintained that the HII Group was not obliged to pay or reimburse any such fees and expenses, which in effect would have been tantamount to granting security ranking in priority over all other stakeholders, nor to permit that such fees and expenses be included in Stichting's claims under the Plans. The negotiations referred to hereinafter were conducted on that basis.

2.4 Negotiations and related agreements

2.4.1 Purchase agreement involving HCI and HII Group

[30] On November 17, 2011, a *Purchase Agreement* (the "**Purchase**")[11] was entered into, between, *inter alia*, HCI, Management, RH and HII (Stichting was not a party thereto), providing, *inter alia*, for the purchase by HII Group of HCI's property management of HII's business and assets, with certain exceptions.

[31] One of the conditions precedent to the Purchase was the settlement of all proceedings involving HII and Stichting:

[11] Exhibit M-4.

2014 QCCS 980 (CanLII)

> "10.9 Withdrawal of proceedings by Trustees [Stichting]
>
> The trustees [Stichting] acting in that capacity for the bondholders of Homburg Shareco Inc. or HII (the "**Trustees**") shall have entered into a settlement agreement with certain members of the HII Group and shall have respected their obligations thereunder, including without limitation, the withdrawal of certain motions or proceedings before the CCAA Court."

[32] The Purchase was approved by this Court on January 12, 2012, thereby authorizing HCI and RH to transfer their controlling interests in HII and related entities to HII, the whole for a consideration of approximately $21 million.

2.4.2 Amending agreements involving HCI and Stichting

[33] On December 3, 2011, an *Amended Heads of Agreement and Voting Agreement* ("**AHOA**")[12] was entered into between, *inter alia*, HCI, Management, Finance, RH and Stichting (HII was not a party thereto), which amended the HOA and the restructuring transactions provided therein and the POA, and which provided, *inter alia*, for the payment of Stichting's Pre-December 3 Expenses by HCI[13] further to, and in accordance with, the POA Indemnity.

[34] However, the AHOA also provided for Stichting's undertaking to use its "commercial best efforts" (the "**Stichting Undertaking**") to recover the Pre-December 3 Expenses from HII in order to reimburse HCI:

> "3.2 The Trustees [Stichting] agree that:
>
> (a) they shall use commercial best efforts to obtain the approval of the CCAA Court to their motion for funding (**Funding Motion** [Original Motion for Funding]) as soon as practicable after the date hereof;
>
> (a) whether or not the Funding Motion is granted, the Trustees shall use commercial best efforts to recover their fees and expenses, including the Termination Amount [the Pre-December 3 Expenses], in the context of the proceedings initiated by HII and certain of its subsidiaries through the *Companies' Creditors Arrangement Act* (the **CCAA Proceedings**) and to reimburse to HC [HCI], to the maximum extent practicable from any such recovery, the Termination Amount; and
>
> (b) any reimbursement due to HC shall be remitted to HC by the Trustees within ten (10) days of receipt of recovery through the CCAA Proceedings."
>
> (quoted as is)

[12] Exhibit R-5, filed under confidential seal.
[13] AHOA (Exhibit R-5), art. 2.1.

2014 QCCS 980 (CanLII)

[35] Concurrently, on December 3, 2011, an *Amended and Restated Voting Power of Attorney and Standstill Agreement* ("**APOA**")[14] was entered into between RH, Finance and Stichting (HII was not a party thereto), which amended and restated the POA, including the removal of the POA Indemnity for the period post-December 3, 201.

2.4.3 Settlement Agreement involving HII Group and Stichting

[36] On December 3, 2011, a Settlement Agreement (the "**Settlement Agreement**")[15] was entered into between the HII Group and Stichting (RH and HCI were not parties thereto), which provided, *inter alia*, for the settlement of the Stichting Proceedings, including the following undertaking from all parties:

> "to (ii) immediately cease and desist from making any allegations negatively affecting the credibility and appropriateness of the CCAA Proceedings or any allegations of conflict of interest in respect of the Parties, the Monitor or their respective legal counsel or, subject to the relevant provisions of the Indentures in respect of the rights and powers of the Trustees, the standing of the Trustees;"[16]

[37] This is very telling of the acrimonious ambiance that then prevailed; it was far from being a situation involving an "effective participation" for the proper advancement of the Restructuring.

[38] Thus, by the Settlement Agreement, the HII Group and Stichting wanted to resolve their differences and to work towards a successful restructuring in establishing the *modus vivendi* rules to govern their relations, including bridge-fundings of Stichting's fees and expenses to be incurred thereafter, namely the Post-December 3 Expenses, particularly because it was impossible from a practical point of view to request funding from more than 9,500 Bondholders, each having an average holding of approximately €31,999.

[39] To that end, the Settlement Agreement provided for the necessary amendments to the Original Motion for Funding (the "**Amended Motion for Funding**"), which resulted in the issuance of an order by this Court, on February 15, 2012, along with the accompanying reasons on February 17, 2012 (collectively the "**Funding Order**") to specifically deal with the Post-December 3 Expenses:

> **"ORDERS** that the Petitioners shall advance from the available cash of the Debtors, on the same payment terms as the fees and disbursements payable by the Petitioners pursuant to paragraph [41] of the Initial Order dated September 9, 2011 as amended and/or restated, amounts equivalent to the reasonable fees and expenses incurred as and from December 3rd, 2011 in connection with the CCAA proceedings and the Restructuring by the Trustees' Advisors, the aggregate of which advances (the "**Stichting Advances**") up to the

[14] Exhibit R-6, filed under confidential seal.
[15] Exhibit R-7, filed under confidential seal.
[16] Settlement Agreement (Exhibit R-7), art. 5(ii).

2014 QCCS 980 (CanLII)

> maximum amount to be distributed or paid (i) shall become due and payable to the Debtors immediately prior to any distribution or payment, including pursuant to a sale of assets, liquidation or realization of security or otherwise (each a "**Distribution Event**"), to be made to or for the benefit of the holders of the Securities, as the case may be, (ii) shall be set-off/compensated against the aggregate of any distribution to be made to or for the benefit of the holders of Securities pursuant to any such Distribution Event and (iii) shall be allocated, as between the holders of Securities, on a pro-rata basis, based on the amount, if any, to be distributed or paid in respect of each of the Corporate Bonds, Mortgage Bonds and Capital Securities as a percentage of the total amount to be distributed in respect of all Securities."
>
> (the "**Stichting Advances**")

[40] The Amended Motion for Funding and the draft Funding Order were intensively negotiated among the parties, with the result that only the funding of the Post-December 3 Expenses was included therein.

[41] It was unacceptable for the Monitor to include any funding for the Pre-December 3 Expenses, or to provide for the payment by the HII Group of any of the Expenses.

[42] In fact, Stichting acknowledged the gist of the Settlement Agreement in the AHOA[17]:

> "3.1 The Trustees acknowledge and agree that, as of the date hereof, the Trustees have reached an agreement to effect a settlement of the issues in dispute between them and HII, including but not limited to the issue of HII's responsibility to pay or contribute to the fees and expenses of the Trustees and its advisors in connection with the Trustee's participation in the CCAA Proceedings from and after the date hereof."
>
> (the Court underlines)

2.5 Proofs of claims and Notices of disallowance

2.5.1 Stichting's Proofs of claim

[43] On July 6, 2012, further to the CPO issued by this Court on April 30, 2012, Stichting filed a *Proof of Claim of Stichting Homburg Bonds and Stichting Homburg Capital Securities Against Homburg Invest Inc.* claiming the Pre-December 3 Expenses, on the basis of claims resulting from pre-filing contractual obligations (the "**Pre-December 3 POC**")[18].

[17] Exhibit R-5.
[18] Exhibit R-8.

2014 QCCS 980 (CanLII)

[44] Also, on July 6, 2012, Stichting filed a series of proofs of claim for Stichting, claiming, *inter alia*, the Post-December 3, 2011 Expenses, on the basis of claims resulting from pre-filing contractual obligations (the "**Post-December 3 POC**")[19].

2.5.2 Monitor's Notices of disallowance

[45] On February 4, 2013, the Monitor disallowed[20] the Pre-December 3 POC on the basis that the Pre-December 3 Expenses did not qualify as obligations under the Indentures, nor under the Guarantee.

[46] On May 10, 2013, the Monitor issued several notices[21] disallowing in part the Post-December 3 POC on the basis, *inter alia*, that the Post-December 3 Expenses represented the Stichting Advances pursuant to the Funding Order, reimbursable to HII and thus did not form part of a claim pursuant to the CPO, the Meeting Orders and the Plans.

[47] As mentioned above, Stichting appealed these disallowances by filing, on February 14, 2013, the First Appeal Motion and, on May 17, 2013, the Second Appeal Motion.

2.6 Dutch Proceedings by HCI

[48] In October 2013, HCI instituted proceedings in the Netherlands against Stichting and certain existing and former directors (the "**Dutch Proceedings**")[22] seeking a condemnation for an amount of $2.1 million on the basis that they failed to use their "commercial best efforts" to recover the Pre-December 3 Expenses from HII in accordance with the Stichting Undertaking under the AHOA[23].

3. POSITION OF PARTIES

3.1 Stichting

3.1.1 Full recovery on the basis of "substantial contribution"

[49] Stichting argues that it is entitled to full payment of the Stichting Expenses before any distribution to any stakeholder under the Plans, based on the US concept of "substantial contribution" to a successful restructuring, which concept stems from Section 503(b)(5) of the *US Bankruptcy Code*[24].

[50] Stichting contends that its actions and involvement in the Restructuring have contributed in a meaningful way to the successful approval of the Plans, and have ultimately benefited, not only the Bondholders, but all HII Group's creditors.

---

[19] Exhibit R-9.
[20] Exhibit R-10.
[21] Exhibit R-11.
[22] Exhibit R-12.
[23] AHOA (Exhibit R-5), art. 3.2(a).
[24] *Bankruptcy Code*, 11 USC § 503.

2014 QCCS 980 (CanLII)

[51] Furthermore, according to Stichting, the Stichting Expenses are reasonable in the circumstances, particularly considering the composition of the group of Bondholders and the complexity of the multiple issues that were addressed over the last two years in order to effect a successful Restructuring of the HII Group.

[52] Therefore, Stichting requests that the Stichting Expenses be paid entirely before any distribution under the Plans and not be compromised thereunder; this reimbursement right being entirely independent of the contractual entitlement to the reimbursement thereof pursuant to the Indentures and argued on a subsidiary basis.

[53] If the Court confirms such right, then Stichting requests the authorization to remit the full amount of the Pre-December 3 Expenses to HCI, as the latter paid same to Stichting at the time the AHOA was signed, the whole in satisfaction of the Stichting Undertaking under the AHOA.

3.1.2 Subsidiarily: recovery on the basis of pre-filing contractual obligation

[54] Subsidiarily, Stichting submits that the Indentures provide for the payment of all its fees and expenses, including the Stichting Expenses, the whole in accordance with standard financing practices.

[55] Therefore, according to Stichting, the Stichting Expenses were incurred as a result of pre-filing contractual obligations of HII and Shareco, and thereby constitute claims under the CPO, the Meeting Orders and the Plans.

[56] Furthermore, Stichting argues that the Funding Order provides for the reimbursement of the Stichting Advances relating to the Post-December 3 Expenses by way of set-off/compensation against any distribution to be made to, or for the benefit of, the Bondholders. Thus Stichting is not precluded from claiming same from HII and Shareco on the basis of such pre-filing contractual obligations under the Indentures. There is no waiver or release of any such claim.

[57] Stichting submits that the Stichting Advances constituted only bridge-fundings of the Post-December 3 Expenses, duly authorized by the Funding Order, with no effect on Stichting's right to claim the Post-December 3 Expenses under the CPO, the Meeting Orders and the Plans, on the basis of HII's and Shareco's pre-filing contractual obligations.

[58] Therefore, the First Appeal Motion and the Second Appeal Motion should be granted, and the Stichting Expenses should be included in the Stichting Proven Claims, with entitlement to distributions under the Plans.

[59] Furthermore, whether or not the First Appeal Motion and the Second Appeal Motion are granted by the Court, Stichting requests that any portion of the Pre-December 3 Expenses, remaining unpaid following the implementation of the Plans, be deducted from the Bondholders' distributions thereunder, such that 100% of the Pre-December 3 Expenses be paid to Stichting. The same set-

2014 QCCS 980 (CanLII)

off/compensation mechanism provided under the Funding Order with respect to the Post-December 3 Expenses should apply.

[60] In such event, Stichting requests the authorization to remit to HCI any amounts to be received on account of the Pre-December 3 Expenses, up to the sum of $2.1 million, the whole in satisfaction of the Stichtching Undertaking under the AHOA.

[61] On the other hand, it is understood that any distribution to be received by Stichting under the Plans on account of the Post-December 3 Expenses would be for the benefit of, and returned to, the Bondholders, reducing their related liability thereunder as provided in the Funding Order.

2014 QCCS 980 (CanLII)

3.1.3 Protection against the Dutch Proceedings

[62] Finally, and as a reply to the Dutch Proceedings, Stichting submits that the First Appeal Motion and the Expenses Payment Motion are an eloquent demonstration that it is using its "commercial best efforts" to recover from HII the Pre-December 3 Expenses, thereby meeting its obligations under the Stichting Undertaking provided in the AHOA.

[63] Notwithstanding such defence, Stichting requests, in the event the Dutch Proceedings are successful, an order from this Court authorizing its indemnification for all its current and future fees and expenses relating to the Dutch Proceedings (the "**Dutch Proceedings Expenses**").

[64] Such indemnification would be enforced prior to the final distribution to the Bondholders under the Plans, by applying the same set-off/compensation mechanism provided under the Funding Order for the Stichting Advances relating to the Post-December 3 Expenses.

3.2 Monitor

[65] According to the Monitor, the parties settled all matters relating to the Stichting Expenses in virtue of the Settlement Agreement and the Funding Order. Stichting cannot revisit this issue.

[66] As a matter of fact, the Settlement Agreement includes the withdrawal of the Original Motion for Funding.

[67] Moreover, the Pre-December 3 Expenses were not incurred for the purpose of advancing or protecting the interests of the Bondholders; they were far from an "effective participation" by Stichting and its experts in a successful Restructuring, or a "substantial contribution" thereto.

[68] On the contrary, during the pre-December 3 period, Stichting's acts impaired seriously HII Group's efforts to achieve a successful Restructuring.

[69] Finally, the Monitor adds that this concept of "substantial contribution" does not exist under Canadian law, and should not be "imported" from the United States.

[70] As to the post-December 3 period, the Monitor submits that Stichting's involvement did not extend beyond the standard functions which indenture trustees customarily engage in, and it has always been understood that any such expenses were for the Bondholders' account, and not for HII Group's account.

[71] In any event, the Monitor points out that the Stichting Expenses are not included in the determination of Stichting Proven Claims pursuant to the Meeting Orders, which are limited to the capital owed under the Indentures and Bonds issued pursuant thereto, plus interest as of September 9, 2011 (the date of the Initial Order) for HII and Shareco, or February 6, 2013 for Homco 61 (Homco 61 filing date under the *CCAA*)[25].

[72] As such, the Stichting Expenses are "post-filing claims", namely obligations incurred after the Initial Order, and therefore they fall outside the scope of an allowable claim pursuant to the *CCAA* and the Meeting Orders.

[73] In addition, the Monitor stresses that Stichting failed to prove that the Pre-December 3 Expenses are reasonable and incurred in relation to the administration or execution of the Indentures.

[74] Finally, the Monitor concludes that it will be totally unacceptable that any recovery in relation to the Pre-December 3 Expenses be for the benefit of HCI, including that the Bondholders be ordered to pay any of the Dutch Proceedings Expenses.

[75] RH and HCI have constantly created hurdles in the Restructuring, including instituting the Dutch Proceedings, and the Court should not endorse such behaviour by granting Stichting's requests for reimbursement of fees.

4. ISSUES TO BE CONSIDERED

[76] The Court identifies the following issues:

a. Substantial contribution:

i. Should the US concept of "substantial contribution" be imported into the rules governing restructurings under the *CCAA*?

ii. In the affirmative, did Stichting have a "substantial contribution" to the Restructuring?

iii. In the affirmative, is Stichting entitled to a full or partial reimbursement of the Stichting Expenses?

[25] HII/Shareco Meeting Order, art. 22, and Homco 61 Meeting Order, art. 17.

2014 QCCS 980 (CanLII)

iv. In the affirmative, should the Court authorize Stichting to remit to HCI the reimbursement to be received with respect to the Pre-December 3 Expenses, up to the maximum amount of $2.1 million?

b. Subsidiarily – Pre-filing contractual obligations:

i. Can the Stichting Expenses be included in the Stichting Proven Claims on the basis that they relate to pre-filing contractual obligations under the Indentures?

ii. In the affirmative, what portion of the Stichting Expenses should be included in the Stichting Proven Claims?

c. In any event:

i. Should the Court authorize Stichting to deduct the Pre-December 3 Expenses and the Dutch Proceedings Expenses from the Bondholders' distribution under the Plans, less any portion of the Pre-December 3 Expenses that Stichting may receive on account thereon under the Plans?

ii. Should the Court authorize Stichting to remit to HCI any distribution to be received under the Plans, if any, including through set-off compensation from the Bondholders, on account of the Pre-December 3 Expenses, up to the maximum amount of $2.1 million?

5. DISCUSSION

5.1 Should the US concept of "substantial contribution" be imported into the rules governing restructurings under the *CCAA*?

5.1.1 US concept of "substantial contribution"

[77] The concept of "substantial contribution" by an indenture trustee has a statutory basis under the *US Bankruptcy Code*[26]:

> "**§ 503. Allowance of administrative expenses**
> […]
> (b) After notice and a hearing, there shall be allowed administrative expenses, other that claims allowed under section 502(f) of this title, including –
> […]
> (5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the

[26] *Bankruptcy Code*, 11 USC § 503.

2014 QCCS 980 (CanLII)

> cost of comparable services other than in a case under this title;
>
> […]"
>
> (the Court underlines)

[78] The US case law[27] has restrictively applied this "substantive contribution" concept in considering several factors, including:

a. whether the actions fostered and enhanced, rather than inhibited or interrupted, the restructuring;

b. whether the expenses were duplicative of other parties' expenses; and

c. whether the services conferred a direct and demonstrable benefit on all stakeholders.

[79] The Court concludes from the proof and the various proceedings in this matter that, following the execution of the HOA and POA on September 8, 2011, Stichting's actions between the Initial Order (September 9, 2011) and December 3, 2011, were tantamount to aggressive positioning, more for the benefit of RH, Finance and HCI, than for the benefit of the Bondholders.

[80] The Court also concludes from the proof and the various proceedings in this matter that, further to the execution of the AHOA, the APOA and the Settlement Agreement on December 3, 2011, Stichting's actions were strictly in the nature of a trustee's standard functions acting for bondholders under a trust indenture.

[81] Indeed, most of the work related to informing and advising the Bondholders through consultations and newsletters posted on Stichting's web site, reviewing documents submitted by the Monitor, attending planning meetings with the Monitor, the AFM and/or potential investors, all in order to be in a position to adequately inform and advise the Bondholders.

[82] When Stichting was incurring fees and expenses for the general benefit of the HII Group, such as arranging and attending meetings with the Bondholders, the HII Group paid the related fees and expenses of Stichting.

[83] Therefore, the Court is of the opinion that Stichting did not make a "substantial contribution" to the Restructuring.

[84] In any event, the Court does not agree that the concept of "substantial contribution" provided under the US *Bankruptcy Code* should be imported into the rules governing restructurings under the *CCAA*.

---

[27] Robert J. ROSENBERG et al., *Ad Hoc Committees and Other (Unofficial) Creditor Groups : Management, Disclosure and Ethical Issues*, American Bankruptcy Institute Business Reorganization Committee Newsletter, June 2008, p. 270-271.

2014 QCCS 980 (CanLII)

[85] There is no legal basis, nor any reason to endorse and import such a concept into the *CCAA*, which has its own mechanisms to deal with fees and expenses relating to a restructuring.

[86] Indeed, Section 11.52(1)(c) of the *CCAA* already provides the possibility for an interested person to request a security or charge, affecting all or part of a debtor's property, to cover the fees and expenses of its financial, legal or other experts having an "effective participation" [une "participation efficace"] in the debtor's ongoing restructuring.

[87] The Court is of the opinion that authorizing the payment of fees and expenses prior to any distribution to HII Group's stakeholders is equivalent to granting prior ranking security. Therefore, the analysis of Section 11.52(1)(c) of the *CCAA* is relevant for the purpose of these presents.

2014 QCCS 980 (CanLII)

5.1.2 Section 11.52 of the *CCAA*

[88] Section 11.52 of the *CCAA* provides for the following:

> **11.52** (1) **[Court may order security or charge to cover certain costs]** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation [participation efficace] in proceedings under this Act.
>
> (2) **[Priority]** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (the Court underlines)

[89] On October 4, 2011, Stichting filed its Original Motion for Funding pursuant to Section 11.52 of the *CCAA*.

[90] Concurrently, and as mentioned above, on October 7, 2011, the Court issued the *Case Management Order* #3 declaring that it was prepared to consider an interested person's request under Section 11.52 of the *CCAA*, subject to the Monitor's ("conductor of orchestra") favourable recommendation and the interested person being an "effective participant" in the Monitor's orchestra.

[91] Thus, the Court already gave some indication as to what it would take into consideration if it were to proceed on the merits with the Original Motion for Funding.

[92] Thereafter, HII Group and Stichting settled their disagreements in that regard, and Stichting proceeded with the Amended Motion for Funding, in accordance with the terms of the Settlement Agreement agreed to by them, and both parties consented to the issuance of the February 15, 2012 Funding Order.

[93] Therefore, Stichting's initial indemnification request pursuant to Section 11.52(1)(c) of the *CCAA* was resolved by the issuance of the Funding Order.

[94] Now, Stichting brings the Expenses Payment Motion before the Court, not on the basis of Section 11.52(1)(c) of the *CCAA*, but on the basis of the US concept of "substantial contribution" which, as mentioned above, the Court rejects and refuses to import into the rules governing restructurings under the *CCAA*.

[95] Nevertheless, the Court is of the opinion that a request similar to the Expenses Payment Motion must be analyzed pursuant to Section 11.52(1)(c) of the *CCAA*, even if no security or charge is requested. As mentioned above, authorizing the payment of fees and expenses prior to any distribution to HII Group's stakeholders would be equivalent to granting prior ranking security.

[96] During the hearing, the Court stressed the importance of the timing issue for a request under Section 11.52(1)(c) of the *CCAA*, as an "effective participation" to be secured in a restructuring must be agreed on as soon as it can be established that the interested person requires such security to cover the fees and expenses of its financial, legal or other experts for their "effective participation" in the restructuring.

[97] "After the fact" requests for security protecting any such fees and expenses, or for the payment or reimbursement thereof as in the present instance, namely after the creditors' and the Court's approval of the Plans, must be discouraged and avoided, as it would directly affect the distribution to the creditors.

[98] The Court cannot, once a plan of arrangement has been approved by the creditors and the Court, change the distribution provided thereunder.

[99] The Court is also of the opinion that before incurring, or continuing to incur, any such fees and expenses to be claimed from a debtor in a *CCAA* restructuring, either through direct payment or by way of security on the debtor's assets, the interested person must first take the appropriate steps to set up with the monitor and the debtor the rules applicable to the "effective participation" of its financial, legal or other experts, the whole subject to the Court's approval.

[100] Such rules would take into consideration many factors, including the following:

a. a court officer is already involved, namely the court appointed monitor and, as such, he is the "eyes and ears" of the Court, and he must, at all

2014 QCCS 980 (CanLII)

times, remain independent and act impartially for the benefit of all stakeholders;

b. therefore, services already rendered or to be rendered by the monitor must not be duplicated by the interested person's financial, legal or other experts, at least, not for the debtor's account;

c. an "effective participation" has to be pro-active and constructive, never losing sight of the global picture of the restructuring and the interests of all stakeholders;

d. an "effective participation" shall not include challenging the merits *per se* of the restructuring proceedings; the debtor need not fund the opponent of its restructuring;

e. "time is of the essence": the monitor must be in a position to assess appropriately, and budget for, the fees and expenses to be incurred in a restructuring; therefore, interested persons claiming the right to be indemnified or secured for their financial, legal or other experts' "effective participation" must act quickly to obtain confirmation of said right and set up the applicable rules;

f. once the rules are established by the claimant, the monitor and the debtor, they must be authorized by the Court, including whether or not fees and expenses already incurred ought to be included;

g. finally, and as authorizing the payment of fees and expenses before any distribution to a debtor's stakeholders is tantamount to granting prior ranking security, the Court endorses Judge Clément Gascon's, j.s.c (now j.c.a.) comments on the principles governing the granting of a *CCAA* administration charge in the matter of *Mecachrome International Inc.*[28] :

> « **LA CHARGE D'ADMINISTRATION**
>
> […]
>
> [77] Les critères déjà énumérés confirment qu'une charge prioritaire établie en vertu de la *LACC* se veut exceptionnelle. Le Tribunal se doit de l'accorder avec parcimonie, en la limitant seulement à ce qui est essentiel au succès d'une restructuration.
>
> [78] Dans cette perspective, le Tribunal est d'avis qu'à moins de circonstances particulières bien appuyées par une preuve convaincante, une charge d'administration ne devrait pas inclure des conseillers juridiques ou financiers autres que ceux du contrôleur et des débitrices.
>
> […]

[28] 2009 QCCS 1575.

2014 QCCS 980 (CanLII)

> [80] Rien n'explique en quoi leur demande est essentielle au succès de la restructuration envisagée. Rien n'établit que leurs interventions placent les intérêts des Débitrices Canadiennes ou le succès de la restructuration avant la protection de leurs clients respectifs.
>
> […]
>
> [89] L'objectif de la Charge d'Administration n'est pas de protéger le maximum de professionnels possible. C'est plutôt de mettre en place une charge qui facilite le but d'en arriver à un arrangement au meilleur coût possible pour les créanciers qui en feront, en dernière analyse, les frais.
>
> [90] Que chacun des acteurs retienne ses conseillers juridiques ou financiers est légitime. Que tous le fassent aux frais des Débitrices Canadiennes, et partant des créanciers les moins protégés, est, de l'avis du Tribunal, exagéré. »
>
> (the Court underlines)

[101] A restructuring process is very expensive, and every effort should be made to reduce and control the related fees and expenses.

[102] There must be "clear added value for the benefit of all stakeholders" if the fees and expenses of an interested person's financial, legal or other experts are to be paid by the debtor.

5.1.3 Conclusion

[103] The Court is of the opinion that the US concept of "substantial contribution" must not be imported into the rules governing restructurings under the *CCAA*.

[104] Furthermore, the Court is also of the opinion that a request pursuant to Section 11.52(1)(c) of the *CCAA* cannot be presented by an interested person "after the fact".

[105] The applicable rules must be set up with the monitor and the debtor as soon as possible and, ideally, before incurring the related fees and expenses, the whole subject to the Court's final approval, and before the creditors vote on the plan of arrangement.

[106] Considering this negative answer to the first question under the heading "substantial contribution", there is no need to answer the three other questions listed thereunder.

5.2 Can the Stichting Expenses be included in the Stichting Proven Claims on the basis that they relate to pre-filing contractual obligations under the Indentures?

5.2.1 The Indentures

2014 QCCS 980 (CanLII)

[107] The Indentures provide for the payment by HII and Shareco of Stichting's reasonable fees and expenses, both before and after default thereunder:

> "**12.1** ***General Covenants***
>
> The Corporation [HII or Shareco] hereby covenants and agrees with the Trustee [Stichting] for the benefit of the Trustee and the Bondholders as follows:
>
> […]
>
> (e) *To Pay Trustee*. That the Corporation will pay to the Trustee reasonable remuneration for its services hereunder and will pay or reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee in the administration or execution of the trusts hereby created (including the reasonable compensation and the disbursements of its counsel and all other advisers and assistants not regularly in its employ), both before any default hereunder and thereafter until all duties of the Trustee under the trust hereof shall be finally and fully performed, except any such expense, disbursement or advance as may arise from its negligence or bad faith.
>
> […]"[29]
>
> (the Court underlines)

[108] Stichting's right to retain the services of financial, legal or other experts is also clearly provided in the Indentures:

> "**16.4** ***Delegation; Experts and Advisers***
>
> […]
>
> (b) The Trustee [Stichting] may employ or retain such counsel, auditors or accountants (who may be the Corporation [HII or Shareco]'s auditors), appraisers, architects, engineers or such other experts or advisers as it may reasonably require for the purpose of discharging its duties hereunder.
>
> (c) The Trustee may pay reasonable remuneration for all services performed for it in the discharge of the trusts hereof by any such agent or attorney, or expert or adviser, without taxation for costs or fees of any counsel, solicitor or attorney."[30]
>
> (the Court underlines)

[109] Similarly, the Guarantee provides for the payment by HII of any such fees and expenses:

> "**SECTION 15. Expenses.** The Guarantor [HII] shall pay, or reimburse, the Trustee [Stichting] and the Holders for all costs and expenses including, without limitation, reasonable attorneys' fees

[29] Corporate Bonds Indenture (Exhibit R-1) and Mortgage Bonds Indenture (Exhibit R-2).
[30] *Id.*

2014 QCCS 980 (CanLII)

> and disbursements reasonably incurred by it in connection with the enforcement of this Guarantee Agreement; provided, however, that the Guarantor shall only be required to pay, or reimburse, for the reasonable attorneys' fees and disbursements for one counsel for the Trustee and the Holders."[31]
>
> (the Court underlines)

[110] Therefore, HII and Shareco have covenanted to pay Stiching's fees and expenses (the "**Payment Covenant**") under, and as provided in, the Indentures and Guarantee, entered into before the Initial Order.

5.2.2 Analysis

[111] As is the situation with respect to most of the contractual obligations, the Court is of the opinion that, failing specific provision to the contrary in the Initial Order, the Payment Covenant was stayed by the Initial Order.

[112] A line must be drawn between fees and expenses incurred before the Initial Order and those to be incurred thereafter, which are conditional upon services being effectively rendered. This is controllable, and must be controlled.

[113] The Court is of the opinion that any enforcement of the Payment Covenant with respect to the Stichting Expenses, incurred after the Initial Order, was subject to establishing the rules applicable thereto, with the Monitor and the HII Group, and the Court's final approval. The factors mentioned above with respect to a request pursuant to Section 11.52(1)(c) of the *CCAA* would apply.

[114] The Court cannot help but imagine what would happen if all HII Group's stakeholders had undertakings similar to the Payment Covenant and that such covenant was not stayed by the Initial Order.

[115] The Restructuring would then be burdened by unlimited and uncontrollable fees and expenses, the only limit being that they be "reasonable", but the aggregate thereof would not be reasonable.

[116] No fees and expenses of the nature of the Stichting Expenses should be paid or reimbursed by a debtor if there is no post-filing agreement thereon, including applicable control rules, with the monitor and the debtor, and confirmed by the Court.

[117] In any event, the Court is of the opinion that the Stichting Proven Claims under the Meeting Orders are limited to the aggregate principal amount owed under the terms of the Indentures and the Bonds, together with accrued and unpaid interest, to September 9, 2011 (the date of the Initial Order) for HII and

[31] Guarantee (Exhibit R-2, Appendix D).

2014 QCCS 980 (CanLII)

Shareco, and February 6, 2013 for Homco 61 (Homco 61 filing date under the *CCAA*)[32].

[118] Interest accruing after September 9, 2011 and February 6, 2013 is not included in the definition of Stichting Proven Claims in the Meeting Orders, nor any fees and expenses in the nature of the Stichting Expenses.

[119] It is rather surprising that Stichting does not contest the Monitor's disallowance of its claims as they relate to the post-filing interest, but does contest the exclusion of the Stichting Expenses.

2014 QCCS 980 (CanLII)

5.2.3 Conclusion

[120] The Stichting Expenses are not, and cannot be, included in the Stichting Proven Claims, and therefore Stichting cannot claim reimbursement thereof from the HII Group.

[121] Considering this negative answer to the first question under the heading "subsidiarily – pre-filing contractual obligations", there is no need to answer the second question listed thereunder.

5.3 Should the Court authorize Stichting to deduct the Pre-December 3 Expenses and the Dutch Proceedings Expenses from the Bondholders' distribution under the Plans, less any portion of the Pre-December 3 Expenses that Stichting may receive on account thereon under the Plans?

[122] As already mentioned, Stichting's actions between the Initial Order (September 9, 2011) and December 3, 2011, were tantamount to aggressive positioning, more for the benefit of RH, Finance and HCI, than for the benefit of the Bondholders.

[123] In such circumstances, it would be unacceptable that the Bondholders, in addition to their losses in this matter, assume the payment of the Pre-December 3 Expenses. This matter was settled at the time the Funding Order was issued.

[124] If Stichting's efforts had focused, from day one, on working positively towards a successful Restructuring, the Pre-December 3 Expenses would have been much lower.

[125] In any event, the Court cannot consider such a request from Stichting, including with respect to the Dutch Proceedings Expenses, without having heard the Bondholders' position thereon; the Bondholders are not parties to the present

[32] HII/Shareco Meeting Order, art. 22, and Homco 61 Meeting Order, art. 17.

proceedings. It is an issue to be debated between Stichting and the Bondholders and, no doubt, the basic rule of "*audi alteram partem*" applies.

[126] In requesting such a conclusion against the Bondholders, Stichting is certainly not acting for the Bondholders' interests.

[127] Therefore, the Court will not authorize Stichting to deduct the Pre-December 3 Expenses and the Dutch Proceedings Expenses from the Bondholders' distribution under the Plans.

5.4 Should the Court authorize Stichting to remit to HCI any distribution to be received under the Plans, if any, including through set-off compensation from the Bondholders, on account of the Pre-December 3 Expenses, up to the maximum amount of $2.1 million?

[128] Considering the answers to the above questions, there is no need to answer this last question.

[129] On the other hand, the Court finds awkward that Stichting requests court authorization to remit to HCI any distribution that it may receive on account of the Pre-December 3 Expenses.

[130] The Control Issues involving RH and HCI, and raised by the AFM, have caused major hurdles and serious delays in the Restructuring and, in those circumstances, such a request is rather bold and quite questionable, if not unacceptable, for both the HII Group and the Bondholders.

6. CONCLUSION

[131] The Court will dismiss the Stichting Motions.

FOR THESE REASONS, THE COURT:

[132] **DISMISSES** the "*Amended Motion for the Payment of the Fees and Expenses of Stichting Homburg Bonds and Other Relief*" (Cote #228) (the Expenses Payment Motion);

[133] **DISMISSES** the "*Motion in Appeal of a Disallowance of a Proof of Claim, pursuant to the "Claims Process Order" issued on April 30, 2012*" (Cote #154) (the First Appeal Motion);

[134] **DISMISSES** the "*Motion in Appeal of the Disallowance of Proofs of Claim filed pursuant to the "Claims Process Order" issued on April 30, 2012*" (Cote #212) (the Second Appeal Motion);

[135] **THE WHOLE** with costs in each of the three Motions.

2014 QCCS 980 (CanLII)

LOUIS J. GOUIN, J.S.C.

Me Guy Martel
Me Nathalie Nouvet
Stikeman Elliott LLP
Counsel to Petitioners

Me Mason Poplaw
Me Jocelyn T. Perreault
McCarthy Tétrault LLP
Counsel to Monitor

Me Sandra Abitan
Me Martin Desrosiers
Osler, Hoskin & Harcourt LLP
Counsel to Debtors and Mises-en-cause

Hearing dates : February 5, 6 and 7, 2014

2014 QCCS 980 (CanLII)

TAB 6

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *League Assets Corp. (Re),*
2013 BCSC 2043

Date: 20131108
Docket: S137743
Registry: Vancouver

2013 BCSC 2043 (CanLII)

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

And

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

And

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

And

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

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	D.E. Gruber T.M. Tomchak R. Morse T.C. Louman-Gardiner
Counsel for PricewaterhouseCoopers Inc. as Monitor:	J.R. Sandrelli T.R.M. Jeffries
Counsel for Quest Mortgage Corp., Quest Capital Management Corp.	C.D. Brousson
Counsel for BCMP Mortgage Investment Corporation and Interior Savings Credit Union	K.E. Siddall

Counsel for TCC Mortgage Holdings Inc. FCC Mortgage Associates Inc.; Citizens Bank of Canada; First Calgary Financial Credit Union Limited, Firm Capital Mortgage Fund Inc.	Geoffrey Thompson R.B. Dawkins
Counsel for Canadian Western Bank	A. Frydenlund
Counsel for Romspen Investment Corporation	S.H. Stephens
Counsel for Business Development Bank of Canada	D.B. Hyndman
Counsel for Timbercreek Mortgage Investment Corporation	William C. Kaplan, Q.C. H. Sevenoaks
Counsel for Ad Hoc Committee of Convertible Promissory Noteholders of League Opportunity Fund Ltd.	W.E.J. Skelly
Counsel for Export Development Canada, Bank of Montreal and Churchill Real Estate Inc.	H. Ferris
Counsel for Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (Proposed DIP Lenders)	G.J. Gehlen
Counsel for Maxium Financial Services	P.J. Reardon
Counsel for Roynat Inc.	D.K. Fitzpatrick
Counsel for Proposed Representative Counsel for Investors	J. Grieve
Place and Date Of Hearing:	Vancouver, B.C. October 25, 2013
Place and Date of Judgment:	Vancouver, B.C. November 8, 2013

2013 BCSC 2043 (CanLII)

2013 BCSC 2043 (CanLII)

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.

2013 BCSC 2043 (CanLII)

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

2013 BCSC 2043 (CanLII)

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

2013 BCSC 2043 (CanLII)

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

2013 BCSC 2043 (CanLII)

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, *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384 (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).

2013 BCSC 2043 (CanLII)

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,

2013 BCSC 2043 (CanLII)

based on well-known British Columbia authorities such as *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327. 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 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, 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

2013 BCSC 2043 (CanLII)

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

2013 BCSC 2043 (CanLII)

> 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

2013 BCSC 2043 (CanLII)

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

2013 BCSC 2043 (CanLII)

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

2013 BCSC 2043 (CanLII)

(*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.

2013 BCSC 2043 (CanLII)

(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 at para. 49(c).

[34] Counsel for certain note holders 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.

2013 BCSC 2043 (CanLII)

(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 at para. 66. The amounts are large but not unusual given the complexity of these proceedings and the issues raised. These

2013 BCSC 2043 (CanLII)

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.

2013 BCSC 2043 (CanLII)

[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.

2013 BCSC 2043 (CanLII)

[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

2013 BCSC 2043 (CanLII)

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.

2013 BCSC 2043 (CanLII)

[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.

2013 BCSC 2043 (CanLII)

(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, aff'd 2012 ONCA 552, 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.

2013 BCSC 2043 (CanLII)

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 RRSP 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

2013 BCSC 2043 (CanLII)

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, *Fraser Papers Inc. (Re)*, 2009 CarswellOnt 6169, *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 9398, and *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663 and by this court: *Catalyst Paper Corp. (Re)*, 2012 BCSC 451.

2013 BCSC 2043 (CanLII)

[72] In *Canwest Publishing Inc. (Re)*, 2010 ONSC 1328, 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, 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

2013 BCSC 2043 (CanLII)

proceedings for certain investor groups: see *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage Corp.* (1998), [1999] 4 W.W.R. 375 (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.

2013 BCSC 2043 (CanLII)

[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. (Re)*, 2010 ONSC 222 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.

2013 BCSC 2043 (CanLII)

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.

"Fitzpatrick J."

2013 BCSC 2043 (CanLII)

TAB 7

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 Gurantee 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
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Procedure
XIX.2.a.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(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.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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").

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Footnotes

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

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 8

2009 CarswellOnt 3530
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3530, [2009] O.J. No. 2529, 177 A.C.W.S. (3d) 875, 55 C.B.R. (5th) 114, 75 C.C.P.B. 220

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

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.

Judgment: June 17, 2009
Docket: 09-CL-7950

Proceedings: additional reasons to *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List])

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
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Procedure
XIX.2.a.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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, including law firm NS who sought to represent certain former non-unionized employees and be co-counsel for continuing employees — 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 — At request of NS, further submissions made regarding representation by KM — No alteration to representation order necessary — Overriding objective of appointing representative counsel was to ensure representation — KM capable of representing employees with interest in transitional retirement allowance — Claims for bonus in 2008 year not unique to continuing employees and KM was capable of providing representation — Future claims were hypothetical.

Table of Authorities

Statutes considered:

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

Generally — referred to

ADDITIONAL REASONS to judgment reported at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]), respecting terms of representation order.

***Morawetz J.*:**

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as Representative Counsel with reasons to follow.

2 Reasons were released on May 27, 2009.

3 The motion of Messrs. Sproule, Archibald and Campbell was granted and Koskie Minsky was appointed as Representative Counsel.

4 The motions to appoint Nelligan O'Brien and Shibley Righton, Juroviesky and Ricci and the CAW as Representative Counsel were dismissed.

5 On June 1, 2009, correspondence was received from Ms. Janice B. Payne of Nelligan O'Brien Payne. Her letter reads as follows:

> I am writing on behalf of the Nortel Continuing Canadian Employees Committee ("NCCE").
>
> On May 20, 2009 Your Honour dismissed the NCCE's motion for a representation order with reasons to follow. On May 27, 2009, the Reasons for Your Honour's decision were released but they do not appear to contain any explanation or reasons for the decision to dismiss the NCCE's motion. The NCCE respectfully requests reasons for your decision to dismiss its motion.

6 It is my understanding that the formal order relating to the endorsement of May 27, 2009 has yet to be taken out.

7 The purpose of this endorsement is to address the issue raised by Ms. Payne

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

8 At the outset, it is noted that Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") were proposed to be appointed as co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA Filing Date. This group was referred to as the Recently Severed Canadian Nortel Employees ("RSCNE"). In addition, NS sought to be appointed as co-counsel to the continuing employees of Nortel. This group was referred to as the NCCE. I assume that NS was of the view that there was no conflict in representing both the RSCNE and the NCCE. This is referenced in the April 6, 2009 affidavit of Mr. Levitt and a common factum was filed by NS.

9 The distinction between the RSCNE and the NCCE is recognized at paragraphs [19] and [20] of my reasons.

10 The request for supplementary reasons was put forth solely by the NCCE.

11 The grounds for the NCCE motion were:

(a) the representation order will permit and facilitate proper representation for those former non-unionized employees to whom Nortel owes severance and/or pay in lieu of reasonable notice.

(b) members of the NCCE class have interests which conflict with the interests of former employees in receipt of a pension from Nortel.

(c) there have already been changes made to the terms and conditions of employment of current employees, and future changes are anticipated.

12 In support of the motion, affidavits were filed by Kent Felske, Dany Sylvain and Steven Levitt.

13 The affidavit of Mr. Felske describes what he considers to be three existing claims of current Nortel employees that will need to be determined in the CCAA process.

14 The first claim arises out of the cancellation of the Transitional Retirement Allowance ("TRA"). The second claim arises out of Nortel's announcement that they will not make any payments for bonuses earned in 2008 and the third claim relates to amendments to pension plan (accumulation of benefits 2008 and forward). Mr. Felske also references other future claims.

15 In my endorsement at paragraph [13] reference is made to the Koskie Minsky factum which set forth the rationale behind a representative order. I indicated that I was in agreement with the general submissions as set forth.

16 In my view, the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process.

Claim for TRA

17 The issue of the TRA is referenced at paragraph [30] of my endorsement. At paragraph [35] it is noted that the group that sought the appointment of Koskie Minsky includes members who have an interest in and/or are entitled to TRA payments. The issue of any conflict of interest between various employee groups, including those entitled to TRA payments, is addressed at paragraphs [37], [44], [51], [52] and [56].

18 In my view, the position of continuing employees who may have an interest in a TRA, can be represented by Koskie Minsky. The claims of the NCCE for TRA are not dissimilar from that of former employees.

Claim for 2008 Bonus

19 With respect to claims of continuing employees for bonuses earned in 2008, the reference in the affidavit of Mr. Felske reads as follows:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Second, Nortel has announced that it will not make any payments for bonuses earned in 2008.

20 In my view, there is nothing to suggest that this type of claim is unique to continuing employees and, it seems to me, that the interests of continuing employees can be adequately represented by Koskie Minsky.

Amendments to Pension Plan

21 With respect to amendments to pension plan, the Koskie Minsky group includes pension plan members and it seems to me that the interests of members can be represented by Koskie Minsky.

Future Claims

22 At paragraph 17 of his affidavit, Mr. Felske refers to other future claims of current employees. In my view, Representative Counsel should be addressing actual issues and actual claims as opposed to hypotheticals. In the event that the situation changes, it is open to any party to bring a motion for appropriate relief.

Directions

23 In my endorsement, I determined that the process could be best served by having one firm put forth arguments on behalf of all employees as opposed to subdividing the employee group.

24 I see no basis to alter this finding. In my view, the interests of members of the NCCE can be represented by Koskie Minsky. To the extent that members wish to opt out of the Koskie Minsky group, they are, of course, free to do so.

Order accordingly.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 9

CITATION: Target Canada Co. (Re), 2015 ONSC 1028
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-02-18

SUPERIOR COURT OF JUSTICE - ONTARIO

2015 ONSC 1028 (CanLII)

RE: 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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, John MacDonald* and *Shawn Irving,* for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

William Sasso, Sharon Strosberg and *Jacqueline Horvat*, Proposed Representative Counsel for the Pharmacy Franchisee Association of Canada

Susan Philpott, Employee Representative Counsel for employees of the Applicants

Alan Mark, Melaney Wagner, Graham Smith and *Francy Kussner*, for the Monitor, Alvarez & Marsal Inc.

J. Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC

Andrew Hodhod, for Bell Canada

Harvey Chaiton, for the Directors and Officers

HEARD: February 11, 2015

RELEASED: February 18, 2015

ENDORSEMENT

[1] The Pharmacy Franchisee Association of Canada ("PFAC") brought this motion for the following relief:

a. appointing PFAC as the representative of the Pharmacists and Franchisees (collectively, the "Pharmacists") under the Pharmacy Franchise Agreements ("Franchise Agreements");

b. appointing Sutts, Strosberg LLP as the Pharmacists' Representative Counsel (the "Representative Counsel");

c. appointing BDO Canada ("BDO") as the Pharmacists' financial advisor;

d. directing that the Pharmacists' reasonable legal and other professional expenses be paid from the estate of the Target Canada Entities with appropriate administrative charges to secure payment;

e. directing that the "Disclaimer of Franchise Agreements" dated January 26, 2015 by the Franchisor, Target Pharmacy Franchising LP ("Target Pharmacy") be set aside;

f. declaring that the Franchise Agreements and/or related agreements may not be disclaimed without court order; and

g. directing that Target Pharmacy cannot deny the Pharmacists access to premises, discontinue supplies or otherwise interfere with a Pharmacist's operations without that Pharmacist's consent or a court order.

[2] On January 26, 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements and related agreements to each of the Pharmacists operating the pharmacies at 93 locations across Canada (outside Quebec), seeking to shut down these pharmacies in the Target Canada store locations within 30 days.

[3] The Pharmacists ask the court to deny Target Pharmacy's Disclaimer of the Franchise Agreements because (i) the Disclaimers will not enhance the prospects of a viable arrangement being made; and (ii) the Pharmacists will suffer significant financial hardship as a consequence of the disclaimer, with insolvency and/or bankruptcy awaiting many of them.

[4] Under the proposed wind-down, Target Pharmacy is not responsible for pharmacy shut-down costs. Instead, the Pharmacists are responsible for (i) the payment of salaries, severance pay and other obligations to their own employees, suppliers and contractors; (ii) the relocation costs of their pharmacies; and (iii) the continuation of services to their patients in accordance with professional standards.

2015 ONSC 1028 (CanLII)

[5] The Pharmacists recognize that they face numerous challenges as a result of Target store closures. In relocating, or winding-down pharmacy operations, the Pharmacists are required to comply with applicable legislation, regulations and standards governing the conduct of pharmacists in Canada, including such matters as: notice of pharmacy closure; notice of intention to open a new pharmacy; the safe-guarding of personal health records; providing notice to patients respecting their personal health information; and safeguarding and disposing of narcotics and controlled substances.

[6] The Pharmacists seem to accept that when a Target store closes, the pharmacy within that store will also close. They state that they require "breathing space" that may be afforded to them by an order that the Franchise Agreements are not to be disclaimed at this time. They ask the court to direct Target Pharmacy and its Affiliates not to deny them access to their licenced space or otherwise interfere with the Pharmacist's operations without the consent of or on terms directed by the court. Practically speaking, the Pharmacists want to postpone the effect of the disclaimer in the hope of obtaining a continuation of support payments from Target Canada for an unspecified time.

[7] There is no doubt that the closure or pending closure of Target Canada is causing and will cause significant dislocation for a number of parties. For the most part, Target Employees will lose their jobs. Representative Counsel have been appointed to assist employees in a process that includes an Employee Trust.

[8] The closure of Target Canada also impacts suppliers to Target, especially sole suppliers. The insolvency of Target Canada and its filing under the *Companies' Creditors Arrangement Act* (CCAA) has no doubt resulted in Target defaulting on a number of contractual relationships. These suppliers will have claims against Target Canada that will be filed in due course.

[9] The closure of Target Canada also affects the Pharmacists. The insolvency of Target and its filing under the CCAA has resulted in Target defaulting on its contractual relationships with the Pharmacists. Target wishes to disclaim the Franchise Agreements. The Monitor approved the proposed disclaimer and, as noted, disclaimer notices were sent on January 26, 2015.

[10] The Pharmacists are challenging the disclaimer and seek an order under s. 32(2) of the CCAA that the Franchise Agreements not be disclaimed. Section 32(4) of the CCAA references a section 32(2) order and provides:

> **Factors to be considered** – In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

2015 ONSC 1028 (CanLII)

[11] The reality that the Target stores will be closing provides, in my view, the starting point to analyze the issue being brought forward by the Pharmacists.

[12] Following the closing of a particular Target Store, it is unrealistic for the Pharmacist to carry on the operation of the pharmacy. As noted by counsel to the Applicants, as soon as operations cease at a particular location, the store will "go dark" and there will no longer be employee or security support that would permit the Franchisees to continue to operate. Further, counsel to the Applicants submits it would not be either commercially reasonable or practical for the Franchisees to continue to operate in a closed store, nor would it be reasonable or in the interests of stakeholders to require these locations to remain open in order to serve the interests of the Franchisees.

[13] It is in this context that the issue of the disclaimer has to be considered.

[14] Counsel to the Pharmacists seem to appreciate the reality of the situation, as reflected in the following references in their factum.

> 49. It is cold comfort for the Pharmacists to be advised that their losses in relation to the disclaimer of the Franchise Agreement are provable claims in the CCAA proceedings. The Pharmacists must pay their employees now. It is problematic that a provable claim may result in the possible recovery of some part of those payments, at a future uncertain date, if the funds are available in the Target Pharmacy Estate.
>
> 50. Evidence that simply provides that a debtor company will be more profitable with the disclaimer contracts is insufficient. Setting aside the disclaimers in this case will provide the Pharmacists with flexibility and time to make informed decisions and carry out their own relocation and/or wind-down in a manner that causes the least amount of damages to themselves and those who depend on them. …
>
> 53. Respectfully, such disclaimer should not be permitted until the court receives an independent report of the circumstances of each of the Pharmacists and directs the orderly wind-down and/or relocation of such operations on terms that are fair and reasonable. …
>
> 55. In no respect is the 30-day termination of the Franchise Agreements fair, reasonable and equitable to the Pharmacists, their employees and the public they serve. For many Pharmacists, it minimizes their capacity to relocate, [and] will leave them without funds to pay their employees, or the capacity to meet their ongoing obligations to their patients.

[15] It seems to me, having considered these submissions, that the Pharmacists recognize that it is inevitable that the pharmacies will be shut down.

2015 ONSC 1028 (CanLII)

[16] With respect to the factors to be considered as set out in s. 32(4), the disclaimer notices were approved by the Monitor. The Pharmacists complain that no reasons were provided in the notice approved by the Monitor. However, there is no requirement in s. 32(1) for the Monitor to provide reasons for its approval. This is reflected in Form 4 – Notice by Debtor Company to Disclaim or Resiliate an Agreement.

[17] However, the absence of reasons does not lead necessarily to the conclusion that the Monitor did not consider certain factors prior to providing its approval.

[18] The Monitor has made reference to the issues affecting the pharmacies in its Reports.

[19] The pharmacies were specifically the subject of comment in the Monitor's First Report at sections 8.2 – 8.5, and in the Second Report at section 6. Section 6.1 (h) of the Second Report specifically comments on the disclaimer notices. A summary of the reasons is provided at section 6.2.

[20] The information contained in the Monitor's reports establishes that there was communication as between Target Canada, the Monitor and the Franchisees such that it was clear that the stores were being closed. Specific reference to the communication is set out in the Monitor's Report at section 6.1(f), which in turn references the second Wong affidavit, filed by the Applicants.

[21] I am satisfied that the Monitor considered a number of relevant factors prior to approving the disclaimer notices.

[22] With respect to the second factor to be considered, namely whether the disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company, the Applicants have indicated they may be filing a plan of arrangement. I note that a plan may be required to ensure an orderly distribution of assets to the creditors.

[23] The Applicants seek to achieve an orderly wind-down and maximization of realizations to the benefit of all unsecured creditors. It seems to me that if the disclaimers are set aside it would delay this process because it would extend the time period for Target Canada to make payments to one group of creditors (the Pharmacists) to the detriment of the creditors generally. Further, in the absence of an effective disclaimer, the Target Entities will continue to incur significant ongoing administrative costs which would be detrimental to the estate and all stakeholders.

[24] The interests of all creditors must be taken into account. In this case, store closures and liquidation are inevitable. The Applicants should focus on an asset realization and a maximization of return to creditors on a timely basis. Setting aside the disclaimer might provide limited assistance to the Pharmacists, but it would come at the expense of other creditors. This is not a desirable outcome. I expressed similar views in *Timminco Ltd., Re*, 2012 ONSC 4471 at paragraph 62 as follows:

2015 ONSC 1028 (CanLII)

> [62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[25] I am satisfied that the disclaimer will be beneficial to the creditors generally because it will enable the Applicants to move forward with their liquidation plan without a further delay to accommodate the Pharmacists.

[26] The third factor is whether the disclaimer would likely cause significant financial hardship to a party to the agreement. This factor is addressed by Counsel to the Monitor at paragraph 27 of its factum.

> 27. On its own terms the CCAA effectively imposes a high threshold, beyond economic or financial loss, for the consideration under section 32(4): there must be evidence of financial *hardship*, it must be *significant* financial hardship, and it must be *likely* to be caused by the disclaimer. Financial loss or damage, without more, is not sufficient, in the Monitor's submission. It appears that Section 32 itself recognizes the distinction, providing expressly in ss. 32(7) that where a party suffers "a loss" in relation to the disclaimer the consequence is that such party "is considered to have a provable claim." (emphasis in original)

[27] In these circumstances, the pharmacies will inevitably close in the very near future whether or not the Franchise Agreements are disclaimed. I accept the submission of counsel to the Monitor to the effect that no Franchisee has adduced evidence that disallowing the Disclaimer and continuing to operate in otherwise dark, vacated premises would improve its financial circumstances.

[28] The situation facing the Pharmacists is not pleasant. However, in my view, setting aside the disclaimer will not improve their situation. Extending the time before the disclaimers take effect has the consequence of requiring Target Canada to allocate additional assets to the Pharmacists in priority to other unsecured creditors. This is not a desirable outcome.

[29] The Target Canada Entities, in consultation and with the support of the Monitor, have offered a degree of accommodation to the Pharmacists. The details are set out at paragraphs 64-66 of the affidavit of Mark Wong sworn February 16, 2015:

> 64. As outlined above, in consultation with and with the support of the Monitor, on February 9, 2015 the Target Canada Entities' legal advisors delivered an accommodation to PFAC's counsel intended to address the primary concern expressed by PFAC, namely that franchisees require additional time to transfer patient files and drug inventory and to relocate their respective pharmacy

2015 ONSC 1028 (CanLII)

businesses. Under the terms of the accommodation, TCC will permit the pharmacists to continue to operate at their respective existing TCC locations until the earlier of March 30, 2015 and three days following written notice by TCC to the pharmacist of the anticipated store closure at such pharmacist's location. The accommodation provides that the Notices of Disclaimer will continue in effect and the franchise agreements will be disclaimed on February 25, 2015, but the pharmacists will be entitled to remain on the premises for an additional period of time.

64. Under the terms of the accommodation, pharmacists will be able to continue operating in TCC stores for longer than the 30-day period contemplated. Depending on the date the Agent decides to vacate certain TCC stores, many pharmacists may be able to continue operating for 60 days or more following delivery of the Notices of Disclaimer and approximately 75 days following the date of the Initial Order. As I described above, at any time after the third anniversary of the opening date of the pharmacy, TCC Pharmacy would have the right to terminate the franchise agreement for any reason on 60 days' notice.

66. The March 30, 2015 date indicated in the accommodation made by Target Canada Entities is intended to be a reasonable compromise whereby pharmacist franchisees will get additional time to transfer patient files and inventory and relocate their businesses, while at the same time permitting the Target Canada Entities to undertake the orderly wind down of TCC pharmacy operations and the TCC retail stores as a whole. As I described above, in order to accommodate the continued operations of the pharmacies during the wind down process, TCC Pharmacy and TCC have not yet delivered notices of disclaimer to a number of third-party providers such as McKesson, Kroll and others, which TCC Pharmacy has maintained at considerable cost. The March 30, 2015 outside date for the operation of all TCC pharmacies will allow TCC Pharmacy to time the delivery of disclaimer notices to these third-party providers so as to avoid incurring additional unnecessary costs. The certainty provided by the firm outside date is also to the benefit of the pharmacies themselves, each of whom will be required to win down their operations and make alternate arrangements in the very short term as a result of the imminent closures of TCC retail stores.

[30] In the circumstances of this case, this accommodation represents, in my view, a constructive, practical and equitable approach to address a difficult issue.

[31] Having considered the factors set out in section 32(4) of the CCAA, the motion of PFAC for a direction that the disclaimer of the Franchise Agreements be set aside is dismissed, together with ancilliary relief related to the disclaimers. It is not necessary to address the standing issue raised by the Monitor.

2015 ONSC 1028 (CanLII)

[32] I turn now to the request of PFAC that it be appointed representative of the Franchisees and that Sutts, Strosberg LLP be appointed as the Pharmacists' Representative Counsel, and BDO as the Pharmacists' financial advisor.

[33] In view of my decision relating to the disclaimers, the scope of legal and financial services required by the Pharmacists may be limited. However, there are many transitional issues that remain to be addressed. First and foremost is dealing with the patient records and ensuring uninterrupted delivery of prescription drugs to all such patients. There is also interaction required between Target Pharmacy, the Franchisees, and the regulators, concerning the relocation or shut down of pharmacies and the return of certain products to suppliers. This is not a simple case where the Franchisee receiving the disclaimer notice can simply walk away from the scene. From a professional and regulatory standpoint, they still have to participate in the process.

[34] In addressing these transition issues and recognizing that similar circumstances exist for the Franchisees, there would appear to be some benefit in having a limited form of representation for the Franchisees. This would assist in ensuring that a consistent approach is followed not only in the wind-down or relocation aspect of the process, but also in the claims process. In my view, the estate could benefit if this process was coordinated.

[35] The Monitor and the Applicants would have a single point of contact which would likely result in a reduction in administrative time and costs during the liquidation and the claims process. I am satisfied that PFAC has the support of the majority of franchisees. PFAC is appointed as the Representative of the Pharmacists. Sutts, Strosberg LLP is appointed Representative Counsel and BDO is appointed as the Pharmacists financial advisor.

[36] The funding of this representational role is to be limited. The Applicants are to make available up to $100,000, inclusive of disbursements and HST, to PFAC to be used for legal and financial advisory services to be provided by Sutts, Strosberg, as Representative Counsel and BDO as financial advisor in these proceedings. PFAC can provide copies of invoices to the Monitor, who can arrange for payment of same. Any surplus funds at the conclusion of the representation are to be returned to the Applicants. The contribution to PFAC can be used only to cover legal and financial advisory services provided to date in these proceedings as well as to assist on the going forward matters, subject to the following parameters.

[37] Such assistance is to be limited to:

a. corresponding with the regulators concerning the wind-down process and the relocation process;

b. return of inventory; and

c. participating in the claims process.

[38] If the individual franchisees decide not to participate in PFAC, they should not expect any further accommodation in a financial sense.

2015 ONSC 1028 (CanLII)

[39] In arriving at this accommodation, I have taken into account that this limited funding will provide benefits to the Applicants under CCAA protection insofar as the legal and financial advisory services provided by Representative Counsel and BDO should reduce the overall administrative cost to the estate and will avoid a multiplicity of legal retainers. The representation and funding will also benefit the franchisees so that they can effectively shut-down or relocate their business and prepare any resulting claim in the CCAA proceedings.

[40] Given the limited nature of the Applicants' financial contribution, an administrative charge is not, in my view, required.

[41] In the result, PFAC's motion for representation status is granted, with limitations set out above. The motion in respect of the disclaimers is dismissed.

R.S.J. Geoffrey Morawetz

Date: February 18, 2015

2015 ONSC 1028 (CanLII)

TAB 10

CITATION: Urbancorp Inc. (Re), 2016 ONSC 5426
COURT FILE NO.: CV-16-11389-00CL
DATE: 20160829

2016 ONSC 5426 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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 URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (collectively, the "Applicants") AND THE AFFILIATED ENTITIES IN SCHEDULE "A" HERETO

Court File No.: 31-2114850
Court File No.: 31-2114850

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (WOODBINE) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (BRIDLEPATH) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BEFORE: Newbould J.

COUNSEL: *Lisa S. Corne and David P. Preger,* for the moving parties
Edmond F. B. Lamek, for the Urbancorp interests
Robin B. Schwill, for the KSV Kofman Inc., the Monitor and Proposal Trustee
Adam Slavens, for Tarion Warranty Corporation
Vern W. DaRe, for Stefano Serpa and Adrian Serpa
James M. Wortzman, for Atrium Mortgage Investment Corporation
Trent Morris, for several purchasers
Monique Sassi, for Mattamy Homes Limited
Dominique Michaud, for Terra Firma Capital Corporation.
Kenneth D. Kraft, for Guy Gissin, the Foreign Representative of Urbancorp Inc.

Chris Burr, for Laurentian Bank

HEARD: August 25, 2016

2016 ONSC 5426 (CanLII)

ENDORSEMENT

[1] This is a motion brought at the request of 40 different purchasers of residential units from Urbancorp (Lawrence) Inc. ("Lawrence"), Urbancorp (St. Clair Village) Inc. ("St. Clair"), Urbancorp (Woodbine) Inc. ("Woodbine"), and Urbancorp (Bridlepath) Inc. ("Bridlepath") for the appointment of Dickinson Wright LLP ("Dickinson Wright") as their representative counsel in the CCAA and BIA NOI proceedings and for an order that their legal fees and disbursements capped at $150,000 be paid and secured by an administrative charge against the four properties.

[2] The motion is supported by Tarion. It is opposed by KSV, the Monitor and Proposal Trustee, and by Mr. Gissin, the Foreign Representative of Urbancorp Inc. appointed by the Israeli Court. It is also opposed by the Urbancorp entities and with respect to the Bridlepath project by two purchasers of units and Atrium, a secured lender on that project.

[3] For the reasons that follow, the motion is granted in part.

[4] The four properties in question are vacant properties which Urbancorp intended to develop for residential use. No construction has been commenced and the properties consist of raw land. Each of the Urbancorp companies pre-sold freehold homes and received deposits from home buyers in connection with the home sales. The deposits were $3.7 million on the Lawrence property, $3.3 million on the St. Clair property, $1.9 million on the Woodbine property and $5.6 million on the Bridlepath property. The Urbancorp companies did not hold the deposits in trust and they have all been spent. As the projects involved the construction of freehold homes, there was no legislation requiring home buyer deposits to be segregated or held in trust.

[5] On June 30, 2016, orders were made in the CCAA proceedings and the NOI proceedings approving sale processes for the properties[1]. Offers were due on August 16, 2016. Multiple offers were received for each of the properties. As of the date of August 23rd, offers had been accepted for the Lawrence and Bridlepath properties and the sale process is advancing for the other properties. Any transaction will be subject to approval by this Court.

[6] All of the leading offers received in the sale process required that clean title be vested in the purchaser free of all obligations, including the agreements of purchase and sale entered into between the Urbancorp companies and home buyers. The agreements of purchase and sale are obligations of the Urbancorp companies and do not attach to the real estate owned by them.

[7] In the event that the contemplated transactions are completed, KSV states that it appears that the sale proceeds from each transaction will be sufficient to repay in full the amount of the deposits as well as any registered liens and mortgages. KSV as Monitor and Proposal Trustee is in the process of commencing a claims process in the CCAA and NOI proceedings, so further claims may be identified. However, no creditor not already known to KSV has contacted KSV advising that they may have a material claim against one or more of the Urbancorp companies.

[8] Ms. Corne advises that forty buyers have either retained her firm Dickinson Wright or requested it to bring this motion for a representative order and a charge for legal fees and disbursements. Buyers that have signed retainer engagements had agreements for the purchase of homes on three of the projects, being St. Clair, Lawrence and Bridlepath. None of the Woodbine purchasers have signed engagement letters but Dickenson Wright has been asked by 11 of the purchasers to represent their interests. Some of the purchasers wish to just get their deposits back while others would like to see that the homes they purchased be built and their contract accepted by any purchaser of the lands. There are a total of approximately 183 purchasers of pre-

[1] The order covered more than the four projects in question. This endorsement covers only the four properties which are the subject of this motion.

2016 ONSC 5426 (CanLII)

construction homes who have lost their deposits. Some have retained other firms. Fogler Rubinoff has been retained by two purchasers of the Bridlepath property and Mr. Morris has been retained by five undisclosed purchasers of one or more of the four properties.

[9] The agreements of purchase and sale are in a standard form and provide that in the event that the construction of a dwelling has not been completed by the closing date, the vendor shall not be liable for any damages or costs other than the costs paid by Tarion, which has a maximum coverage of $40,000 per purchaser.

2016 ONSC 5426 (CanLII)

Legal framework

[10] The authority to appoint representative counsel in CCAA proceedings is undoubted under section 11 of the CCAA and rules 10.01 and 12.07 of the rules of practice in Ontario. See *Re Target Canada Co.* (2015), 22 C.B.R. (6th) 323 and *Re Nortel Networks Corporation*, 2009 CanLII 26603. I agree with Justice Wilton-Siegel in *Re Kitchener Frame Limited*, July 7, 2011 unreported, that there is no reason why the same should not pertain to a proposal under the BIA.

[11] In *Re CanWest Publishing Inc.* (2010), 65 C.B.R. (5th) 152, Pepall J. (as she then was) stated that 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.

[12] As the issue of whether to appoint a representative counsel is one of equity, there can be no hard and fast rules governing any particular case, but these factors need be considered.

[13] So far as granting a charge to secure the fees and disbursements of a representative counsel, this is covered by section 11.52 (1)(c) of the CCAA which provides:

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

[14] Thus the court must be satisfied that the security or charge is necessary for the effective participation of representative counsel in the proceedings. In considering this issue. Pepall J. in *Re CanWest Publishing Inc.* (2010), 63 C.B.R. (5th) 115 stated that factors that might be considered would include:

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

2016 ONSC 5426 (CanLII)

Analysis

[15] It is contended that the purchasers are an especially vulnerable and disparate group of creditors and that without representation counsel who can advocate for their rights, they will be prejudiced. It is said that with such a large group of purchasers, it is administratively preferable to have one representative counsel who can deal with the purchasers of the properties and with KSV rather than have a multiplicity of individual legal retainers and the inefficiencies that would involve.

[16] It is argued that for the majority of purchasers, it would not be economical to retain their own legal counsel to represent their interests in these proceedings. However, the evidence to support this is very meagre. There are two purchasers, one from the St. Clair project and one from the Lawrence project, who state in affidavits that they cannot afford to retain counsel individually to represent them. However, there is no evidence that the purchasers could not together retain any law firm to represent all of them, as Dickinson Wright seeks to do on this motion. If all 185 purchasers retained a law firm with a cap on fees and disbursements of $150,000, it would amount to approximately $800 per purchaser.

[17] A group retaining one law firm is not unknown to the Urbancorp saga. In the Leslieville project that was being developed by an Urbancorp entity, Dickinson Wright was retained by a group of approximately 35 purchasers of residential townhouse condominium units. Due to Urbancorp's failure to complete the construction and sale of the Leslieville homes, these purchasers retained Dickinson Wright to commence an application for the appointment of an investigative receiver of Urbancorp Leslieville. That application prompted Urbancorp Leslieville's senior secured creditor to seek the appointment of a receiver of Urbancorp Leslieville. Dickinson Wright is continuing to represent these purchasers in respect of the ongoing receivership proceedings of Urbancorp Leslieville.

[18] KSV, the Monitor and Proposal Trustee, is opposed to the appointment of representative counsel and an administration charge against the properties for the legal fees. It does not believe

2016 ONSC 5426 (CanLII)

that $150,000 is well spent taken that it is likely that all purchasers will get their deposits back. It says that there is no question but that the purchasers are in an unfortunate position because of the Urbancorp insolvency, as is the case for unsecured creditors in any insolvency, and that it will be the purchasers' interests to be represented by counsel. It says that the issue is really one of asking the estates to fund the purchasers, and that as funding has to be fair to all stakeholders, it would be wrong to have funding that would be solely in the interest of one group of stakeholders. Funding the purchasers' lawyers would not assist in maximizing the assets or in negotiating a plan of compromise in this liquidating proceeding. So far as dealing with claims of the purchasers, that is a normal process for a Monitor or Proposal Trustee to deal with claimants.

2016 ONSC 5426 (CanLII)

[19] Ms. Corne says that the majority or nearly all of the purchasers who have contacted Dickinson Wright will want to try to hold on to whatever equity there is in their agreements caused by the increasing market values, and will want a seat at the table to sit down with prospective purchasers of the properties to attempt to negotiate some arrangement to continue with their purchase agreements, perhaps by way of paying some top-up. It is pointed out by KSV and Urbancorp that what is being sold is raw land and there is no knowledge of what the purchasers of the land will intend to build on the land. To suggest that the purchasers of the pre-construction units will be able to save their purchase agreements in some way is speculative at this stage.

[20] I have considerable doubt that appointing a representative counsel by whom all 185 purchasers are to be represented unless they opt out is warranted. It is likely that their interests are not all similar. Some may be prepared to simply walk from the situation if they get back their deposit, which appears in all likelihood will be the case. Some are investors whose interests might be quite different. Some want to negotiate with a purchaser of the raw land. Already there have been two other lawyers retained by some purchasers, albeit a small number. I recognize however that whether a conflict will exist is to some extent hypothetical at this stage.

[21] This is not a situation such as *Target* in which representative counsel was appointed to represent some 17,600 employees or in *Nortel* in which there were many thousands of affected employees and representative counsel was obviously needed to represent their interests.

[22] I recognize that purchasers are better off if they have legal advice and be represented by counsel. This issue is really whether the Urbancorp estates should fund representative counsel. I am not at all satisfied that a security or charge against the Urbancorp properties is necessary for the effective participation of purchasers in these proceedings. There is no evidence of any financial inability of the purchasers to jointly engage counsel to represent them. Two purchasers of the Bridlepath project are opposed to representative counsel being appointed for the Bridlepath purchasers. On that project the pre-sales for the then proposed 37 units averaged approximately $1.18 million.[2] Purchasers in the Urbancorp Leslieville insolvency were able to jointly retain Dickenson Wright and there is no evidence that the purchasers on the four Urbancorp projects in question could not do the same.

[23] Taken that all purchasers are likely to get back their deposits, legal representation for further action would likely be to negotiate with the known or potential purchasers of the raw lands to agree to some arrangement that would result in purchasers obtaining some part of their equity in their deals being preserved[3]. There would be nothing wrong in their attempting to do so. However to do that with estate funds could well be contrary to the interests of the insolvent estates. Any purchaser of the raw lands would want the lands free and clear of any claims, and the best prices offered have reflected that. If such a purchaser were to provide to any of the pre-sale construction buyers some of the equity in their agreements, that no doubt would reduce what a purchaser would be willing to pay for the raw land and be against the interests of the estates as

[2] The average purchase price for the St. Clair Village project was approximately $800,000 and for the Lawrence project approximately $652,000. I do not believe the average price for the Woodbine project is in the record.

[3] During argument Ms. Corne said that her firm had no intention of commencing litigation against the Urbancorp entities in question. In light of the contractual provisions, that is understandable. It does not mean that some purchaser might not want to do that however.

2016 ONSC 5426 (CanLII)

a whole. As well, KSV points out that there is no certainty that purchasers would have bid for the properties in the sales process if they were required to construct homes conforming to the requirements in the agreements with the home buyers.

[24] Estate funds should be spent for the benefit of the estate as a whole, not for the benefit of one group whose interests are contrary to the interests of the estate as a whole. If there is some equity available after all creditors of these Urbancorp entities have been paid, there are other interests entitled to share in such equity, including other Urbancorp entities under cross-collateralization agreements and Urbancorp Inc., represented by its Foreign Representative Mr. Gissin, which owes approx. $64 million plus interest on debentures issued in Israel and which is the shareholder of many of the Urbancorp insolvent entities.

[25] Thus it is not at all clear that funding a representative of the purchasers will be for the benefit of the companies in question.

[26] It is said that the amount of funding and the security for it is minimal, being $150,000. That may be but the issue is whether in principle it should be ordered. As well, it is by no means clear that representative counsel would not come back and later ask for that amount to be increased. Originally they proposed a total of $300,000 but later reduced that to $150,000.

[27] In all of the circumstances, I am prepared to make an order appointing Dickenson Wright as representative counsel for the purchasers of the four projects in question, but rather than having an opt-out provision as requested, the order shall provide an opt-in process in which purchasers are clearly advised that they will be represented by Dickenson Wright only if they choose to do so.

[28] I am not prepared to make an order that the fees and disbursements of Dickenson Wright be paid from the estates or secured by a charge. Counsel for KSV contended that if any representative order is made, the fees and disbursements could be paid by the estates from the distributions to be made to the purchasers who opted in. That would align the interests of

2016 ONSC 5426 (CanLII)

whatever purchaser wanted to retain Dickenson Wright with the steps taken on behalf of such purchasers. I accept that position and the order may provide that Dickenson Wright is entitled to be paid its fees and disbursements by the particular estates from the distributions to be made to those purchasers who choose to be represented by Dickenson Wright. The notice to purchasers advising them of their right to opt-in shall make this payment provision clear.

Newbould J.

Date: August 29, 2016

2016 ONSC 5426 (CanLII)

TAB 11

Estate No. 31-2278725
Court File No. 31-2278725

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR	)	FRIDAY, THE 6th
	)	
JUSTICE MYERS	)	DAY OF OCTOBER, 2017

B E T W E E N:

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF SECURECARE CAPITAL INC.

UNSECURED BONDHOLDERS REPRESENTATIVE COUNSEL ORDER

THIS MOTION, made by SecureCare Capital Inc. ("**SecureCare**") for an order, among other things, appointing Cassels Brock & Blackwell LLP ("**Cassels**") as representative counsel for persons holding unsecured bonds of SecureCare and establishing a committee of investor representatives, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Benjamin Goodis sworn September 29, 2017, and the Exhibits attached thereto, and on hearing the submissions of counsel for SecureCare, Grant Thornton Limited in its capacity as proposal trustee of SecureCare (the "**Proposal Trustee**") and of the proposed representative counsel, no one else appearing,

APPOINTMENT OF REPRESENTATIVE COUNSEL

1. **THIS COURT ORDERS** that Cassels is hereby appointed as representative counsel (the **"Representative Counsel")** to represent the interests of holders of unsecured bonds of SecureCare ("**Unsecured Bondholders**", as further defined below) in these proposal proceedings under the *Bankruptcy and Insolvency Act* (the "**Proceedings**"), provided, however, that Representative Counsel is not required to, and shall not, represent or provide legal advice or services to Unsecured Bondholders that are employees, officers, or directors of any of the following companies:

(a) SecureCare;

(b) J. Priest Investment Management Inc.;

(c) Trade Finance Solutions;

(d) InvestCare Capital Corporation;

(e) TFS RT, Inc.;

(f) TFS Canada Bond Series, Inc.; or

(g) TFS Management, Inc.

2. **THIS COURT ORDERS** that, as used herein, "Unsecured Bondholders" means any person holding bonds in either of the following series issued by SecureCare:

(a) $78,156,153 and US$8,071,800 of unsecured fixed rate bonds issued by SecureCare prior to April 30, 2016 to acquire a beneficial interest in certain eligible credit receivables, or

(b) US$3,220,000 in unsecured fixed rate bonds issued pursuant to a Confidential Information Memorandum dated December 10, 2016 to be used to fund a portion of a secured subordinated loan to TFS Canada Bond Series, Inc.

3. **THIS COURT ORDERS** that Michael Sun, Paul Read, Thomas Beyer, Tommy Baltzis, and Michael Edwards (collectively, the **"Investor Representatives"**) are hereby appointed as representatives of all Unsecured Bondholders (excluding the Opt-Out Investors (as defined below), if any) in the Proceedings, to act in the overall best interests of the Unsecured Bondholders.

4. **THIS COURT ORDERS** that the mandate of the Investor Representatives and Representative Counsel is specifically limited to advancing the interests of Unsecured Bondholders, as a group and not individually, in the Proceedings, and, in particular,

(a) reviewing sources of potential recovery by SecureCare in respect of its assets, including SecureCare's potential claims against other persons or entities;

(b) advocating for Unsecured Bondholders' interests in the formulation of a proposal or other proposed distribution by SecureCare to creditors;

(c) providing a recommendation to Unsecured Bondholders about whether to vote in favour of a proposal under the *Bankruptcy and Insolvency Act* ("**BIA**") filed by SecureCare (a "**Proposal**");

(d) working with SecureCare and the Proposal Trustee to implement a streamlined claims process for Unsecured Bondholders;

(e) reviewing the findings and conclusions of the Proposal Trustee regarding the affairs of SecureCare and suggesting further work for the Proposal Trustee to reasonably undertake;

(f) participating in the discussions with SecureCare and the Proposal Trustee in the development of a Proposal;

(g) representing Unsecured Bondholders and taking a position on behalf of them at relevant motions in the Proceedings;

(h) where reasonably necessary, preparing and sending communications to Unsecured Bondholders to supplement the statutory reporting function of the Proposal Trustee;

(i) providing ongoing information to securities dealers whose clients are Unsecured Bondholders about the Proceedings, the activities of the Proposal Trustee, and a Proposal; and

(j) if necessary, seeking directions from the court in accordance with paragraph 20 herein.

(collectively, the "**Mandate**").

5. **THIS COURT ORDERS** that, for greater certainty, the Mandate shall not include (and the Representative Counsel shall not be in any way involved in)—and neither the

Investor Representatives nor Representative Counsel shall have any duties or obligations in respect of—investigating, assessing, advising on, or pursuing

(a) any remedies, claims, or proceedings (including class proceedings) that Unsecured Bondholders (individually or collectively) may be able to assert directly against persons other than SecureCare; or

(b) regulatory complaints, including complaints under securities laws.

6. **THIS COURT ORDERS** that Representative Counsel may rely upon the advice, information and instructions received from the Investor Representatives in carrying out the mandate of Representative Counsel without further communications with or instructions from the Unsecured Bondholders, except as may be recommended by Representative Counsel or ordered by this Court

7. **THIS COURT ORDERS** that, with the exception of Opt-Out Investors, (a) the Investor Representatives and Representative Counsel shall represent all Unsecured Bondholders, on a collective basis, in the Proceedings; and (b) the Unsecured Bondholders shall be bound by the actions of the Investor Representatives and Representative Counsel in the Proceedings, provided, however, that nothing in this Order shall affect the rights or obligations of each Unsecured Bondholder, if any, to file a proof of claim, receive notices and other communication provided for under the BIA, or cast a vote in respect of a Proposal.

8. **THIS COURT ORDERS** that in respect of any decision made by the Investor Representatives, the will of the majority of the Investor Representatives will govern.

9. **THIS COURT ORDERS** that, in circumstances where an Investor Representative has an actual or potential conflict of interest with respect to any issue being considered or decision being made by the Investor Representatives, such Investor Representative shall recuse himself or herself from such matter and have no involvement in it.

10. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act,* SecureCare shall disclose to Representative Counsel, subject to confidentiality arrangements satisfactory to SecureCare and the Proposal Trustee, the following information, documents and data (collectively, the **"Information")** for the sole purpose of carrying out the Mandate, but only to the extent desirable or required to carry out the Mandate, in the context of these proceedings:

(a) the names, last known addresses and last known telephone numbers and e-mail addresses (if any) of the Unsecured Bondholders (excluding Opt-Out Investors, if any, who have opted out prior to delivery of the Information); and

(b) details of the holdings of unsecured SecureCare bonds by each Unsecured Bondholder,

and that, in so doing, SecureCare is not required to obtain express consent from such Unsecured Bondholders authorizing disclosure of the Information to Representative Counsel and, further, in accordance with clause 7(3) of the *Personal Information Protection and Electronic Documents Act,* this Order shall be sufficient to authorize the disclosure of the Information for the purposes set out herein, without the knowledge or consent of the individual Unsecured Bondholders. Representative Counsel to whom

such information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to carrying out the Mandate, and if it ceases to carry out or otherwise complete the Mandate, shall return all such information to SecureCare, or, in the alternative, destroy all such information (but only to the extent that destruction is technically feasible given the nature of Representative Counsel's computer and record keeping systems). Representative Counsel shall be entitled to continue to use the personal information provided to it, and related to carrying out the Mandate, in a manner which is in all material respects identical to the prior use of such information by SecureCare, and shall return all other personal information to SecureCare, or ensure that all other personal information is destroyed (but only to the extent that destruction is technically feasible given the nature of Representative Counsel's computer and record keeping systems).

11. **THIS COURT ORDERS** that the Proposal Trustee shall give notice of the granting of this Order to the Unsecured Bondholders by delivering to them a notice substantially in the form attached as Schedule "A" by ordinary mail, fax, or email as soon as practicable after the granting of this order, and the Proposal Trustee shall post a copy of the notice and this Order on its website.

12. **THIS COURT ORDERS** that any Unsecured Bondholder who does not wish to be represented by the Investor Representatives and Representative Counsel in the Proceedings shall, within 30 days of the date of the notice sent pursuant to paragraph 11 above, deliver to the Proposal Trustee, in writing, an opt-out notice in the form attached as Schedule "B" (the "**Opt-Out Notice**") that he or she is opting out of representation by the Investor Representatives and Representative Counsel and shall

thereafter not be bound by the actions of the Investor Representatives or Representative Counsel and shall represent himself or herself or be represented by any counsel that he or she may retain exclusively at his or her own expense in these proceedings (any such persons who deliver an Opt-Out Notice in compliance with the terms of this paragraph, "**Opt-Out Investors**"). The Proposal Trustee shall deliver copies of all Opt-Out Notices sent by Opt-Out Investors received to SecureCare and Representative Counsel as soon as reasonably practicable.

13. **THIS COURT ORDERS** that Representative Counsel shall be given notice of all motions to which the Unsecured Bondholders are entitled to receive notice in the Proceedings and that it shall be entitled to represent those on whose behalf it is hereby appointed in all such proceedings.

14. **THIS COURT ORDERS** that, subject to availability of funds (as determined by the Proposal Trustee) and subject to paragraphs **16** and **17** below, Representative Counsel shall be paid its reasonable fees and disbursements (including fees and disbursements incurred between August 1, 2017 and the date of this order) by SecureCare on a bi-weekly basis, forthwith upon rendering its accounts to SecureCare for fulfilling its mandate in accordance with this Order, and subject to such partial redactions to the invoices as are necessary to maintain solicitor-client privilege between Representative Counsel and the Unsecured Bondholders. In the event of any disagreement with respect to such fees and disbursements, such disagreement may be remitted to this Court for determination. To the extent there is insufficient availability of funds (as determined by the Proposal Trustee) to pay the fees and disbursements of Representative Counsel, the Proposal Trustee, counsel to the

Proposal Trustee and counsel to SecureCare, all such professionals shall share the available funds *pari passu*.

15. **THIS COURT ORDERS** that Representative Counsel shall have its fees approved by the Court, but SecureCare shall pay such fees on an ongoing interim basis in accordance with paragraph 14 prior to Court approval.

16. **THIS COURT ORDERS** that the fees of Representative Counsel, excluding disbursements and HST, for the period from August 1, 2017 to November 27, 2017 (the "**Extension Date**") shall be limited to $125,000 in aggregate, but such amount may increased with the consent of SecureCare, the Proposal Trustee, and Representative Counsel.

17. **THIS COURT ORDERS** that the maximum amount of fees of Representative Counsel for subsequent periods following the Extension Date, if any, shall be agreed upon by SecureCare, the Proposal Trustee, and Representative Counsel and, if no agreement can be reached, such amount shall be determined by the Court.

18. **THIS COURT ORDERS** that the payments made by SecureCare to Representative Counsel pursuant to this Order do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable laws.

19. **THIS COURT ORDERS** that Representative Counsel is hereby authorized to take all steps and do all acts necessary or desirable to carry out the terms of this Order.

20. **THIS COURT ORDERS** that Representative Counsel shall be at liberty, and is hereby authorized, at any time on 10 days' notice, to apply to this Court for advice and directions in respect of its appointment or the fulfillment of its duties in carrying out the provisions of this Order or any variation of the powers and duties of Representative Counsel, which shall be brought on notice to SecureCare, the Proposal Trustee, and other interested parties, unless this Court orders otherwise.

21. **THIS COURT ORDERS** that Representative Counsel and the Investor Representatives shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of this Order or any subsequent Orders in these proceedings, save and except for liability arising out of gross negligence or wilful misconduct.

22. **THIS COURT ORDERS** that no action or other proceeding may be commenced against Representative Counsel or the Investor Representatives in respect of the performance of their duties under this Order without leave of this Court on 10 days' notice to Representative Counsel or the Investor Representatives, as the case may be.

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist SecureCare, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to SecureCare and the Proposal Trustee, as an officer of this Court, as may be necessary or desirable

to give effect to this Order, or to assist SecureCare and the Proposal Trustee and their respective agents in carrying out the terms of this Order.

SCHEDULE "A"

NOTICE TO UNSECURED BONDHOLDERS

On August 1, 2017, SecureCare Capital Inc. ("**SecureCare**" or the "**Company**") filed a Notice of Intention to Make a Proposal (the "**NOI**") with the Office of the Superintendent of Bankruptcy Canada. An NOI is a procedure under the *Bankruptcy and Insolvency Act* ("**BIA**") that allows financially troubled corporations the opportunity to restructure their financial affairs. An NOI is often taken as a preliminary step in a restructuring process under the BIA, which allows a company to restructure its affairs, through a formal Proposal.

By orders dated August 25, 2017 and October 6, 2017, the Court has extended the time period for SecureCare to make a Proposal to its creditors, to November 27, 2017.

FURTHER TAKE NOTICE THAT pursuant to an Order of the Court dated October 6, 2017:

1. Cassels Brock & Blackwell LLP ("**Representative Counsel**") was appointed as representative counsel for the purpose of representing the interests of the holders of the following series of unsecured bonds issued by SecureCare:

   (a) $78,156,153 and US$8,071,800 of unsecured fixed rate bonds issued by SecureCare prior to April 30, 2016 to acquire a beneficial interest in certain eligible credit receivables, or

   (b) US$3,220,000 in unsecured fixed rate bonds issued pursuant to a Confidential Information Memorandum dated December 10, 2016 to be used to fund a portion of a secured subordinated loan to TFS Canada Bond Series, Inc.

   (the "**Unsecured Bondholders**").

   A copy of the Order can be accessed on the website of the Proposal Trustee: https://www.grantthornton.ca/services/reorg/bankruptcy_and_insolvency/SecureCare

2. You are receiving this notice because the records of SecureCare indicate that you are an Unsecured Bondholder.

3. Representative Counsel will represent the interest of Unsecured Bondholders, as a group and not individually, within the scope of the mandate outlined below. Representative Counsel will not represent the interest of any persons in their capacity as holders of secured bonds issued by SecureCare, such as the $7,270,784 and US$2,263,000 of secured bonds issued pursuant to

SecureCare's Offering Memorandum dated September 30, 2016 (collectively, the "**Secured Bonds**").

4. Accordingly, if you are a holder of Secured Bonds in additional to being an Unsecured Bondholder, Representative Counsel will represent you only as Unsecured Bondholder and not in your capacity as a holder of Secured Bonds.

5. A committee of five individuals, namely Michael Sun, Paul Read, Thomas Beyer, Tommy Baltzis, and Michael Edwards (collectively, the "**Investor Representatives**"), whose membership includes both Unsecured Bondholders as well as employees of the exempt market dealers whose clients hold Unsecured Bondholders, has been appointed by court order. The Investor Representatives are the sole parties that have the authority to provide instructions to Representative Counsel.

6. The mandate of the Investor Representatives and Representative Counsel is to advance the interests of Unsecured Bondholders within the current BIA proposal proceedings by SecureCare, and, in particular,

(a) reviewing sources of potential recovery by SecureCare in respect of its assets, including SecureCare's potential claims against third parties;

(b) advocating for Unsecured Bondholders' interests in the formulation of a proposal or other proposed distribution by SecureCare to investors;

(c) updating Unsecured Bondholders about the BIA proceedings;

(d) providing a recommendation to Unsecured Bondholders about whether to vote in favour of a proposal;

(e) working with SecureCare and the Proposal Trustee to implement a streamlined claims process for Unsecured Bondholders;

(f) reviewing the findings and conclusions of the Proposal Trustee and suggesting further work for the Proposal Trustee to reasonably undertake;

(g) in concert with SecureCare and the Proposal Trustee exploring sources of potential recovery for SecureCare to enhance the funds that SecureCare has available to pay to its creditors;

(h) participating in the discussions with SecureCare and the Proposal Trustee in the development of SecureCare's proposal;

(i) representing Unsecured Bondholders and taking a position on behalf of them at relevant motions in these proceedings;

(j) where reasonably necessary, preparing and sending communications to Unsecured Bondholders to supplement the statutory reporting function of the Proposal Trustee;

(k) providing ongoing information to securities dealers whose clients are Unsecured Bondholders about the proposal process and activities of the Proposal Trustee; and

(l) seeking directions from the court, if required, relating to the exercise of the powers of the Investor Representatives and Representative Counsel

(collectively, the "**Mandate**").

7. In carrying out the Mandate, the Investor Representatives and Representative Counsel will represent the interests of Unsecured Bondholders as a group. The Investor Representatives and Representative Counsel will not provide representation or advice concerning the specific personal circumstances of any individual Unsecured Bondholder.

8. The Mandate does not include investigating, assessing, advising on, or pursuing

(a) any remedies, claims, or proceedings (including class proceedings) that Unsecured Bondholders (individually or collectively) may be able to assert directly against persons other than SecureCare; or

(b) regulatory complaints.

9. To the extent that you require legal or other advice about your individual situation or about matters outside the scope of the Mandate, you may retain your own legal counsel at your own expense and pursue whatever remedies you deem appropriate.

10. For more information, visit the Employee Representative Counsel's website at **http://www.casselsbrock.com/●**

IF YOU DO NOT WISH TO BE REPRESENTED by the Investor Representatives and Representative Counsel, you must, before November ●, 2017, provide an Opt-Out Notice (a copy of which can be obtained from the Employee Representative Counsel's website or the Proposal Trustee's website at [web page link]) indicating that you wish to opt-out of such representation and send the completed Opt-Out Notice to:

Grant Thornton Limited, in its capacity as
Proposal Trustee of SecureCare Capital Inc.
11th floor
200 King Street West, Box 11
Toronto, ON M5H 3T4

Attention: Jason Knight
Fax: (416) 360-4948

Persons requiring further information about the proposal proceedings of SecureCare should review the website established by the Proposal Trustee https://www.grantthornton.ca/services/reorg/bankruptcy_and_insolvency/SecureCare or call the Proposal Trustee's toll-free hotline at 1-866-481-9217.

SCHEDULE "B"

FORM OF OPT-OUT NOTICE

To: Grant Thornton Limited, in its capacity as Proposal Trustee of SecureCare Capital Inc.
11th Floor
200 King Street West, Box 11
Toronto ON M5H 3T4
Fax: (416) 360-4948

Attention: Jason Knight

I hereby provide written notice that I do not wish to be represented by Cassels Brock & Blackwell LLP as representative counsel (the "**Representative Counsel**") for the Unsecured Bondholders of SecureCare Capital Inc. ("**SecureCare**") or by the Investor Representatives in relation to SecureCare's proposal proceedings under the *Bankruptcy and Insolvency Act* (Estate No. 31-2278725) (the "**BIA Proceedings**"). I understand that, by opting out of representation, if I wish to take part in the BIA Proceedings or assert other rights that I have I would need to do so as an independent party. I am responsible for retaining my own legal counsel should I choose to do so, and that I would be personally liable for the costs of my own legal representation.

I understand that a copy of this Opt-Out Form will be provided to Representative Counsel and to SecureCare.

_____ _____
Witness Signature

Name [please print]: _____

Address: _____

_____

_____

Telephone: _____

Note: To opt out, this form must be completed and received at the above address on or before _____, 2017

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF SECURECARE CAPITAL INC.

Court File No. Estate No. 31-2278725
Court File No. 31-2278725

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDINGS COMMENCED AT
TORONTO

UNSECURED BONDHOLDERS REPRESENTATIVE COUNSEL ORDER

BENNETT JONES LLP

S. Richard Orzy
Tel: 416.777.5737
Fax: 416.863.1716
orzyr@bennettjones.com

Sean H. Zweig
Tel: 416.777.6254
Fax: 416.863.1716
zweigs@bennettjones.com

Lawyers for SecureCare Capital Inc.

TAB 12

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

An Act to facilitate compromises and arrangements between companies and their creditors

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act,* R.S., c. C-25, s. 1.

...

General power of court

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

…

Court may order security or charge to cover certain costs

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

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

Priority

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