COURT FILE NUMBER	0901-11866
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, THE *JUDICATURE ACT*, R.S.A. 2000, c. J-2, AS AMENDED AND THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, C. B-9, AS AMENDED
RESPONDENT	AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD., ORILLIA INVESTMENTS LTD., 0726028 B.C. LTD., 0675816 B.C. LTD. and BOSUN'S HOLDINGS LTD.
DOCUMENT	**BENCH BRIEF**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MacPherson Leslie & Tyerman LLP Lawyers 1600 Centennial Place 520 - 3rd Avenue S.W., Calgary, Alberta T2P 0R3 Telephone: 403.693.4300 Fax: 403.508.4349 Attention: Dean A. Hutchison/Jeffrey M. Lee

MACPHERSON LESLIE & TYERMAN LLP LAWYERS

BENCH BRIEF OF 613790 SASKATCHEWAN LTD., BLAIR BETTS, WILLIE UNGER, SHARI BEDIENT & CHERYL LANG

Respecting an application to be heard by the Honourable Madam Justice C.A. Kent in Chambers on Wednesday, August 24, 2010 at 10:00 am

---

I. INTRODUCTION

1. This bench brief is submitted on behalf of 613790 Saskatchewan Ltd., Blair Betts, Willie Unger, Shari Bedient and Cheryl Lang (collectively, the "Applicants"), who are each a retail investor in Maples and White Sands Investment Ltd. ("MAWSIL"), in support of an application for an Order seeking the following (the "Representation Order"):

(a) appointing certain individuals/investors of MAWSIL as representatives of all retail investors of MAWSIL (the "MAWSIL Retail Investors");

(b) appointing MacPherson Leslie & Tyerman LLP ("MLT") as representative counsel to all of the MAWSIL Retail Investors;

(c) providing MLT with the benefit of a charge on the net remaining proceeds of the sale of the Sorrento Inn property (which are currently held under court supervision pursuant to the Order of the Honourable Madam Justice C.A. Kent issued in the within matter on April 21, 2011) to the maximum amount of $75,000.00 as security for the reasonable fees and disbursements of MLT in acting as representative counsel to the MAWSIL Retail Investors; and

(d) providing that any notice to the MAWSIL Retail Investors regarding the within matter may be provided by either regular mail or e-mail to the mailing and e-mail addresses set out in the books and records of MAWSIL that are in the possession of the court appointed monitor and receiver of MAWSIL, Ernst & Young Inc. ("E&Y").

2. The Applicants respectively submit that the Representation Order should be granted in light of the large number of MAWSIL Retail Investors, the nature and amounts of the MAWSIL Retail Investors claims, the common interest of the MAWSIL Retail Investors and their means to pursue their claims in the within proceedings.

II. BACKGROUND and FACTS

Investigations by the Monitor/Receiver

3. The Third Report of E&Y, filed in its capacity as court appointed monitor in the within matter on October 7, 2009 (the "Monitor's Third Report"), contained information regarding the

investigations conducted by E&Y into (among other entities) MAWSIL. Pages 95 to 100 of the Monitor's Third Report specifically address MAWSIL and set out that:

(a) by an offering memorandum dated May 16, 2008, MAWSIL indicated that it intended to raise a maximum of $14.1 million in funds from individuals acquiring mortgage units in a mortgage that was to be registered against certain property to be acquired by MWS;

(b) the funds so raised by MAWSIL from individuals acquiring mortgage units were to be used to acquire various assets (collectively, the "MAWSIL Project"), which assets were to include:

(i) all of the issued and outstanding shares of a corporation known as Tidbury Ball Enterprises Ltd. (which subsequently changed its name to 0726028 B.C. Ltd.), which corporation owned the Sorrento Inn located in Sorrento, British Columbia (the "Sorrento Inn");

(ii) the Maples Resort which was situated on two acres of lakeshore land located on the Shuswap Lake ("Maples"). Maples' land was contiguous to the Sorrento Inn; and

(iii) the White Sands Resort comprising 3 acres of waterfront property on the shore of the Shuswap.

(c) Investors in MAWSIL acquired mortgage units that represented an undivided interest in a mortgage that was to be registered against the MAWSIL Project;

(d) MAWSIL ultimately acquired the shares of Tidbury who owned the Sorrento Inn for a total purchase price of $3.0 million on or about May 2, 2008; and

(e) a total of $11,060,399.00 was raised by MAWSIL from the MAWSIL Retail Investors who purchased mortgaged units in MAWSIL.

4. By Order issued by the Honourable Madam Justice C.A. Kent in the within matter on October 8, 2009, E&Y was appointed as Receiver of MAWSIL. On October 19, 2009, E&Y, in its capacity as Court Appointed Receiver, issued a Notice and Statement of Receiver (the "Creditor

Notice") to all creditors of MAWSIL and 0726028 B.C. Ltd. in accordance with sections 245(1) and 246(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 [**TAB 1**]. Such statement lists approximately 399 different MAWSIL Retail Investors as "Secured Mortgage Holders" in MAWSIL. Such statement further indicates that the vast majority of such 399 MAWSIL Retail Investors' investments/mortgage holdings comprise relatively small amounts, which are (on average) between $10,000 to $100,000.

5. By Order issued by the Honourable Madam Justice C.A. Kent in the within matter on September 23, 2010 (the "DIP Charge Reallocation Order"), the Sorrento Inn was declared to be an "encumbered property". A mortgage had been registered against title to the Sorrento Inn property in which Olympia Trust Company had been named as the mortgagee (the "Olympia Trust Mortgage").

6. During the course of the court application leading to the DIP Charge Reallocation Order, an issue arose as to whether the amount secured by the Olympia Trust Mortgage comprises: (i) only the amount required to pay the administration costs of the Olympia Trust Company; or (ii) such administration costs plus the amount contributed to MAWSIL by the MAWSIL Retail Investors pursuant to various investment agreements entered into by the MAWSIL Retail Investors at the behest or invitation of the Shire Group of Companies (which include MAWSIL) (the "Olympia Trust Mortgage Issue"). In making its determination pursuant to the DIP Charge Reallocation Order, this Honourable Court observed that the Olympia Trust Mortgage Issue requires adjudication by the Court.

- **Paragraph 12 of the Affidavit of Gordon Lang sworn July 8, 2011 (the "Lang Affidavit")**

7. By Order issued by the Honourable Madam Justice C.A. Kent in the within matter on April 21, 2011 (the "Sorrento Inn Sale Approval Order"), this Honourable Court approved the sale of the Sorrento Inn. Pursuant to paragraph 7(g) of the Sorrento Inn Sale Approval Order, the balance of the net purchase price shall be held in trust by E&Y pending determination of the Olympia Mortgage Issue or further order of this Honourable Court. Counsel for E&Y has advised that the balance of net purchase price is $608,738.

8. By Order issued by the Honourable Madam Justice C.A. Kent in the within matter on February 25, 2011 (the "MAWSIL Investor Information Order"), this Honourable Court directed E&Y to provide MLT (as counsel for the Applicants) a detailed listing of the names, addresses,

contact information and respective investment amounts contributed to MAWSIL by the individuals listed as creditors of MAWSIL in the Creditor Notice.

9. Subsequent to the issuance of the MAWSIL Investor Information Order, E&Y provided the required information to MLT. Following receipt of such information, MLT caused to be sent by e-mail a two-page letter addressed to the MAWSIL Retail Investors dated May 27, 2011 (the "May 27th Letter"), together with an enclosed one-page form whereby the MAWSIL Retail Investors could indicate their support for the proposed course of action described in the May 27th Letter (the "Support Form") by completing the Support Form and returning it to MLT. The May 27th Letter described to the MAWSIL Retail Investors a proposed course of action whereby the Applicants would make the within application to this Honourable Court.

- **Paragraph 15 of the Lang Affidavit**

10. MLT caused the May 27th Letter and accompanying Support Form to be sent by e-mail to 377 of the MAWSIL Retail Investors in respect of whom MLT had been provided by E&Y with e-mail addresses. Of the 377 e-mails sent, 21 were returned as "Undeliverable" with the net result that 356 of the MAWSIL Retail Investors received from MLT the May 27 Letter and accompanying Support Form.

- **Paragraph 17 of the Lang Affidavit**

11. From among those 356 MAWSIL Retail Investors, MLT received back 178 completed Support Forms in which the MAWSIL Retail Investors indicated there support for the within application.

- **Paragraph 17 of the Lang Affidavit**

III. SUBMISSIONS

A. Authority to Grant Representation Order and Charges for Professional Fees in Insolvency Proceedings

12. In proceeding under the *Companies Creditors' Arrangement Act*, R.S.C. c. C-36 (the "*CCAA*"), the court has the authority to appoint representatives and order charges for the legal fees

for such representatives. In *Nortel Networks Corp. (Re)*, the Honourable Justice G.B. Morawetz of the Ontario Superior Court of Justice, Commercial List, stated the following:

> "... 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 paid from the estate of the debtor applicant."

- ***Nortel Networks Corp. (Re)*, [2009] O.J. No. 2166 at para. 12 ("*Nortel*") [TAB 2]**

13. In *Nortel*, the Honourable Justice G.B. Morawetz considered applications by various parties to be appointed as representative counsel for various factions of the debtor Nortel group of companies' ("Nortel") current and former employees. One of the applications sought to have one law firm act as the single representative counsel for all the current and former employees (which included pension plans recipients or their spouses) and to have such counsel legal fees and disbursements paid for by Nortel . There were approximately 6,000 employees and another 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by Nortel.

14. In granting such application, the Honourable Justice G.B. Morawetz made note of the large number of current and former employees of Nortel. He noted that the employees and retires were 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" and "would benefit from an order appointing representative counsel". He further noted that the granting of a representation order would "provide a reliable resource for former employees for information about the process" and that the appointment of representative counsel would "also have the benefit of streamlining and introducing efficiency to the process of all parties involved in Nortel's insolvency".

- *Nortel* at paras. 7 and 13.

15. The Order granted by the Honourable Justice G.B. Morawetz (a copy of which is enclosed at [**TAB 3**]), appointed three individuals as representatives for all former employees of Nortel, appointed one law firm to act as counsel for all former employees of Nortel in the proceedings, and ordered that Nortel pay the fees and disbursements of such counsel.

16. The circumstances concerning the MAWSIL Retail Investors are substantially similar to those concerning the employees and former employees of Nortel. There are a large number of individuals, there is a commonality of interest among such individuals (they are all secured creditors/mortgage holders of MAWSIL - similar to the commonality of interest found of the employees/former employees of Nortel as unsecured creditors), and there are limited means among the group to pursue their claims.

B. Practicality and Fairness

17. In granting representation orders and funding for representative counsel, courts have considered factors relating to what practicality demands, including the size of the estate and the size, substance and coherence of the proposed group of creditors.

18. In *Residential Warranty Co. of Canada In . (Re),* [2006] A.J. No. 872 (Q.B.) **[TAB 4]** , Justice Toplniski certified a committee of a group of 627 creditors who were are all builders (the bankrupt entities had operated a home warranty business). Such builders' claimed an interest in builder's cash deposits and letters of credit that were in possession of the trustee in bankruptcy, which ranged in amount between $5,000 to $20,000. In certifying the committee of builder creditors, Justice Toplniski stated the following at paragraph 7:

> "**The number and relatively small value of the Builder Claimants' individual claims make separate representation by each *impracticable*. The certification of a Builders' Committee will facilitate communications among and between the Builder Claimants, the Court, the Trustee and others**. In addition, it will assist in streamlining any Court applications which are necessary and will facilitate negotiations with other stakeholders."
> [Emphasis Added]

19. The Court can order the funding of representative counsel where it is fair and just and where the work will benefit the estate:

> "As was recognized in *Enron Mortgage Corp. (Trustee of) v. Enron Mortgage* [Q.L. [1998] B.C.J. No. 282] (B.C.S.C.) at para. 36., to succeed in this application Ladner Downs must establish that the legal work it is doing for the Greenhills Mine Suppliers Group **is work that will either benefit the Westar Estate or is work that is necessary for the management and preservation of the assets of that Estate**. *Enron, supra*, also recognized that:

> Implicit in the statement that the work be necessary for the management and preservation of the trust assets is that another person would have been required to perform the work if the party claiming compensation has not done it.
>
> The Court should proceed cautiously to ensure that it is just and equitable for the owners of trust property to bear the expense of a third party who has not been engaged by them."
> [Emphasis Added]

- *Westar Mining Ltd. (Re)*, [1999] B.C.J. No. 2169 (S.C.J.) at para. 23 **[TAB 5]**

20. The adjudication of the Olympia Trust Mortgage Issue will benefit the estate of MAWSIL in that it will determine the proper administration of the estate's assets (namely the net proceeds from the sale of the Sorrento Inn property). This Honourable Court has already determined that the Sorrento Inn property is an "encumbered property" as a result of the Olympia Trust Mortgage. The determination of the amount of such encumbrance, and who the beneficiaries of such encumbrance are, is necessary for the proper administration of the estate of MAWSIL.

21. As noted above, the majority of the MAWSIL Retail Investors' investments/mortgage holdings comprise relatively small amounts, on average between $10,000 to $100,000. As further noted above, the total amount invested by the nearly 400 different MAWSIL Retail Investors is substantial, in excess of $11,000,000. The net proceeds from the sale of the Sorrento Inn however is a significantly lesser sum - $608,738. In the event the adjudication of the Olympia Trust Mortgage Issue results in a finding that the Olympia Trust Mortgage does secure the near 400 MAWSIL Retail Investors' investments, the *pro rata* share each MAWSIL Retail Investor will receive will be very small, approximately 6 cents on the dollar.

22. Considering:

(a) the large number of MAWSIL Retail Investors;

(b) the inefficiencies and costs involved (both to the interested parties and the Court) in having each MAWSIL Retail Investor find separate counsel and adjudicate their claim separately ;

(c) communication issues;

(d) the commonality of interest among the MAWSIL Retail Investors;

(e) the small value of each individual MAWSIL Retail Investors' claim; and

(f) the amount of the net proceeds from the sale of the Sorrento Inn property,

equity and practicality dictate collective, representative action on behalf of an organized body of the MAWSIL Retail Investors in which their resources and costs of litigating the Olympia Trust Mortgage Issue can be shared.

IV. RELEIF SOUGHT

23. The Applicants respectfully request that the Representation Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

MCPHERSON LESLIE & TYERMAN LLP

Per: ______________________
Dean A. Hutchison / Jeffrey M. Lee
Counsel for the Applicants,
613790 Saskatchewan Ltd., Blair Betts,
Willie Unger, Shari Bedient and Cheryl Lang

LIST OF AUTHORTIES

1. Maples and White Sands Investment Ltd. and 0726028 B.C. Ltd – Notice and Statement of Receiver dated October 19, 2009

2. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2166 (S.C.J.)

3. Order of the Honourable Mister Justice G.B. Morawetz of the Ontario Superior Court of Justice, Commercial List, granted May 27, 2009 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, Nortwel Networks International Corporation and Nortel Networks Technology Corporation – Court File No. 09-CL-7950

4. *Residential Warranty Co. of Canada Inc. (Re),* [2006] A.J. No. 872 (Q.B.)

5. *Westar Mining Ltd. (Re)*, [1999] B.C.J. No. 2169 (S.C.J.)