

**ONTARIO
SUPERIOR COURT OF JUSTICE
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 SEARS CANADA INC., CORBEIL
ELECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC.,
SEARS CONTACT SERVICES INC. INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR COVERING
CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC.,
6988741 CANADA INC., 10011711 CANADA INC., 1592580
ONTARIO LIMTIED, 955041 ALBERTA LTD., 4201531 CANADA
INC., 168886 CANADA INC. and 3339611 CANADA INC.**

(each an “**Applicant**”) and collectively the “**Applicants**”)

**BRIEF OF AUTHORITIES OF THE MOVING PARTY
(MOTION RETURNABLE JANUARY 22, 2018)**

January 17, 2018

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TO: THE ATTACHED SERVICE LIST

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TAB 1

2009 CarswellOnt 3028
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Nortel Networks Corp., Re

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**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

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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
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

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Rules considered:

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

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R. 10.01 — considered

R. 12.07 — considered

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

Morawetz J.:

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

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

3 The proposed representative counsel are:

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

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

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

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

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

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

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

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

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

9 These motions give rise to the following issues:

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

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

Issue 1 - Representative Counsel and Funding Orders

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

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

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

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

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

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

Issue 2 - Who Should be Appointed as Representative Counsel?

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

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

- (a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission;
- (b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and

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

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

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

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

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

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

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

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

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

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

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

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

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

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

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

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

32 Certain former unionized employees also have certain entitlements including:

- (a) Voluntary Retirement Option ("VRO");
- (b) Retirement Allowance Payment ("RAP"); and
- (c) Layoff and Severance Payments

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

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

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

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

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

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

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

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

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

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

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as

possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

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

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

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

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

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

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

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

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

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

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

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

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

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

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

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

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of

Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

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

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

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

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

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

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

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

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.

3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.

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

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

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

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

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

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

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

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

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

Order accordingly.

Footnotes

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

TAB 2

2015 ONSC 1028
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 3274, 2015 ONSC 1028, 23 C.B.R. (6th) 303, 252 A.C.W.S. (3d) 11

**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 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

Geoffrey Morawetz R.S.J.

Heard: February 11, 2015
Judgment: February 18, 2015
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, John MacDonald, Shawn Irving for Applicants, 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

Jay Swartz for Target Corporation

William Sasso, Sharon Strosberg, Jacqueline Horvat for Pharmacy Franchisee Association of Canada

Susan Philpott for employees of the Applicants

Alan Mark, Melaney Wagner, Graham Smith, Franci Kussner for 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 Directors and Officers

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](#)

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.h Miscellaneous](#)

Headnote

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

Pharmacies operated in debtor company's chain of retail stores pursuant to franchise agreements — Debtor
applied for protection of Companies' Creditors' Arrangement Act and sought to wind down its Canadian

operations — Debtor delivered disclaimers of franchise agreements and sought to shut down pharmacies in store locations within 30 days — Monitor approved disclaimers — Pharmacists brought motion for, inter alia, order under s. 32(2) of Act that franchise agreements not be disclaimed — Motion granted in part on other grounds — Motion dismissed with respect to disclaimers — Disclaimers had to be considered in context that all of debtor's Canadian stores would be closing — Setting aside disclaimer might provide limited assistance to pharmacists, but would come at expense of other creditors — Disclaimer would benefit creditors generally because it would enable debtor to move forward with liquidation plan without further delay to accommodate pharmacists — As pharmacies would be closing in any event, setting aside disclaimer would not improve their situation — Extending time before disclaimers took effect would require debtor to allocate additional assets to pharmacists in priority to other unsecured creditors, which was not desirable outcome.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

Pharmacies operated in debtor company's chain of retail stores pursuant to franchise agreements — Debtor applied for protection of Companies' Creditors' Arrangement Act and sought to wind down its Canadian operations — Debtor delivered disclaimers of franchise agreements and sought to shut down pharmacies in store locations within 30 days — Pharmacists brought motion for, inter alia, appointment of pharmacist franchisee association as representative of pharmacist franchisees, appointment of representative counsel for pharmacists, and appointment of financial advisor — Motion granted in part — Pharmacists receiving disclaimer notices still had to participate in process from professional and regulatory standpoint — Estate would benefit from having limited representation for pharmacist franchisees — Association appointed as representative of pharmacists — Representative counsel and financial advisor appointed; limited funding for counsel and advisor to be made available by debtor.

Table of Authorities

Cases considered by *Geoffrey Morawetz R.S.J.*:

Timminco Ltd., Re (2012), 2012 CarswellOnt 10568, 2012 ONSC 4471, 93 C.B.R. (5th) 326 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

s. 32 — considered

s. 32(1) — considered

s. 32(2) — considered

s. 32(4) — considered

s. 32(7) — considered

Forms considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Form 4 — referred to

MOTION by pharmacists for order under s. 32(2) of *Companies' Creditors Arrangement Act* that franchise agreements not be disclaimed, and other relief.

Geoffrey Morawetz R.S.J.:

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.

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.

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.

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 (Ont. S.C.J. [Commercial List]) at paragraph 62 as follows:

[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 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 ancillary relief related to the disclaimers. It is not necessary to address the standing issue raised by the Monitor.

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.

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.

Motion granted in part.

TAB 3

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE

JUSTICE NEUBOURD

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WEDNESDAY, THE 19TH
DAY OF AUGUST, 2016



GROSVENOR PARK MEDIA FUND L.P.

Plaintiff

- and -

ARC PRODUCTIONS LTD., ARC HOLDINGS INC., ARC INVESTMENTS LTD.,
ARC/DARK CRYSTAL PRODUCTIONS INC., KICK PRODUCTIONS LTD., IN THE
JUNGLE PRODUCTIONS INC., TF I PRODUCTIONS INC., BL II PRODUCTIONS INC.,
ARCADIA PRODUCTIONS LTD., EGGS LTD., PRINCESS PRODUCTIONS INC.,
UNDERZOO PRODUCTIONS INC., HOLE IN THE BELLY PRODUCTIONS LTD., SIR
SIMON PRODUCTION LTD., SAMURAI PRODUCTIONS LTD., THOMAS MURRAY,
KALLAN KAGAN and PETER KOZIK

ORDER

THIS MOTION, made by Koskie Minsky LLP ("**Proposed Representative Counsel**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Michael Chaffe, sworn August 18, 2016, and the First and Second Reports of Deloitte Restructuring Inc., in its capacities as interim receiver and receiver (the "**Receiver**"), and on hearing the submissions of Proposed Representative Counsel, counsel for the Receiver, counsel to Grosvenor Park Media Fund L.P., and such other parties as were present,

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and that further service thereof is hereby dispensed with.

2. **THIS COURT ORDERS** the appointment of Koskie Minsky LLP ("**KM**") as Representative Counsel to advise and represent the former employees (the "**Employees**" or individually "**Employee**") of Arc Productions Ltd. ("**Arc**") who were terminated by Order of the Court dated August 2, 2016, in respect of any Claims (as defined herein) which the Employees may have against Arc for unpaid wages, vacation pay, severance or other rights, entitlements or benefits in the Receivership Proceedings (as herein defined) of Arc, and with the power and authority to act on behalf of the Employees in the Receivership or in any subsequent bankruptcy or other related proceedings (collectively, the "**Receivership Proceedings**").

3. **THIS COURT DECLARES** that a Claim includes any claim which has now arisen or may arise under:

- (a) common law or equity related to notice of termination or severance entitlements; or
- (b) federal or provincial legislation, or regulations thereunder, including but not limited to, claims under employment standards legislation or any other provincial or federal legislation, or regulation applicable to employees or otherwise (collectively with (a) above, "**Labour Laws**").

4. **THIS COURT ORDERS** that, in furtherance of its mandate to assist Employees in asserting Claims, Representative Counsel shall, at its expense, have access to and the right to examine all relevant records and data kept by Arc in respect of its capacity as an employer of the Employees under Labour Laws, whether they are kept on paper, electronic or any other form, including access to Proofs of Claim received from Employees by the Receiver.

5. **THIS COURT ORDERS THAT** pursuant to section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* S.C. 2000, c. 5, the Receiver is authorized and permitted to disclose personal information of identifiable individuals who are believed to be Employees to Representative Counsel. Representative Counsel shall maintain and protect the privacy of such information and shall limit the use of such information to its role as Representative Counsel.

6. **THIS COURT ORDERS** that KM will review the information for Employees posted on the Receiver's dedicated website at <http://www.insolvencies.deloitte.ca/> and will determine whether further communication with the Employees is necessary at this time. KM is authorized to send written notice ("**Written Notice**") to all of the Employees at the addresses and contact information provided by the Receiver, by email or regular mail to the last known residential or email address of each employee, explaining its appointment and engagement as Representative Counsel, explaining the process for opting out of representation by KM, and inviting interested Employees to sit on a committee (the "**Committee**") to provide instructions to KM as required. The Written Notice shall also be posted by the Receiver on its dedicated website for this proceeding.

7. **THIS COURT ORDERS** that KM is authorized to establish the Committee, in consultation with the Receiver, which will, upon establishment, provide instructions to KM as needed.

8. **THIS COURT ORDERS** that Representative Counsel is authorized to take all steps and to do all necessary or desirable acts in carrying out the terms of the Order, including dealing with any regulatory body and any other government or ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

9. **THIS COURT ORDERS** that notice of the issuance of this Order, substantially in the form attached hereto as **Schedule "A"** (the "**Notice**") shall be:

- (a) posted by Representative Counsel on its firm's website within two calendar days of the date of this Order;
- (b) included in the Written Notice described in paragraph 7 above; and
- (c) posted by the Receiver on its dedicated website for this proceeding.

10. **THIS COURT ORDERS** that any individual Employee who does not wish to be represented by KM in the Receivership Proceedings shall, within 10 business days of the granting of this Order, notify the Receiver and KM in writing that he or she wishes to opt out of representation by KM and shall thereafter not be bound by the actions of KM and is free to represent himself or herself or be represented by any other counsel that he or she may retain exclusively at his or her own expense (an "**Opt-Out Individual**").

11. **THIS COURT ORDERS** that from and after August 3, 2015, the reasonable legal costs and disbursements of the Employees plus applicable taxes (collectively, the "Costs") shall be paid by the Receiver on the rendering of accounts by Representative Counsel, subject to the approval of this Court, provided that in no event shall the amount of the Costs to be paid by the Receiver or the estate of Arc exceed CAD\$25,000 (inclusive of taxes and disbursements), and provided further that under no circumstances shall any amount be payable by the Receiver or the estate of Arc to cover the legal costs or disbursements in connection with any effort by the Employees to investigate or challenge the priority of another stakeholder, or to litigate a priority dispute, over funds in the estate of Arc.

12. **THIS COURT ORDERS** that KM and the Committee shall have no liability as a result of their appointment or the fulfilment of their duties in carrying out the provisions of this Order, save and except for any claims based on gross negligence or wilful misconduct on their part.

13. **THIS COURT ORDERS** that KM and the Committee shall be at liberty and are authorized at any time to apply to this Court for advice and directions in the discharge or variation of their powers and duties hereunder.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

AUG 19 2016

PER / PAR: 

SCHEDULE "A"

Court File No. 16-CV-11472-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

GROSVENOR PARK MEDIA FUND L.P.

Plaintiff

- and -

ARC PRODUCTIONS LTD., ARC HOLDINGS INC., ARC INVESTMENTS LTD.,
ARC/DARK CRYSTAL PRODUCTIONS INC., KICK PRODUCTIONS LTD., IN THE
JUNGLE PRODUCTIONS INC., TF I PRODUCTIONS INC., BL II PRODUCTIONS INC.,
ARCADIA PRODUCTIONS LTD., EGGS LTD., PRINCESS PRODUCTIONS INC.,
UNDERZOO PRODUCTIONS INC., HOLE IN THE BELLY PRODUCTIONS LTD., SIR
SIMON PRODUCTION LTD., SAMURAI PRODUCTIONS LTD., THOMAS MURRAY,
KALLAN KAGAN and PETER KOZIK

Defendants

NOTICE TO ALL ARC PRODUCTIONS LTD. EMPLOYEES

On or about August 2, 2016, Arc Productions Ltd. ("**Arc**") became subject to an interim receivership pursuant to a court order on the application of Grosvenor Park Media Fund L.P. Deloitte Restructuring Inc. was appointed the interim receiver of the estate of Arc. On August 10, 2016, the court expanded the interim receiver's powers to appoint it as a full receiver over Arc.

TAKE NOTICE THAT, pursuant to Order of the Court dated August 19, 2016:

Koskie Minsky LLP ("**Representative Counsel**") was appointed as representative counsel of all Arc Employees in the receivership proceeding (the "Proceeding").

Contact Information for Representative Counsel:

Website: ●

Email: ●

Toll-free Hotline: ●

IF YOU DO NOT WISH TO BE REPRESENTED in the Proceeding by Representative Counsel, you must, before August ●, 2016, provide notice in writing (by letter or email) to both Koskie Minsky LLP and Deloitte Restructuring Inc. at the addresses below stating that you wish to opt-out of such representation.

<p>Koskie Minsky LLP 20 Queen Street West Suite 900, Box 52 Toronto, ON M5H 3R3</p> <p>Email: ●@kmlaw.ca</p>	<p>Deloitte Restructuring Inc. Bay Adelaide East 22 Adelaide Street West, Suite 200 Toronto, ON M5H 0A9</p> <p>Attention: Warren Leung Telephone: 416-874-4461 Fax: 416-601-6690 Email: waleung@deloitte.ca</p> <p>OR, contact Jay Tailor at: Telephone: 416-601-6517 Fax: 416-601-6690 Email: jtaylor@deloitte.ca</p>
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REGARDLESS OF WHETHER YOU CHOOSE TO be represented by Koskie Minsky or not, you should still review, amend as may be necessary, and file your Proof of Claim with the court-appointed receiver (Deloitte Restructuring Inc.) as soon as possible to allow the receiver to input your claim into the Service Canada Wage Earner Protection Program Act portal. Otherwise, your Wage Earner Protection Program claim cannot be processed.

GROSVENOR PARK MEDIA FUND L.P.
Plaintiff

v. ARC PRODUCTIONS LTD. et al.
Defendants

Court File No. 16-CV-11472-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at **TORONTO**

ORDER

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Proposed Representative Counsel to Employees
of Arc Productions Ltd.

KM-2213867v1

TAB 4

2010 ONSC 1328
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

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

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

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

Pepall J.

Judgment: March 5, 2010
Docket: CV-10-8533-00CL

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

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.5 Miscellaneous](#)

Headnote

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

In January 2010 LP Entities obtained order pursuant to Companies' Creditors Arrangement Act staying all proceedings and claims against them — Order permitted, but did not require, payments to employees and pension plans — There were approximately 45 non-unionized employees who were still owed termination and severance payments, as well as accrual of pensionable service — There were further nine employees who were, or would be, entitled pursuant to executive pension plan to pension benefits in excess of those under main pension plan — Moving parties sought order permitting them to represent those employees, for appointment of counsel, and for funding of counsel — Respondents did not object to appointment representatives or counsel, but opposed funding of counsel — Motion granted — All four proposed representatives had claims against LP Entities that were representative of claims that would be advanced by former employees — Individuals at issue were unsecured creditors whose recovery expectations might be non-existent, however they found themselves facing legal proceedings of significant complexity — Evidence was that members of group had little means to pursue representation and were unable to afford proper legal representation at this time — Employees were vulnerable group and there was no other counsel available to represent their interests — Canadian courts did not typically appoint unsecured creditors committees — It would be of considerable benefit to have representatives and representative counsel who could represent

interests of salaried employees and retirees — There were three possible sources of funding: LP Entities, Monitors, or senior secured lenders — Court had power to compel senior secured lenders to fund or alternatively to compel LP Administrative Agent to consent to funding — Source of funding other than salaried employees themselves should be identified now — Funding would be prospective in nature and would not extend to investigation of or claims against directors — Counsel were directed to communicate with one another to ascertain how best to structure funding and report back to court by certain date.

Table of Authorities

Statutes considered:

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

Generally — referred to

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

Generally — referred to

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

Pepall J.:

Reasons for Decision

Relief Requested

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

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

Facts

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

4 There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary

continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

5 Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the *Income Tax Act*. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately \$14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.

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

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

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

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

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

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

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

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

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

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

Issues

14 The issues on this motion are as follows:

(1) Should the Representatives be appointed?

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

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

Positions of Parties

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

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

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

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

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

Discussion

20 No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a

human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

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

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.

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

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

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

preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

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

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

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

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

Motion granted.

TAB 5

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]
Canwest Publishing Inc. / Publications Canwest Inc., Re
2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J.
No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT
ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER
OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT
OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST
INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.**

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

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

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.a Approval by creditors](#)

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.5 Miscellaneous](#)

Headnote

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

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business.

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

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 5 — considered

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

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

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.

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 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 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 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.

(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 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 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.

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. 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 I 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.

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 SISF 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 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., Re*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.

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.

(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: *Canwest Global Communications Corp., Re*⁶ and *Lehndorff General Partner Ltd., Re*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 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, if 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 *Philip Services Corp., Re*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 secured creditors or to unsecured creditors or to both groups."⁹ Similarly, in *Anvil Range Mining Corp., Re*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 *Anvil Range Mining Corp., Re*, 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.

(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 *Canwest Global Communications Corp., Re*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 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.

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.

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 online 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 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.

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.

(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 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 *Canwest Global Communications Corp., Re*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 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.

(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 *Canwest Global Communications Corp., Re*¹⁵, I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re*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 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 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 *Canwest Global Communications Corp., Re*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 *Canwest Global Communications Corp., Re* 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 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.

Application granted.

Footnotes

- 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.
- 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.
- 5 [2006 CarswellOnt 264](#) (Ont. S.C.J. [Commercial List]).
- 6 [2009 CarswellOnt 6184](#) (Ont. S.C.J. [Commercial List]) at para. 29.
- 7 [\(1993\), 9 B.L.R. \(2d\) 275](#) (Ont. Gen. Div. [Commercial List]).
- 8 [1999 CarswellOnt 4673](#) (Ont. S.C.J. [Commercial List]).
- 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) [[2003 CarswellOnt 730](#) (S.C.C.)].
- 11 *Ibid* at para. 34.
- 12 *Supra*, note 7 at paras. 31-35.
- 13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

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

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

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

19 Supra, note 7 at para. 52.

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

and

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF SEARS CANADA INC. ET AL.**

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**BRIEF OF AUTHORITIES OF THE MOVING PARTY
(MOTION RETURNABLE JANUARY 22, 2018)**

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