COURT FILE NUMBER	2303 – 06543
COURT	COURT OF KING'S BENCH
JUDICIAL CENTRE	EDMONTON
	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 J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
APPLICANTS	J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS (AMENDED & RESTATED CCAA INITIAL ORDER, SISP ORDER & ANCILLARY RELIEF)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP Barristers and Solicitors 2200, 10235 – 101 Street, Edmonton, AB T5G 3G1 Telephone: 306.975.7136 / 780.969.3518 Fax No.: 306.975.7145 / 780.969.3549 Attention: Jeffrey M. Lee, K.C / Mandi A. Deren-Dube File No.: 0159371.00008

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND 3

A. Introduction 3

B. Initial Order 4

C. Summary of Facts 5

II. ISSUES 5

A. Is it appropriate for this Court to grant the Amended and Restated CCAA Initial Order and the SISP Order? 5

B. Is it appropriate for this Court to approve the appointment of the P-Note Representative Counsel and the P-Note Holder representatives? 6

C. Is it appropriate for this Court to grant the SAVO's? 6

D. Is it appropriate for this Court to grant a sealing order? 6

III. LAW AND ARGUMENT 6

A. It is appropriate for this Court to approve the proposed Amended and Restated CCAA Initial Order and Sales Investment and Solicitation Process Order 6

B. It is appropriate for this Court to appoint representatives on behalf of the P-Note Holders and to appoint Representative Counsel for the P-Note Holders 8

C. It is appropriate for this Court to grant the proposed SAVOs 11

IV. REQUESTED RELIEF 13

V. INDEX OF AUTHORITIES 14

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I. INTRODUCTION AND BACKGROUND

A. Introduction

1. This Brief of Law is submitted on behalf of the Applicants, J.W. Carr Holdings Ltd., Spruce Grove Industrial Park Inc., 272649 Alberta Ltd., 279896 Alberta Ltd., Grande Prairie Place Enterprises (1996) Inc., 1170292 Alberta Ltd. and 627612 Alberta Ltd. (collectively, the **"Applicants"** or the "**Carr Group**").

2. The Applicants were granted a stay of proceedings protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended[1] (the "**CCAA**") by an initial order granted on April 19, 2023 by the Honourable Justice Gill (the "**Initial Order**"), pursuant to which Ernst & Young Inc. ("**EYI**") was appointed Monitor.

3. The Applicants seek the following relief from this Honourable Court at a heaing scheduled for April 26, 2023:

   a. an Amended and Restated Initial Order ("**ARIO**") under the CCAA, including, *inter alia*, a continuation of the stay of proceedings and the court-ordered Administration Charge, and a continuation of and increase to the Interim Lender's Charge;

   b. an order approving a sales and investment solicitation process ("**SISP**") in order to monetize the real estate assets of the Applicants;

   c. approval of the appointment of a representatives of the Promissory Note Holders, (the "**P-Note Representatives"**) and the appointment of representative counsel for the Promissory Note Holders (the "**P-Note Representative Counsel**");

   d. a sale approval and vesting Order ("**SAVO**") in respect of two residential lots; and

   e. an order sealing the Confidential Affidavit of Marjorie Carr dated April 18, 2023, which was relied upon in support of the Initial Order, and the 2nd Confidential Affidavit of Marjorie Carr dated April 20, 2023, until the earlier of the termination of the CCAA proceedings, August 31, 2023, or further order of this Court.

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [**CCAA**], **TAB 1 of the Initial Order Brief.**

B. Initial Order

4. The proposal relief to be sought in the proposed AIRO and SISP orders was before this Honourable Court on hearing of the Originating Application for the Initial Order on April 19, 2023 (the "**Originating Application**"). The Originating Application was brought on notice to all creditors.

5. In support of its Orginating Application for an Initial Order, the Carr Group relied upon the First Carr Affidavit[2], the Second Carr Affidavit[3], a Brief of Law filed April 13, 2023 (the "**First Carr Brief**"), and a reply Brief of Law (the "**Reply Carr Brief**") submitted in response to the brief filed by The Owners: Condominium Plan 872 8944 (the "**Central Park Condo Corp**").

6. During the Originating Application, Justice Gill heard and considered objections from Roynat Inc., a secured creditor of the Carr Group and First Charge Mortgagee on the Clariant Building, and from the Central Park Condo Corp. Justice Gill made the following findings and determinations:

   a. Roynat's partial objection to the Initial Order and its request to have its second charge $250,000 mortgage rank in priority to the court-ordered charges created by the Initial Order was dismissed.

      (i) Roynat Inc. had failed to establish that the Applicants failed to act in good faith. The objections raised by Roynat Inc. had to be considered in the context of the significant efforts undertaken by the Applicants to negotiate and enter into forbearance agreements with a significant number of secured lenders, the attempts made by the Applicants to accommodate Roynat Inc.'s concerns, the overall complexity and dynamic aspect of the negotiations leading up to the Originating Application.

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[2] Affidavit of Marjorie Carr, sworn on April 10, 2023 ["**1st Carr Affidavit**"].
[3] Supplemental Affidavit of Marjorie Carr, sworn on April 18, 2023 ["**2nd Carr Affidavit** "].

(ii) Roynat also failed to establish that it would be materially prejudiced by the Initial Order.

b. The Central Park Condo Corp's objection to the Initial Order and request to be carved out of the stay of proceedings in order to be able to continue to garnish rents was dismissed.

(i) The Court concluded that allowing the Central Park Condo Corp to continue to garnish rents in the face of the stay of proceedings would be inconsistent with the clear purpose of the CCAA.

(ii) The Court was also satisfied that the proposed amendments to the Initial Order offered by the Carr Group satisfactorily addressed the priority concerns raised by the Central Park Condo Corp in respect of Condominium Fees.

C. Summary of Facts

7. The Applicants adopt and rely upon the facts set out in in the First Carr Affidavit, the Second Carr Affidavit, the Pre-Filing Report of the Proposed Monitor, and the First Carr Brief.

8. The necessary background for the SAVO Applications is set out in the Second Carr Affidavit and the Second Confidential Carr Affidavit, which encloses the proposed Purchase Agreements for which court approval is sought.

9. As will be particularized in the pending First Report of the Monitor (to be filed), since the date of the April 19 CCAA Initial Order, the Applicants have worked diligently and in good faith towards restructuring their business and financial affairs. The Applicants have continued operations and have made toward implementing the proposed SISP.

II. ISSUES

10. This Application raises the following issues:

A. Is it appropriate for this Court to grant the Amended and Restated CCAA Initial Order and the SISP Order?

B. Is it appropriate for this Court to approve the appointment of the P-Note Representative Counsel and the P-Note Holder representatives?

C. Is it appropriate for this Court to grant the SAVO's?

D. Is it appropriate for this Court to grant a sealing order?

III. LAW AND ARGUMENT

A. It is appropriate for this Court to approve the proposed Amended and Restated CCAA Initial Order and Sales Investment and Solicitation Process Order

11. The Applicants adopt and repeat the contents of the First Carr Brief for the purposes of this Application, which includes submissions on the issues of the appropriateness of the Stay of Proceedings, the Administration Charge, and the Interim Financing Credit Facility.

12. Section 11.02 of the CCAA sets out the test for an extension of stays of proceedings on an application other than an initial application. Section 11.02(2) and (3) states that:[4]

> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[4] CCCA, *supra* note 1 at ss. 11.02(2)-(3), TAB 1 of 1st Carr Brief.

13. Section 36(1) of the CCAA provides that a sale or disposal of assets outside the ordinary course of business by a debtor may only occur with the approval of the Court on notice to affected creditors. The factors to be considered in the approval of such a proposed sale or disposal of assets are set out in subsection 36(3) of the CCAA:[5]

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

14. The proposed SISP contemplates a two-phase offering process. In the first phase, qualified bidders submit letter of intent to purchase certain of the Applicants' Properties. In the second phase, those bidders are invited to submit binding offers (subject to court approval).[6]

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[5] CCAA *supra* note 1 at s. 36(3), TAB 1 of Initial Order Brief.

[6] Pre-Filing Report of Ernst & Young Inc. in its Capacity As the Proposed Monitors of the Applicants [the "**Pre-Filing Report**"] at paras 24-28.

15. The Monitor has expressed support for and affirmed the reasonableness of the proposed SISP process, which is notably preferable to bankruptcy.[7] The Monitor has also confirmed that in its opinion, the SISP will allow participants sufficient time to assess the possible purchase of the assets or invest in the Applicants, and to submit their offers.[8]

16. The Applicants have provided notice of their intention to seek the ARIO and the SISP Order, and of the relief sought therein, in conjunction with the Originating Application. A significant number of secured creditors attended the Originating Application and either expressed their support for or did not object to such relief being granted.

17. For all of the foregoing reasons, the Applicants submit that circumstances exist that support the granting of the Amended and Restated Initial Order and the requested stay extension to August 31, 2023. The Applicants are diligently pursuing the SISP, have obtained Interim Financing in order to continue operations, and are acting in good faith and with due diligence in advancing their restructuring efforts.

B. It is appropriate for this Court to appoint representatives on behalf of the P-Note Holders and to appoint Representative Counsel for the P-Note Holders

18. As described in Part VII of the First Carr Affidavit, the largest group of unsecured creditors of the Carr Group is made up of individuals, closely-held corporations and professional corporations who have extended loans to the Carr Group in exchange for promissory notes of varying amounts (the "**P-Note Holders**"). The P-Note Holders collectively are owed in excess of $31 million in debt.[9]

19. In *Canwest*, the Ontario Superior Court provided a list of factors to be considered when determining whether it is appropriate to appoint representative counsel in a CCAA proceeding:[10]

   a. the vulnerability and resources of the group sought to be represented;

   b. any benefit to the companies under CCAA protection;

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[7] *Ibid.*
[8] *Ibid* at paras 47-48.
[9] 1st Carr Affidavit at para 184.
[10] *Canwest Publishing Inc*., 2010 ONSC 1328at para 21, **TAB 1.**

c. any social benefit to be derived from representation of the group;

d. the facilitation of the administration of the proceedings and efficiency;

e. the avoidance of a multiplicity of legal retainers;

f. the balance of convenience and whether it is fair and just including to the creditors of the Estate;

g. whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and

h. the position of other stakeholders and the Monitor.

20. The Court in *League Assets Corp. (Re)* considered an additional factor to those outlined above, being the "commonality in interest" between the parties which a representative counsel is sought to be appointed.[11] The Court found that, when there is a multiplicity of representation of parties with commonality in interest, such circumstances have the potential to add to the cost and complexity of the proceedings unnecessarily. In many cases, a single representation of the group's interests may serve to ensure that the group of similarly interested parties has adequate input in the proceedings.[12]

21. Many of these factors are present in this case. The P-Note holders are primarily made up of individuals,[13] most of whom either do not yet have counsel or have counsel with limited experience in dealing with insolvency law issues.[14]

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[11] *League Assets Corp. (Re)*, 2013 BCSC 2043, at para 68, **TAB 2.**
[12] *Ibid* at **TAB 2.**
[13] 1st Carr Affidavit at para 184
[14] Service List dated April 20, 2023.

22. The Applicants have a history of difficulty in dealing with certain of the P-Note Holders.[15] Several of the P-Note holders have obtained judgments against the Applicants, which has led to difficulty selling the assets of the Carr Group. The inexplicable refusal of one or more judgment creditors to co-operate with such asset sales in circumstances in which their judgments were "out of the money" has also led to increased time and costs spent in liquidating property for the benefit of creditors.[16] The Applicants anticipate that experienced insolvency counsel would likely assist the P-Note Holders in advancing and protecting their interests by addressing relevant issues in a focused and cost-effective manner.

23. It is also likely that the P-Note Holders will have a commonality of interest and will face similar legal issues, which would benefit from the economies of scale associated with a single counsel experienced in insolvency law.

24. In previous insolvency cases where the appointment of representative counsel was sought, the Court has acknowledged the experience of proposed representative counsel. For example, in *Nortel*, the Court obsered: "it is noted that all parties who seek representation orders […] establish that the legal counsel they seek […]are well respected members of the profession".[17]

25. In this case, due to the number of secured creditors involved in these proceedings, a number of insolvency counsel in Edmonton face conflicts. However, the Applicants have secured the services of Alexis Teasdale of Lawson Lundell LLP of Calgary, Alberta, who specializes in the areas of insolvency and restructuring.

26. The Applicants submit that the appointment of representative counsel on behalf of the P-Note Holders is appropriate in this case, for the reasons set out above. The Applicants also submit that there is a social benefit to be derived from assisting vulnerable creditors in navigating a complex CCAA proceeding, and that a benefit would be provided to the Court and to the proceedings by appointing experienced and respected insolvency counsel to represent the interests of such a large group of creditors with substantively similar interests and legal issues.

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[15] 1st Carr Affidavit, paras 69, 71, 73, 80-81
[16] *Ibid* at para 81.
[17] *Nortel Networks Corporation (Re),* [2009] OJ No 3280 (QL), **TAB 3.**

C. It is appropriate for this Court to grant the proposed SAVOs

27. The Applicants seek this Honourable Court's approval of a purchase and sale agreement and offer to purchase in respect of two vacant lots (the "**272 Lots**"), which predate the Initial Order and were entered into by the Applicants in the ordinary course of business (the "**Transactions**").

28. The Applicants rely on the Second Confidential Carr Affidavit, which encloses the prior history of sold lots and the range of prices associated with those sales as evidence that the Transactions are in the ordinary course and at fair market value.

29. Section 11 and 36 of the CCAA provides for the general powers of the Court, and when a Court should agree to a disposition of assets:[18]

> **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.
>
> **Restriction on disposition of business assets**
>
> 36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> **Factors to be considered**
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

[18] CCAA, supra note 1 at s 11, TAB 1 of Initial Order Brief.

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Assets may be disposed of free and clear

36(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

30. The Applicants submit that the Transactions are in the ordinary course of business. As the First Charge Mortgagees consent to the Transactions, approval of the Court would not be required, but for the existence of writs on title.

31. Notably, there is no equity available in the properties, and accordingly, no basis to maintain the registration of the writs on title. All of the proceeds will be flowing to the First Charge Mortgagees in satisfaction of the indebtedness.

32. Further, even if the Transactions were to be considered outside of the ordinary course, the Applicants submit that the factors in 36(3) of the CCAA have been met.

33. Specifically, the process leading to the proposed sale was reasonable in the circumstances, and was in fact the ordinary process for the sale of similar assets in the usual course. The primary secured creditors were consulted, and have approved the Transactions. The Monitor has also reviewed the Transactions and has approved the Transactions. Finally, the past history of lot sales supports a finding that the Transactions are occurring at fair market value.

IV. REQUESTED RELIEF

34. For the foregoing reasons, the Applicant respectfully requests that this Honourable Court grant an Amended & Restated Initial CCAA Order and Sales and SISP Order concerning the Carr Group substantially in the form attached to the Second Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of April 2023.

MLT AIKINS LLP

Jeffrey M. Lee, K.C. / Mandi Deren-Dube
Counsel for the Applicant

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V. INDEX OF AUTHORITIES

TAB	DESCRIPTION
1.	*Re Canwest Publishing Inc. / Publications Canwest Inc.*, 2010 ONSC 222
2.	*League Assets Corp. (Re)*, 2013 BCSC 2043
3.	*Nortel Networks Corporation (Re)*, [2009] OJ No 3280 (QL)

CITATION: Canwest Publishing Inc., 2010 ONSC 1328
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100305

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.

COUNSEL: *Lyndon Barnes and Alex Cobb* for the Canwest LP Entities
Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.
Hilary Clarke for the Bank of Nova Scotia, Administrative Agent for the Senior Secured Lenders' Syndicate
Janice Payne and Thomas McRae for the Canwest Salaried Employees and Retirees (CSER) Group
M. A. Church for the Communications, Energy and Paperworkers' Union
Anthony F. Dale for CAW-Canada
Deborah McPhail for the Financial Services Commission of Ontario

PEPALL J.

REASONS FOR DECISION

Relief Requested

[1] Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried

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

Discussion

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

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

- the vulnerability and resources of the group sought to be represented;

- any benefit to the companies under CCAA protection;

- any social benefit to be derived from representation of the group;

- the facilitation of the administration of the proceedings and efficiency;

- the avoidance of a multiplicity of legal retainers;

- the balance of convenience and whether it is fair and just including to the creditors of the Estate;

- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and

- the position of other stakeholders and the Monitor.

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

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

[24] In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and

the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

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

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

[27] In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here

are somewhat different. Staged payments commencing with the sum of $25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.

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

Pepall J.

Released: March 5, 2010

CITATION: Canwest Publishing Inc., 2010 ONSC 1328
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100305

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.

REASONS FOR DECISION

Pepall J.

Released: March 5, 2010

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Date: 20131108
Docket: S137743
Registry: Vancouver

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

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

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.

[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

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.

[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.

COURT FILE NO.: 09-CL-7950
DATE: 20090527

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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 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

BEFORE: **MORAWETZ J.**

COUNSEL: **Janice Payne, Steven Levitt and Arthur O. Jacques for the Steering Committee of Recently Severed Canadian Nortel Employees**

Barry Wadsworth for the CAW-Canada and George Borosh and Debra Connor

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

Alan Mersky and Derrick Tay for the Applicants

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

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

Leanne Williams for Flextronics Telecom Systems Ltd.

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

Gail Misra for the Communication, Energy and Paperworkers Union of Canada

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

Mark Zigler and 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 the Unsecured Creditors' Committee (U.S.)

HEARD: **April 20, 2009**

ENDORSEMENT

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

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

[3] The proposed representative counsel are:

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

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

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

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

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

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

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

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

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

[9] These motions give rise to the following issues:

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