CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

SUPERIOR COURT

(Commercial Division)

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

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

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUEBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL, and **NEIL JOHNSON**

Petitioners-Mises-en-cause

BOOK OF AUTHORITIES

1	*Nortel Networks Corp. (Re)*, [2009] O.J. No. 2166.
2	*Fraser Papers Inc. (Re)*, [2009] O.J. No. 4287.
3	*Cash Store Financial Services (Re),* 2014 ONSC 4567.
4	*Target Canada Co. (Re),* [2015] O.J. No. 247.
5	*U.S. Steel Canada Inc. (Re)*, [2014] O.J. No. 5547.
6	*Nortel Network Corp. (Re)*, (July 30, 2009) No. 09-CL-7950 (Ont. SCJ) Morawetz, J., unreported.
7	*Nortel Network Corp. (Re)*, [2009] O.J. No. 3149.
8	*Catalyst Paper Corp. (Re)*, [2012] B.C.J. No. 615.
9	*Canwest Publishing Inc. (Re)*, [2010] O.J. No. 943.
10	*Hollinger Canadian Publishing Holdings Co. (Re)*, (December 10, 2009) No. 09-8503-00CL (Ont. SCJ), Campbell, J., unreported.
11	*Hollinger Canadian Publishing Holdings Co. (Re)*, [2010] O.J. No. 3494.
12	*Homburg Invest Inc. (Arrangement relative à)*, (February 17, 2012) No. 500-11-041305-117 (QCSC), Schrager, J.S.C., unreported.
13	*Target Canada Co. (Re)*, 2015] O.J. No. 1205.
14	*Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 3300.
15	*League Assets Corp. (Re)*, [2013] B.C.J. No. 2458.
16	"The Role of Representative Counsel in Canadian Insolvency Proceedings", Jeffrey Carhart, *National Insolvency Review*, February 2013, Vol. 30, No. 1.
17	*Sun Indalex Finance, LLC v. United Steelworkers,* [2013] 1 S.C.R. 271.
18	*Stelco Inc. (Re),* [2005] O.J. No. 4883.
19	*Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1693.
20	*Nortel Network Corp. (Re)*, [2009] O.J. No. 2529.

21	*Dugal v. Research in Motion,* (2007), 87 O.R. (3d) 721.
22	*Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1997), [1997] O.J. No. 3086.

MONTREAL and TORONTO, June 19, 2015

KOSKIE MINSKY LLP & NICHOLAS SCHEIB
Attorneys for the Petitioners-Mises-en-cause Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson

TAB 1

Case Name:

Nortel Networks Corp. (Re)

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
RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2009] O.J. No. 2166

75 C.C.P.B. 206

53 C.B.R. (5th) 196

2009 CanLII 26603

2009 CarswellOnt 3028

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: April 20, 2009.
Judgment: May 27, 2009.

(67 paras.)

Bankruptcy and Insolvency Law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motions by various factions of Nortel's current and former employees to appoint various representative counsel allowed in part -- Koskie Minsky appointed representative counsel and motions of other proposed representative counsel dismissed -- Appropriate to exercise discretion to make representation order -- No conflict of interest between various employee groups and they had

commonality of interest as unsecured creditors -- Appointment of single representative counsel most time efficient and cost effective way -- Appointment of Koskie Minsky as representative counsel was logical as willing to act on behalf of all former employees and had experience and expertise.

Civil Litigation -- Civil Procedure -- Parties -- Representation of -- Motions by various factions of Nortel's current and former employees to appoint various representative counsel allowed in part -- Koskie Minsky appointed representative counsel and motions of other proposed representative counsel dismissed -- Appropriate to exercise discretion to make representation order -- No conflict of interest between various employee groups and they had commonality of interest as unsecured creditors -- Appointment of single representative counsel most time efficient and cost effective way -- Appointment of Koskie Minsky as representative counsel was logical as willing to act on behalf of all former employees and had experience and expertise.

Motions by various factions of Nortel's current and former employees to appoint various representative counsel. In January 2009, Nortel filed for Companies' Creditors Arrangement Act protection. At the time of the filing, the Nortel group of companies ("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 Nortel. Nortel continued to honour substantially all of the obligations to current employees, but upon commencement of the CCAA proceedings, they ceased making all payments to former employees of amounts that would constitute unsecured claims, including termination, severance and amounts under various retirement and retirement transition programs. The opinion of the Monitor was that it was appropriate that there be representative counsel in light of the large number of former employees and that the financial burden of multiple representative counsel would further increased the financial pressure faced by Nortel. The former employees of Nortel had an interest in the CCAA proceedings in respect of severance, termination pay, retirement allowances and other amounts owed in respect of contractual obligations and employment standards legislation. In addition, most former employees and survivors of former employees had basic entitlement to receive payment from the Nortel pension plan and some might have also been entitled to a payment from certain non-registered retirement plans, health benefits and other retirement allowances. Both the Monitor and Nortel recognized the benefits of representative counsel and Nortel consented to the appointment of one of the proposed representative counsel, but opposed the appointment of any additional representatives. The representative whose appointment Nortel consented to represented a cross-section of all former employees who were entitled to severance and termination pay and payments under some or all of the various other plans.

HELD: Motions allowed in part. Koskie Minsky appointed as representative counsel and motions of all other proposed representative counsel dismissed. It was appropriate to exercise discretion pursuant to s. 11 of the Companies' Creditors Arrangement Act to make a Rule 10 representation order. There was no real or direct conflict of interest between various employee groups and the former employees had a commonality of interest in that they all had unsecured claims against Nortel

for some form of deferred compensation. The appointment of a single representative counsel was the most time efficient and cost effective way to ensure that the arguments of the employees were placed before the Court. The appointment of Koskie Minsky as representative counsel was a logical choice as they indicated a willingness to act on behalf of all former employees, they received a broad mandate from the employees, they had experience in representing large groups of retirees and employees in large scale restructurings and specialty practice in relevant areas of law.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, s. 11

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

Ontario Pension Benefits Act,

Rules of Civil Procedure, Rule 10.01, Rule 12.07

Counsel:

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

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

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

Alan Mersky and Derrick Tay for the Applicants.

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

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

Leanne Williams for Flextronics Telecom Systems Ltd.

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

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

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

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

G.H. Finlayson for Informal Nortel Noteholders Group.

(A) Kauffman for Export Development Canada.

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

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

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

3 The proposed representative counsel are:

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

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

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

(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada

("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

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

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

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

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

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

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?
(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

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

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

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

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

14 I am in agreement with these general submissions.

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

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

Issue 2 - Who Should be Appointed as Representative Counsel?

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

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

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

Ontario Securities Commission or the United States Securities and Exchange Commission:

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

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

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

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

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

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

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

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

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

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

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

permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

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

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

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

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

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

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

32 Certain former unionized employees also have certain entitlements including:

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

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

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;
(b) all TRA agreements where amounts were still owing to the affected former

employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

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

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

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

(f) TRA payments.

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

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

separate claims.

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

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

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

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

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

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

(a) TRA;

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

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

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

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

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

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

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings,

but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

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

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

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

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

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

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

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

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

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

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

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

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of

the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Re Stelco Inc.*, 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 *Re Stelco*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Re Canadian Airlines Corp.* 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.

Re Stelco Inc., 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Re Canadian Airlines Corp.* (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.

G.B. MORAWETZ J.

TAB 2

Case Name:

Fraser Papers Inc. (Re)

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 with respect to Fraser Papers Inc., FPS Canada Inc., Fraser Papers Holdings Inc., Fraser Timber Ltd., Fraser Papers Limited and Fraser N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

[2009] O.J. No. 4287

2009 CarswellOnt 6169

181 A.C.W.S. (3d) 256

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

September 17, 2009.

(20 paras.)

Pension and benefits law -- Private pension plans -- Civil procedure -- Parties -- Motions for appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of Fraser Papers allowed in part -- USW should be appointed as the representative for its former members who were retired since the union already had a relationship with the USW retirees -- No need for separate representation of the Steering Committee of Salaried Employees -- This group to be represented by same firm as Committee of Salaried Employees and Retirees.

Motions for the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other

retirement and benefit plans of Fraser Papers. Fraser Papers was insolvent and was under significant financial pressure. Their largest unsecured claims related to the pension plans and the supplementary employee retirement programs

HELD: All motions except that of the Steering Committee of Fraser Papers' Salaried Retirees Committee allowed. The employees and retirees not otherwise represented were a vulnerable group who required assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favoured the granting of such an order and it was in the interests of justice to do so. The USW should be appointed as the representative for its former members who were retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already had a relationship with the USW retirees. De facto, the USW was already the representative of the USW retirees pursuant to the law in the US. There was no need for separate representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only the Davies law firm avoided excessive fragmentation and duplication and minimized costs. Davies was proposing to represent all unrepresented employees, former employees and their successors, whereas Nelligan/Shibley was only proposing to represent retirees. Absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding was only ordered to be provided by Fraser Papers with respect to the Davies representation.

Statutes, Regulations and Rules Cited:

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

Counsel:

M. Barrack and D.J. Miller for the Applicants.

R. Chadwick and C. Costa, for the Monitor.

D. Wray and J. Kugler, for the Communications, Energy, and Paper Workers Union of Canada and as agent for Pink Larkin.

C. Sinclair, for the United Steelworkers.

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

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

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

Chris Burr, for CIT Business Credit Canada Inc.

D. Chernos, for Brookfield Asset Management Inc.

ENDORSEMENT

S.E. PEPALL J.:--

Relief Requested

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

2 The motions are brought by the following moving parties:

(a) the USW who seeks to represent its former members. It already represents its current members.
(b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.
(c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.
(d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.

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

Discussion

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

programmes ("SERPs").

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

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

7 Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favours the granting of such an order and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(a) USW and CEP Motions

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

9 In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De

facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.

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

(b) Nelligan/Shibley and Davies

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

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

12 Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official

languages; and estimated costs.

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

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

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

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

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

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

19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep

the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

Summary

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

S.E. PEPALL J.

1 This is contrary to the contents of paragraph 24 of the Monitor's 4th Report but, being more recent, I accept counsel's oral representation as being accurate.

2 29 U.S.C.

3 [2009] O.J. No. 2166.

4 *15 C.B.R. (5th) 307 (Ont. C.A.)*

5 *(2000) 19 C.B.R. (4th) 12 Alta Q.B.*

TAB 3

CITATION: Cash Store Financial Services (Re), 2014 ONSC 4567
COURT FILE NO.: CV-14-10518-00CL
DATE: 2014-08-26

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES, THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. doing business as "THE TITLE STORE"

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks*, for the Chief Restructuring Officer of the Applicants

Heather Meredith, for the FTI Canada Consulting Canada Inc., Monitor

Robert W. Staley and *Raj S. Sahni* and *Jonathan Bell*, for 0678786 B.C. Ltd.

Alan Merskey and *Orestes Pasparakis*, for Coliseum Capital Partners LP, Coliseum Capital Partners II LP, Blackwell Partners LLC, Alta Fundamental Advisors Master LP and the Ad Hoc Committee of Cash Store Noteholders in their representative capacities as DIP Lenders, First Lien Noteholders and Holders of Senior Secured Notes

Brendan O'Neill, for the Ad Hoc Committee of Cash Store Noteholders

Andrew Hatnay, *James Harnum* and *Adrian Scotchmer*, for Tim Yeoman,

Brett Harrison, for Trimor Annuity Focus LP, No. 5

HEARD: June 16, 2014

ENDORSEMENT

[1] This motion was brought by Mr. Timothy Yeoman, Plaintiff in the class proceeding, *Timothy Yeoman* v. *The Cash Store Financial Services Inc. et al*, Court File No. 7908/12 CP (the "Class Action") for an order appointing him as representative (the "Class Representative") of the Class Members in this CCAA proceeding, and for an order appointing Harrison Pensa LLP as representative counsel to the class members, and Koskie Minsky LLP as agent to Harrison Pensa LLP ("Representative Counsel").

[2] Other than 0678786 B.C. Ltd. ("McCann") and Trimor Annuity Focus LP No. 5 ("Trimor"), no party opposed the motion.

[3] The Statement of Claim was filed on August 1, 2012 in London, Ontario. The Class Action is being managed by Grace J. who has scheduled a motion for certification on September 15, 2014.

[4] On April 14, 2014, Cash Store Financial Services Inc. and other entities obtained protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA"). As a result, the Class Action and the certification motion have been stayed pending further order.

[5] The Class Action alleges, *inter alia*, that the Defendants' practice of charging fees for various financial products which are tied to their loan products, as well as interest on those fees, is unlawful and in contravention of the *Ontario Pay Day Loans Act* ("PLA").

[6] In the case of Mr. Yeoman, it is alleged that he engaged in a "Pay Day Loan" transaction offered by Cash Store for a loan of $400 and for a duration of 9 days. Mr. Yeoman claims that he was charged $68.60 in "fees and service charges" and was required to pay $78.72 in interest, for a total cost of borrowing of $147.32.

[7] The Class Action asserts the following causes of action against the Applicants:

a. breach of the PLA;

b. breach of the *Competition Act*;

c. conspiracy; and

d. unjust enrichment.

[8] Mr. Yeoman seeks to represent all customers of Cash Store who entered into similar loan transactions in Ontario. Mr. Yeoman estimates that there are thousands of individual borrowers in the Class. Counsel to Mr. Yeoman submit that damages for the Class Members are estimated at over $50 million, based on publicaly available information.

[9] Counsel for Mr. Yeoman referenced section 6(3) of the PLA which states that the consequence of a breach of the PLA by a lender is that borrowers are only required to repay the principal loan advanced to them and are not required to pay any additional costs of borrowing (i.e., interest and fees) charged by a pay day lender. Accordingly, they alleged that any collections in respect of interest and fees are unlawful under the PLA.

[10] McCann, supported by Trimor, take the position that the relief requested by Mr. Yeoman is a waste of the Court's resources and time. McCann and Trimor (collectively, "Third Party Lenders" and referenced as "TPLs") point out that Mr. Yeoman is an unsecured contingent creditor of the Applicants for an amount less than $150. They argue that Mr. Yeoman's motion is premature. Further, given the approximately $150 million of secured creditor claims that must be satisfied first, they submit these insolvency proceedings have not contemplated any recovery for unsecured creditors let alone unsecured contingent creditors and to permit Mr. Yeoman's motion would prejudice these proceedings and other parties, such as McCann and Trimor, through unnecessary costs, delay and diversion.

[11] The issue to be determined is whether the Court should appoint a representative for the members of the Class Action and Representative Counsel in the CCAA proceeding.

[12] Both parties agree that the Court has the authority to appoint representative counsel. The authority for such an appointment is found under Rules 10.01 and 12.07, as well as s. 11 of the CCAA (see: *Nortel Networks Corporation (Re)*, 2009 Carswell Ont. 3028).

[13] The factors that have been considered by Canadian Courts when issuing representative counsel orders in insolvency proceedings were summarized by Pepall J. (as she then was) in *Canwest Publishing Inc. (Re)*, 2010 Carswell Ont. 1344 (S.C.):

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

b. any benefit to the companies under CCAA protection;

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

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

e. the avoidance of a multiplicity of legal retainers;

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

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

h. the position of others stakeholders and the Monitor.

[14] Pepall J., in *Canwest*, held that it is preferable to grant a representation order early in CCAA proceedings, both for the parties to be represented and for the CCAA Applicants.

[15] Counsel to McCann responds that irrelevant facts, circumstances and equities indicate that the motion should be dismissed. Counsel submits that the representation order is premature, that the proposed Class Action is unlikely to be certified, that the intent of the motion is to protect Class Counsel fees not proposed Class Members and, finally, that the *Canwest* factors fail to support Mr. Yeoman.

[16] Turning first to the *Canwest* factors, I am satisfied that the Class Members are a vulnerable group who individually lack the financial resources to pursue litigation. I accept the argument of counsel to Mr. Yeoman that without a representation order, these individuals will likely not have representation in the CCAA proceeding. It is recognized that the Class Members are an economically vulnerable group. As pointed out by counsel to Mr. Yeoman, pay day lenders are typically used by people of low financial means and the Class Members in this case are thousands of individual who, according to counsel to Mr. Yeoman, have entered into pay day loan transactions with the Applicants and were charged unlawful cost of borrowing in contravention of the PLA. Individually, it is acknowledged that their claims are relatively small,

but collectively, the total of their claims is very significant. In my view, a consideration of the *Canwest* factors favours Mr. Yeoman's position.

[17] I accept the submission of counsel to Mr. Yeoman that it is not cost effective or practical for borrowers to engage in individual actions against the Applicants, which would likely involve a multiplicity of Small Claims Court actions. Counsel to Mr. Yeoman submits that the only practical recourse for such individuals to advance their claims for compensation is through a class proceeding with class counsel advancing their collective claims.

[18] Given the size of each individual claim, I accept the submission that without a representation order, the individual class members will not have representation in the CCAA proceedings.

[19] I also accept that the appointment of representative counsel will benefit the Applicants insofar as they will be able to deal with the adjudication of the Class Action in a consistent and streamlined manner.

[20] I am also satisfied that a representation order will facilitate the administration of the CCAA proceeding and enhance its efficiency. The appointment of representative counsel will avoid the need for the Applicants to deal with a potentially large number of individual unrepresented borrowers advancing individual and possibly inconsistent claims.

[21] Turning now to the arguments raised by counsel to McCann, I cannot accept that the making of a representation order is premature. The CCAA proceedings are ongoing. There is an ongoing sale and investment process being conducted by Rothschild. The sale and investment process will likely be followed by some sort of claims process and a distribution process. The adjudication of the Class Action may have an impact on the CCAA proceedings. In my view, there is no reason to delay the Class Action proceeding.

[22] Counsel to McCann submits that Mr. Yeoman has no legitimate role to play in these proceedings and further, that the appointment of Mr. Yeoman as legal representative of the Class would cause direct and tangible prejudice to these proceedings and interested parties. I have not been persuaded by these submissions. There is an administrative benefit to be realized if proceedings are coordinated and since there is no funding request for Representative Counsel at this time, I question the alleged prejudice. I also note that the Chief Restructuring Officer, the Applicants and the Monitor, the parties having a direct interest in the outcome of this motion, do not oppose the granting of the requested relief.

[23] With respect to the submission that the proposed class action is unlikely to be certified, this is an issue to be addressed by Grace J. in September 2014.

[24] With respect to the argument that the motion is to protect Class Counsel fees not proposed class members, this argument has to be considered with the statement that the moving party is not seeking funding for the cost of Representative Counsel at this time.

[25] Finally, it seems to me that motions of this type are very fact-specific. Counsel to McCann relies on *Muscletech Research and Development Inc. (Re)*, 2006 Carswell Ont. 4929; *Muscletech Research and Development Inc. (Re)*, 2006 Carswell Ont. 7877 and *Re Canadian*

Red Cross Society, 1999 Carswell Ont. 3234. Counsel submits that Mr. Yeoman has failed to cite a single reported decision where a CCAA court considered and granted a contested representation order, for a proposed uncertified class action.

[26] In my view, a complete response to the case law cited by counsel to McCann is contained in the Reply Factum filed by counsel for the Class Action Plaintiffs, at paragraphs 5 – 11. In this case is also important to note that the issue before this Court is whether to grant a representation order. It is not to make a determination as to whether the Class Action should be certified.

[27] In the result, I am satisfied that this is an appropriate matter in which to appoint a class representative and representative counsel. The motion is granted and an order shall issue appointment Mr. Yeoman as the Class Representative of the Class Members in the CCAA proceeding and an order appointing Harrison Pensa LLP as representative counsel to the Class Members and Koskie Minsky LLP as agent to Harrison Pensa LLP ("Representative Counsel").

Morawetz, R.S.J.

Date: August 26, 2014

TAB 4

Case Name:

Target Canada Co. (Re)

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as Amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

[2015] O.J. No. 247

2015 ONSC 303

2015 CarswellOnt 620

248 A.C.W.S. (3d) 753

22 C.B.R. (6th) 323

Court File No.: CV-15-10832-00CL

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

Heard: January 15, 2015.
Judgment: January 16, 2015.

(85 paras.)

Counsel:

Tracy Sandler and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants").

Jay Swartz, for the Target Corporation.

Alan Mark, Melaney Wagner, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez").

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust.

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants.

ENDORSEMENT

1 G.B. MORAWETZ R.S.J.:-- Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since

stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going

concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 -- 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation

seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

d) Should the Court approve protections for employees?

e) Is it appropriate to allow payment of certain pre-filing amounts?

f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a

corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco.*

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or

wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re*

Canwest Global Communications Corp., 2009 CarswellOnt 6184 ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to

certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the

estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr.

Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court- ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business 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.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the

order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*(2002), 211 D.L.R (4th) 193, [2002] 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

G.B. MORAWETZ R.S.J.

TAB 5

Case Name:

U.S. Steel Canada Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as Amended
AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement With Respect to U.S. Steel Canada Inc.

[2014] O.J. No. 5547

2014 ONSC 6145

20 C.B.R. (6th) 116

247 A.C.W.S. (3d) 266

2014 CarswellOnt 16465

Court File No. CV-14-10695-00CL

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: October 8, 2014.
Judgment: October 22, 2014.

(48 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Sanction by court -- Motion by applicant, who had been granted protection under Companies' Creditors Arrangement Act, to vary Initial Order allowed -- Appropriate to approve debtor-in-possession loan and lender's charge to ensure stable continuing operations -- Granting super-priority to Administration and Director's Charges granted in Initial Order was essential to success of any possible restructuring -- Proposed key employee retention programme was approved -- Currently unrepresented beneficiaries were granted representation -- Extension of stay provisions in Initial Order was granted.

Motion by the applicant, who had been granted protection under the Companies' Creditors Arrangement Act, to vary the Initial Order. The applicant sought approval of a debtor-in-possession loan facility between it and a subsidiary of its largest creditor to assist its cash flow. A condition precedent to funding under the loan was an order granting the lender priority over all encumbrances. The loan was supported by the monitor and was not opposed by any of the major stakeholders. The applicant also sought to amend the Initial Order to provide that the Administration and Director's Charges granted ranked ahead of all other Encumbrances except the loan charge. It sought approval of its proposed key employee retention programme. The applicant's secured creditor and the monitor supported the programme. The applicant proposed the appointment of six representatives and representative counsel to represent the interests of beneficiaries who were currently unrepresented. It sought an extension of the stay provisions in the Initial Order.

HELD: Application allowed. The existence of a financing facility was of critical importance to the applicant to ensure stable continuing operations. The loan would assist and enhance the restructuring process. It was appropriate to approve the loan and the lender's charge. Granting super-priority to the Administration and Director's Charges was essential to the success of any possible restructuring. The continued employment of the employees to whom the retention programme applied was important for the stability of the business. The programme was approved. The representatives were approved as the beneficiaries were an important stakeholder group and deserved meaningful representation. An extension of the stay provisions of the Initial Order was granted to provide stability. The applicant was acting in good faith and with due diligence to facilitate the restructuring process.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.01(2), s. 11.02(3), s. 11.2, s. 11.2(4), s. 11.51, s. 11.52

Ontario Regulation 99/06,

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

Rules of Civil Procedure, Rule 10.01, Rule 12.07

Counsel:

R. Paul Steep, Jamey Gage and Heather Meredith, for the Applicant.

Kevin Zych, for the Monitor.

Michael Barrack, Robert Thornton and Grant Moffat, for United States Steel Corporation and the proposed DIP Lender.

Gale Rubenstein, Robert J. Chadwick and Logan Willis, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario).

Ken Rosenberg and Lily Harmer, for the United Steelworkers International Union and the United Steelworkers Union, Local 8782.

Sharon L.C. White, for the United Steelworkers Union, Local 1005.

Shayne Kukulowicz and *Larry Ellis*, for the City of Hamilton.

Steve Weisz and Arjo Shalviri, for Caterpillar Financial Services Limited.

S. Michael Citak, for various trade creditors.

Kathryn Esaw and Patrick Corney, for the Independent Electricity System Operator.

Andrew Hatnay, for certain retirees and for the proposed representative counsel.

ENDORSEMENT

1 H.J. WILTON-SIEGEL J.:-- U.S. Steel Canada Inc. (the "Applicant") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, and was granted the requested relief pursuant to an initial order of Morawetz R.S.J. dated September 16, 2014 (the "Initial Order"). The Initial Order contemplated that any interested party, including the Applicant and the Monitor, could apply to this court to vary or amend the Initial Order at a comeback motion scheduled for October 6, 2014 (the "Comeback Motion").

2 The Comeback Motion was adjourned from October 6, 2014 to October 7, 2014, and further adjourned on that date to October 8, 2014. On October 8, 2014, the Court heard various motions of the Applicant and addressed certain other additional scheduling matters, indicating that written reasons would follow with respect to the substantive matters addressed at the hearing. This endorsement constitutes the Court's reasons with respect to the five substantive matters addressed in two orders issued at the hearing.

3 In this endorsement, capitalized terms that are not defined herein have the meanings ascribed to them in the Initial Order.

DIP Loan

4 The Applicant seeks approval of a debtor-in-possession loan facility (the "DIP Loan"), the terms of which are set out in an amended and restated DIP facility term sheet dated as of September 16, 2014 (the "Term Sheet") between the Applicant and a subsidiary of USS (the "DIP Lender").

5 The Term Sheet contemplates a DIP Loan in the maximum amount of $185 million, to be guaranteed by each of the present and future, direct or indirect, wholly-owned subsidiaries of the Applicant. The Term Sheet provides for a maximum availability under the DIP Loan that varies on a monthly basis to reflect the Applicant's cash flow requirements as contemplated in the cash flow projections attached thereto. Advances bear interest at 5% per annum, 7% upon an event of default, and are prepayable at any time upon payment of an exit fee of $5.5 million together with the lender's fees and costs described below. The Term Sheet provides for a commitment fee in the amount of $3.7 million payable out of the first advance. The Applicant is also obligated to pay the lender's legal fees and any costs of realization or disbursement pertaining to the DIP Loan and these CCAA proceedings.

6 The Term Sheet contains a number of affirmative covenants, including compliance with a timetable for the CCAA proceedings. The DIP Loan terminates on the earliest to occur of certain events, including: (1) the implementation of a compromise or plan of arrangement; (2) the sale of all or substantially all of the Applicant's assets; (3) the conversion of the CCAA proceedings into a proceeding under the *Bankruptcy and Insolvency Act*; (4) December 31, 2015, being the end of the proposed restructuring period according to the timetable; and (5) the occurrence of an event of default, at the discretion of the DIP lender.

7 A condition precedent to funding under the DIP Loan is an order of this Court granting a charge in favour of the DIP lender (the "DIP Lender's Charge") having priority over all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (herein, collectively "Encumbrances") other than the Administration Charge (Part I), the Director's Charge and certain permitted liens set out in the Term Sheet, which include existing and future purchase money security interests and certain equipment financing security registrations listed in a schedule to the Term Sheet (the "Permitted Priority Liens").

8 The terms and conditions of the DIP Loan, as set out in the Term Sheet, have been the subject of extensive negotiation in the period prior to the hearing of this motion. The DIP Loan is supported by the monitor and USS, and is not opposed by any of the other major stakeholders of the Applicant, including the Province of Ontario and the United Steelworkers International Union and the United Steelworkers Union, Locals 1005 and 8782 (collectively, the "USW").

9 The existence of a financing facility is of critical importance to the Applicant at this time in order to ensure stable continuing operations during the CCAA proceedings and thereby to provide reassurance to the Applicant's various stakeholders that the Applicant will continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course. As such, debtor-in-possession financing is a pre-condition to a successful restructuring of

the Applicant. In particular, the Applicant requires additional financing to build up its raw materials inventories prior to the Seaway freeze to avoid the risk of operating disruptions and/or sizeable cost increases during the winter months.

10 The Monitor, who was present during the negotiations regarding the terms of the DIL Loan, the Chief Restructuring Officer (the "CRO") and the Financial Advisor to the Applicant have each advised the Court that in their opinion the terms of the DIP Loan are reasonable, are consistent with the terms of other debtor-in-possession financing facilities in respect of comparable borrowers, and meet the financial requirements of the Applicant. The Monitor has advised in its First Report that it does not believe it likely that a superior DIP proposal would have been forthcoming.

11 The Court has the authority to approve the DIP Loan under s. 11 of the CCAA. I am satisfied that, for the foregoing reasons, it is appropriate to do so in the present circumstances.

12 The Court also has the authority under s. 11.2 of the CCAA to grant the requested priority of the DIP Lender's Charge to secure the DIP Loan. In this regard, s. 11.2(4) of the CCAA sets out a non-exhaustive list of factors to be considered by a court in addressing such a motion. In addition, Pepall J. (as she then was) stressed the importance of three particular criteria in *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 at paras. 32-34 (S.C.), [2009] O.J. No. 4286 [*Canwest*]. In my view, the DIP Lender's Charge sought by the Applicant is appropriate based on those factors for the reasons that follow.

13 First, notice has been given to all of the secured parties likely to be affected, including USS as the only secured creditor having a general security interest over all the assets of the Applicant. Notice has also been given broadly to all PPSA registrants, various governmental agencies, including environmental agencies and taxing authorities, and to all pension and retirement plan beneficiaries pursuant to the process contemplated by the Notice Procedure Order.

14 Second, the maximum amount of the DIP Loan is appropriate based on the anticipated cash flow requirements of the Applicant, as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period. The cash flows to January 30, 2015 are the subject of a favourable report of the Monitor in its First Report.

15 Third, the Applicant's business will continue to be managed by the Applicant's management with the assistance of the CRO during the restructuring period. The Applicant's board of directors will continue in place, a majority of whom are independent individuals with significant restructuring and steel-industry experience. The Applicant's parent and largest creditor, USS, is providing support to the Applicant by providing the DIP Loan through a subsidiary. Equally important, the existing operational relationships between the Applicant and USS will continue.

16 Fourth, for the reasons set out above, the DIP Loan will assist in, and enhance, the restructuring process.

17 Fifth, the DIP Lender's Charge does not secure any unsecured pre-filing obligations owed to the DIP lender or its affiliates. It will not prejudice any of the other parties having security interests in property of the Applicant. In particular, the DIP Charge will rank behind the Permitted Priority Liens. Although it will rank ahead of any deemed trust contemplated by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the DIP Loan contemplates continued payment of the pension contributions required under the Pension Agreement dated as of March 31, 2006, as amended by the Amendment to Pension Agreement dated October 31, 2007 (collectively, the "Stelco Pension Agreement") and Ontario Regulation 99/06 under the *Pension Benefits Act* (the "Stelco Regulation").

18 Based on the foregoing, it is appropriate to grant the DIP Charge having the priority contemplated above. As was the case in *Timminco Ltd. (Re)*, 2012 ONSC 948 at paras. 46-47, [2012] O.J. No. 596 [*Timminco*], it is not realistic to conceive of the DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority being requested on this motion, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority. The proposed DIP Loan, subject to the benefit of the proposed DIP Lender's Charge, is a necessary pre-condition to continuation of these restructuring proceedings under the CCAA and avoidance of a bankruptcy proceeding. I am satisfied that, in order to further these objectives, it is both necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex Finance, LLC v. United Steel Workers*, 2013 SCC 6, [2013] 1 S.C.R. 271 [*Sun Indalex*] such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of the DIP Lender's Charge.

Administration Charge and Director's Charge

19 The Initial Order provides for an Administration Charge (Part I) to the maximum amount of $6.5 million, a Director's Charge to a maximum amount of $39 million, and an Administration Charge (Part II) to a maximum amount of $5.5 million plus $1 million. On this motion, the Applicant seeks to amend the Initial Order, which was granted on an *ex parte* basis, to provide that the Administration Charge (Part I) and the Director's Charge rank ahead of all other Encumbrances in that order, and the Administration Charge (Part II) ranks ahead of all Encumbrances except the prior-ranking court-ordered charges and the Permitted Priority Liens.

20 The Court's authority to grant a super-priority in respect of the fees and expenses to be covered by the Administration Charge (Part I) and the Administration Charge (Part II) is found in s. 11.52 of the CCAA. Similarly, s. 11.51 of the CCAA provides the authority to grant a similar charge in respect of the fees and expenses of the directors to be secured by the Director's Charge.

21 As discussed above, the Applicant has fulfilled the notice requirements in respect of those provisions by serving the motion materials for this Comeback Motion to the parties on the service list and by complying with the requirements of the Notice Procedure Order.

22 It is both commonplace and essential to order a super-priority in respect of charges securing professional fees and disbursements and directors' fees and disbursements in restructurings under

the CCAA. I concur in the expression of the necessity of such security as a pre-condition to the success of any possible restructuring, as articulated by Morawetz R.S.J. in *Timminco* at para. 66.

23 In *Canwest*, at para. 54, Pepall J. (as she then was) set out a non-exhaustive list of factors to be considered in approving an administration charge. Morawetz R.S.J. addressed those factors in his endorsement respecting the granting of the Initial Order approving the Administration Charge (Part I) and the Administration Charge (Part II). Similarly, Morawetz R.S.J. also addressed the necessity for, and appropriateness of, approving the Director's Charge in such endorsement.

24 In my opinion, the same factors support the super-priority sought by the Applicant for the Administration Charge (Part I), the Director's Charge and the Administration Charge (Part II). Further, I am satisfied that the requested priority of these charges is necessary to further the objectives of these CCAA proceedings and that it is also necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex*, such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of these Charges. I am satisfied that the beneficiaries of the Administration Charge (Part I) and the Administration Charge (Part II) will not likely provide services to the Applicant in these CCAA proceedings without the proposed security for their fees and disbursements. I am also satisfied that their participation in the CCAA proceedings is critical to the Applicant's ability to restructure. Similarly, I accept that the Applicant requires the continued involvement of its directors to pursue its restructuring and that such persons, particularly its independent directors, would not likely continue in this role without the benefit of the proposed security due to the personal exposure associated with the Applicant's financial position.

The KERP

25 The Applicant has identified 28 employees in management and operational roles who it considers critical to the success of its restructuring efforts and continued operations as a going concern. It has developed a key employee retention programme (the "KERP") to retain such employees. The KERP provides for a cash retention payment equal to a percentage of each such employee's annual salary, to be paid upon implementation of a plan of arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

26 The maximum amount payable under the KERP is $2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

27 The Court's jurisdiction to authorize the KERP is found in its general power under s. 11 of the CCAA to make such order as it sees fit in a proceeding under the CCAA. The following factors identified in case law support approval of the KERP in the present circumstances.

28 First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. The evidence is that these employees perform important roles in the business and cannot

easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

29 Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

30 Third, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the Applicant's operations, the employees to be covered by the KERP would likely consider other employment options if the KERP were not approved

31 Fourth, the KERP was developed through a consultative process involving the Applicant's management, the Applicant's board of directors, USS, the Monitor and the CRO. The Applicant's board of directors, including the independent directors, supports the KERP. The business judgment of the board of directors is an important consideration in approving a proposed KERP: see *Timminco Ltd. (Re)*, 2012 ONSC 506 at para.73, [2012] O.J. No. 472. In addition, USS, the only secured creditor of the Applicant, supports the KERP.

32 Fifth, both the Monitor and the CRO support the KERP. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor has advised in its First Report that it is satisfied that each of the employees covered by the KERP is critical to the Applicant's strategic direction and day-to-day operations and management. It has also advised that the amount and terms of the proposed KERP are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings.

33 Sixth, the terms of the KERP, as described above, are effectively payable upon completion of the restructuring process.

Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries

34 The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "Non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

35 The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to

make such an order under the general authority in section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the *Rules of Civil Procedure*. I am satisfied that such an order should be granted in the circumstances.

36 In reaching this conclusion, I have considered the factors addressed in *Canwest Publishing (Re)*, 2010 ONSC 1328, [2010] O.J. No. 943. In this regard, the following considerations are relevant.

37 The Non-USW Active and Retiree Beneficiaries are an important stakeholder group in these proceedings under the CCAA and deserve meaningful representation relating to matters of recovery, compromise of rights and entitlement to benefits under the plans of which they are beneficiaries or changes to other compensation. Current and former employees of a company in proceedings under the CCAA are vulnerable generally on their own. In the present case, there is added concern due to the existence of a solvency deficiency in the Applicant's pension plans and the unfunded nature of the OPEB's.

38 Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.

39 Third, the contemplated representation will avoid a multiplicity of retainers to the extent separate representation is not required. In this regard, I note tha,t at the present time, there is a commonality of interest among all the non-USW Active and Retiree Beneficiaries in accordance with the principles referred to in *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 3028 at para. 62 (S.C.), [2009] O.J. No. 3280 [*Nortel*]. In particular, at the present time, none of the CRO, the proposed representative counsel and the proposed representatives see any material conflict of interest between the current and former employees. In these circumstances, as in *Nortel*, I am satisfied that representation of the employees' interests can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims. If the interests of such parties do in fact diverge in the future, the Court will be able to address the need for separate counsel at such time. In this regard, the proposed representative counsel has advised the Court that it and the proposed representatives are alert to the possibility of such conflicts potentially arising and will bring any issues of this nature to the Court's attention.

40 Fourth, the balance of convenience favours the proposed order insofar as it provides for notice and an opt-out process. The proposed representation order thereby provides the flexibility to members of this stakeholder group who do not wish to be represented by the proposed representatives or the proposed representative counsel to opt-out in favour of their own choice of

representative and of counsel.

41 Fifth, the proposed representative counsel, Koskie Minsky LLP, have considerable experience representing employee groups in other restructurings under the CCAA. Similarly, the proposed representatives have considerable experience in respect of the matters likely to be addressed in the proceedings, either in connection with the earlier restructuring of the Applicant or in former roles as employees of the Applicant.

42 Sixth, the proposed order is supported by the Monitor and a number of the principal stakeholders of the Applicant and is not opposed by any of the other stakeholders appearing on this motion.

Extension of the Stay

43 Lastly, the Applicant seeks an order extending the provisions of the Initial Order, including the stay provisions thereof, until January 23, 2015. Section 11.02(2) of the CCAA gives the Court the discretionary authority to extend a stay of proceedings subject to satisfaction of the conditions set out in s. 11.02(3). I am satisfied that these requirements have been met in the present case, and that the requested relief should be granted, for the following reasons.

44 First, the stay is necessary to provide the stability required to allow the Applicant an opportunity to work towards a plan of arrangement. Since the Initial Order, the Applicant has continued its operations without major disruption. In the absence of a stay, however, the evidence indicates the Applicant will have a cash flow deficiency that will render the objective of a successful restructuring unattainable. As mentioned, the Monitor has advised that, based on its review, the Applicant should have adequate financial resources to continue to operate in the ordinary course and in accordance with the terms of the Initial Order during the stay period.

45 Second, I am satisfied that the Applicant is acting in good faith and with due diligence to facilitate the restructuring process. In this regard, the Applicant has had extensive discussions with its principal stakeholders to address significant objections to the initial draft of the Term Sheet that were raised by such stakeholders.

46 Third, the Monitor and the CRO support the extension.

47 Lastly, while it is not anticipated that the restructuring will have proceeded to the point of identification of a plan of arrangement by the end of the proposed stay period, the Applicant should be able to make significant steps toward that goal during this period. In particular, the Applicant intends to commence a process of discussions with its stakeholders as well as to explore restructuring options through a sales or restructuring recapitalization process (the "SARP") contemplated by the Term Sheet. An extension of the stay will ensure stability and continuity of the applicant's operations while these discussions are conducted, without which the Applicant's restructuring options will be seriously limited if not excluded altogether. In addition, the Applicant

should be able to take steps to provide continuing assurance to its stakeholders that it will be able to continue to operate in the ordinary course during the anticipated restructuring period, without interruption, notwithstanding the current proceedings under the CCAA.

48 Accordingly, I am satisfied that an extension of the Initial Order will further the purposes of the Act and the requested extension should be granted.

H.J. WILTON-SIEGEL J.

TAB 6

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE	)	THURSDAY, THE 30TH DAY OF
	)	
MORAWETZ	)	JULY, 2009

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

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

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

ORDER
(Representation Order for Disabled Employees)

THIS MOTION, made by the Applicants (collectively, "Nortel") for an order appointing representative counsel for those employees of Nortel who are currently not working due to an injury, illness or medical condition in respect of which they are receiving or entitled to receive disability income benefits by or through Nortel, and who may assert an existing or future claim for payment, reimbursement or coverage arising in connection with their employment with Nortel or termination thereof, a pension or benefit plan sponsored by Nortel, including in relation to medical, dental, long-term or short-term disability benefits, life insurance or any other benefit, obligation or payment to which such person (or others who may be entitled to claim under or through such person) may be entitled from or through Nortel (referred to individually as an "LTD Beneficiary" and collectively, as the "LTD Beneficiaries") save and except those LTD Beneficiaries who are currently employed and whose benefit or other payments, as described above, arise directly or inferentially out of a

collective agreement between the Applicants, or any of them, and the CAW-Canada was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Applicants and on hearing the submissions of counsel for the Representative, the CAW-Canada, Nortel, the Monitor and other parties,

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

2. **THIS COURT ORDERS** that further service of the Notice of Motion and Motion Record on any party not already served is hereby dispensed with, such that this motion was properly returnable July 9, 2009.

3. **THIS COURT ORDERS** that, subject to paragraph 9 hereof, Sue Kennedy is hereby appointed as representative of all LTD Beneficiaries in the proceedings under the *Companies' Creditors Arrangement Act (Canada)* ("CCAA"), the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") or in any other proceeding which has been or may be brought before this Honourable Court (the "Proceedings"), including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the Proceedings.

4. **THIS COURT ORDERS** that, subject to paragraph 9 hereof, Koskie Minsky LLP is hereby appointed as counsel for all LTD Beneficiaries in the Proceedings for any issues affecting the LTD Beneficiaries in the Proceedings.

5. **THIS COURT ORDERS** that Nortel shall provide to the Representatives and their counsel, without charge:

   (a) the names, last known addresses and last known e-mail addresses (if any) of all the Former Employees, whom they represent, as well as applicable data regarding their entitlements, subject to a confidentiality agreement and to only be used for the purposes of the Proceedings; and

   (b) upon request of the Representatives and their counsel, such documents and data, as may be relevant to matters relating to the issues in the Proceedings,

including documents and data, pertaining to the various long term disability, pension, benefit, supplementary pension, termination allowance plans, severance and termination payments and other arrangements for group health, life insurance, retirement and severance payments, including up to date financial information regarding the funding and investments of any of these arrangements.

6. **THIS COURT ORDERS** that all reasonable legal, actuarial and financial expert and advisory fees and all other incidental fees and disbursements, as may have been or shall be incurred by the Representatives and their counsel, shall be paid by Nortel on a bi-weekly basis, forthwith upon the rendering of accounts to Nortel. In the event of any disagreement regarding such fees, such matters may be remitted to this Court for determination.

7. **THIS COURT ORDERS** that notice of the granting of this Order be provided to the LTD Beneficiaries by regular mail to their last know address under such terms and conditions as to be agreed upon by the Representative, the Applicants and the Monitor.

8. **THIS COURT ORDERS** that the Representative, or her counsel on her behalf, are authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body and other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

9. **THIS COURT ORDERS** that any individual LTD Beneficiary who does not wish to be bound by this Order and all other related Orders which may subsequently be made in these proceedings shall, within 30 days of mailing of notice of this Order, notify the Monitor, in writing, by facsimile, mail or delivery, and in the form attached as Schedule "A" hereto and shall thereafter not be bound and shall be represented themselves as an independent individual party to the extent they wish to appear in these Proceedings.

10. **THIS COURT ORDERS** that the Representative and Koskie Minsky LLP shall have no liability as a result of their respective appointment or the fulfilment of their duties in carrying out the provisions of this Order from and after January 14, 2009 save and except for any gross negligence or unlawful misconduct on their part.

11. **THIS COURT ORDERS** that the Representatives shall be at liberty and are authorized at any time to apply to this Honourable Court for advice and directions in the discharge or variation of theirs powers and duties.

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

JUL 30 2009

PER / PAR:

SCHEDULE "A"

Court File No.: 09-CL-7950

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

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

OPT-OUT LETTER

Ernst & Young Inc.
Ernst & Young Tower
222 Bay Street
P.O. Box 251
Toronto, Ontario M5K 1J7

Attention: Lee K. Close
Tel: 1.866.942.7177
Fax: 416.943.3300

I, _____, am an employee of the Nortel companies, and am
[Insert Name]
currently in receipt of or have applied for disability income benefits.

Under Paragraph 9 of the Representation Order for Disabled Employees, LTD Beneficiaries who do not wish Koskie Minsky LLP to act as their representative counsel may opt out.

I hereby notify the Monitor that I do not wish to be bound by the Order and will be represented as an independent individual party to the extent I wish to appear in these proceedings.

_____ _____

Date *Signature*

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

Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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Lawyers for the Applicants

TAB 7

Case Name:

Nortel Networks Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation And Nortel Networks Technology Corporation
Applicants Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2009] O.J. No. 3149

55 C.B.R. (5th) 281

2009 CarswellOnt 4421

182 A.C.W.S. (3d) 316

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: July 9, 2009.
Judgment: July 22, 2009.

(16 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motion by Felske and Sylvain for an order to be appointed representatives of all Canadian non-unionized employees of Nortel allowed -- There had been sufficient new developments such that the motion was not a collateral attack on a previous decision -- Furthermore, the continuing employees had an interest in the proceedings and it was advisable for them to have representation -- However, the role of Representative Counsel was to be limited to avoid duplication of services and the provision of unnecessary services.

Civil litigation -- Civil procedure -- Parties -- Representation of -- Motion by Felske and Sylvain for an order to be appointed representatives of all Canadian non-unionized employees of Nortel allowed -- There had been sufficient new developments such that the motion was not a collateral attack on a previous decision -- Furthermore, the continuing employees had an interest in the proceedings and it was advisable for them to have representation -- However, the role of Representative Counsel was to be limited to avoid duplication of services and the provision of unnecessary services.

Statutes, Regulations and Rules Cited:

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

Counsel:

Thomas McRae and Arthur O. Jacques, for Nortel Continuing Canadian Employees.

Scott Bomhof, for Nokia Siemens Networks.

Max Starnino, for the Superintendent of Financial Services of Ontario.

Alan Merskey, for Nortel Networks Corp. et al.

Lyndon Barnes, for the Board of Directors.

Mark Zigler, Representative Counsel for the Former Employees.

J. Pasquariello and C. Armstrong, for Ernst & Young Inc., Monitor.

Gavin Finlayson, for the Noteholders.

Alex MacFarlane, for the Unsecured Creditors' Committee.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- Mr. Felske and Mr. Sylvain bring this motion for an order to be appointed representatives of all Canadian non-unionized employees of the Applicants (the "Nortel Continuing Canadian Employees" or "NCCE") and an order that Nelligan O'Brien Payne, LLP and Shibley Righton LLP ("NS") be appointed as representative counsel to the NCCE.

2 They also seek an order that all reasonable legal, actuarial and financial expert and advisory fees and other incidental fees and disbursements be paid by the Applicants (also referred to as

"Nortel").

3 The NCCE sought the same relief by Notice of Motion dated March 30, 2009. That motion was dismissed. However, at paragraph 54 of the May 27, 2009 endorsement and at paragraph 22 of the June 17, 2009 supplementary endorsement, I indicated that, in the event that the situation changed, it was open to any party to bring a motion for appropriate relief.

4 Counsel to the NCCE submits that the situation has changed by virtue of the following:

(i) Nortel has entered into an agreement to sell certain assets and liabilities of the CDMA business in North America, as well as certain assets and liabilities of the LTE business in Canada;
(ii) Nortel has announced that it is advancing in its discussions with external parties to sell its other businesses;
(iii) Koskie Minsky has advised that it has a conflict in representing continuing employees as well as former employees, particularly given Nortel's current efforts to sell its businesses.

5 The Applicants resist the motion on the basis that: (i) it is a collateral attack or abuse of process by re-litigation; and (ii) there are no new grounds that would give rise to a representation appointment for current employees.

6 The Applicants are supported by the Monitor, the Noteholders and the Unsecured Creditors' Committee.

7 In my view, there have been sufficient new developments such that I do not regard this motion as a collateral attack on the previous decision.

8 The second objection, however, raised by the Applicants causes a greater difficulty.

9 Counsel to the Applicants makes specific reference to paragraph 22 of the supplementary endorsement where I stated that Representative Counsel should be addressing actual issues and actual claims as opposed to hypotheticals. Counsel to the Applicants submits that the basis upon which there is a non-hypothetical interest has not been identified.

10 Specifically, counsel to the Applicants submits that employees to whom positions will be offered have not been identified; the terms of employment have not been proposed; and no issue of substance distinguishes the present situation from the first motion. Counsel also submits that, in any event, possible - or actual - transactions and offers do not mandate the need for representation.

11 In my previous endorsements, I outlined the rationale for making representative orders in CCAA proceedings on behalf of employees.

12 The manner in which the process is evolving is such that it is likely that some current

employees will be offered employment by the purchasers of assets and some employees may not be offered employment. The group that is not offered ongoing employment can be represented by Koskie Minsky. However, Koskie Minsky has advised that they cannot represent the continuing employees. In my view, continuing employees do have an interest in these proceedings and it is advisable that these employees should have some form of representation.

13 That is not to say, however, that this representative order should be open ended. The role of Representative Counsel for the Continuing Employees should not, to the extent possible, duplicate the role of Koskie Minsky. The role should be limited to situations (i) where Koskie Minsky is in real conflict; and (ii) where there is a potential for a real issue in the CCAA proceedings.

14 In limiting the scope of this retainer, it is not my intention to unduly restrict the role of counsel. Counsel must be in a position to review employee issues generally and advise the NCCE of their rights. The limitation is, however, aimed at avoiding duplication in services or the provision of unnecessary services. In my view, this limitation is reasonable. I note that counsel to the Monitor has, on numerous occasions, reported that the Applicants are under severe financial pressure. Accordingly, it is reasonable that steps be taken to limit unnecessary expenses.

15 An order is granted appointing Messrs. Felske and Sylvain as Representatives of the NCCE and that NS be appointed as Representative Counsel to the NCCE. However, in view of the restrictions placed on this retainer, I would request that the Applicants, the Monitor and NS meet to work out the parameters of appropriate limitations, taking into account the following guidelines:

1. NS must be in a position to provide a general advice on employee issues that affect the NCCE. Charges for these services should be based on an hourly rate and subject to a bi-weekly maximum to be agreed upon, in advance, by the Applicants, the Monitor and NS.
2. The retainer solely covers NS. At this time, I have not been persuaded that actuarial and financial experts are required. The retainer can only be expanded to include such experts if the prior agreement of the Applicants and the Monitor has been obtained.

16 Any disputes arising in respect of the scope of the NS retainer which cannot be resolved by the Applicants, the Monitor and NS, can be discussed at a 9:30 a.m. appointment.

G.B. MORAWETZ J.

TAB 8

Case Name:

Catalyst Paper Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Canada Business Corporations Act, R.S.C. 1985, c. C-44
AND IN THE MATTER OF the Business Corporations Act, S.B.C. 2002, c. 57
AND IN THE MATTER OF Catalyst Paper Corporation and the Petitioners Listed in Schedule "A", Petitioners

[2012] B.C.J. No. 615

2012 BCSC 451

98 C.C.P.B. 1

89 C.B.R. (5th) 292

2012 CarswellBC 883

214 A.C.W.S. (3d) 331

Docket: S120712

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

R.J. Sewell J.

Heard: February 23, 2012.
Judgment: March 28, 2012.

(37 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Parties -- Orders --

Variation or amendment of orders -- Application by employees of Petitioner for order amending Restated Initial Order to allow Committee to make representations on behalf of Canadian employed or resident persons allowed in part -- Petitioners and Superintendent's settlement was included in RIA, under which it was implicit that DIP lender ranked in priority to pension beneficiaries -- RSEA was appointed to represent pension beneficiaries, most current pensioners wanted its continued representation, it had long history of dealing with pension issues and there was no basis for criticism -- However, group RSEA was authorized to represent not adequately defined, so RIA amended in that respect.

Pension and benefits law -- Private pension plans -- Bankruptcy, effect of -- Application by employees of Petitioner for order amending Restated Initial Order to allow Committee to make representations on behalf of Canadian employed or resident persons allowed in part -- Petitioners and Superintendent's settlement was included in RIA, under which it was implicit that DIP lender ranked in priority to pension beneficiaries -- RSEA was appointed to represent pension beneficiaries, most current pensioners wanted its continued representation, it had long history of dealing with pension issues and there was no basis for criticism -- However, group RSEA was authorized to represent not adequately defined, so RIA amended in that respect.

Application by the employees of the Petitioner for an order amending the Amended and Restated Initial Order. The RIA authorized the petitioner to make all normal employer cost contributions to the defined benefits pension plan but prohibited special or catch up payments. The Extension Letter allowed the petitioner to fund solvency deficiencies in defined benefits pension plans over seven years but provided it would be rescinded if the petitioner filed for CCAA protection. After the petitioner filed for CCAA protection, they agreed to make additional payments to the trustee of the defined benefits plan and the Superintendant waived its right to rescind the Extension Letter. An order was made amending the RIA to give effect to this settlement. It was implicit in the settlement that the DIP lender ranked in priority to the pension beneficiaries. The applicants attended the hearing by phone and did not oppose the order. When the petitioner applied for a final order granting DIP financing a priority charge on the petitioner's working capital assets and over any deemed trust under the Pension and Benefits Act, the applicants brought this application. The applicants were seeking an order allowing the Committee to make representations on behalf of all Canadian employed or resident persons.

HELD: Application allowed in part. The RSEA had already been made the representative of the pension beneficiaries and most current pensioners wanted it to continue its representation. RSEA had a long history in dealing with pension issues and there was no basis for criticizing its representation. The applicants had not established a change in representation would be in the best interests of pension beneficiaries. However, the group the RSEA was authorized to represent was not adequately or inclusively defined. The order was amended only with respect to this definition. The amendment would state: Plan former members, persons entitled to or in receipt of survivor benefits and designated beneficiaries of former members.

Statutes, Regulations and Rules Cited:

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

Business Corporations Act, SBC 2002, CHAPTER 57,

Canada Business Corporations Act, R.S.C. 1985, c. C-44,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11

Pension Benefits Standards Act, RSBC 1996, CHAPTER 352, s. 6

Counsel:

Counsel for Petitioners: P.L. Rubin, K. Burns, A. Purgas.

Counsel for Monitor: K.M. Jackson.

Counsel for A Representative Group of 2016 Noteholders: J.R. Sandrelli, S. Kukulowicz, R. Jacobs.

Counsel for Powell River Energy Inc., Quadrant Investments Ltd. and TimberWest Forest Corp.: M. Buttery.

Counsel for Catalyst TimberWest Retired Salaried Employees Association: R.J. Kaardal, A. Glen.

Counsel for Wells Fargo Bank NA: V. Sinha.

Counsel for Representative Group of 2014 Unsecured Noteholders and Certain 2016 Noteholders: T. Louman-Gardiner, M. Wagner.

Counsel for JPMorgan Chase Bank, N.A.: J. Cockbill.

Counsel for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2688: S. Quelch.

Counsel for Canexus Corp. and Casco Inc.: K. Esaw.

Counsel for Wilmington Trust, National Association: R. Patryluk, G. Benchetrit.

Counsel for Ad Hoc Committee of 2014 Noteholders: D. McKinnon.

Counsel for Catalyst Salaried Employees and Pensioner Committee: A. Kaplan, M. Prokosh, D. Yiokaris, J. Harnum.

Counsel for CEP Unions - Locals 1, 76 (Powell River), 592, 686 (Port Alberni), 1132 (Crofton),

630, 1123 (Campbell River): D. Bobert.

Counsel for PPWC Local 2: C. Gordon.

Counsel for Superintendent of Pensions: S. Wilkinson.

Counsel for Board of Directors of Catalyst: H. Ferris.

Counsel for Perella Weinberg Partners LP: K. McElcheran.

Counsel for Wajax Industries: K. Rowan, Q.C.

Reasons for Judgment

1 R.J. SEWELL J.:-- On February 23, 2012, a group of current, former and retired employees of the Petitioners (the "CSE&P Committee") applied for an order amending the Amended and Restated Initial Order of February 3, 2012 (the "R.I.A.") by removing paragraph 84 of the R.I.A. and replacing it with the following:

> (a) Ronald Gary McCaig, Jeff Whittaker, Janice Young, Peter Flynn, Patricia Dwornik, and Francesca Pomeroy (the "CSE&P Committee"), acting on their own behalf and on behalf of the Catalyst Salaried Employees & Pensioners group are, until further Order of this Court, entitled to make representations to the Court as, and be, the authorized representatives of Canadian employed or resident persons, and in particular:
>
> (i) all current non-unionized employees of Catalyst Pulp Operations Limited, Catalyst Pulp Sales Inc., Pacifica Poplars Ltd., Catalyst Pulp and Paper Sales Inc., Elk Falls Pulp and Paper Limited, Catalyst Paper Energy Holdings Inc., 0606890 B.C. Ltd., Catalyst Paper Recycling Inc., Catalyst Paper Recycling Inc., Catalyst Paper (Snowflake) Inc., Catalyst Paper Holdings Inc., Pacific Papers U.S. Inc., Pacifica Poplars Inc., Pacifica Papers Sales Inc., Catalyst Paper (USA) Inc. or the Apache Railway Company (collectively "Catalyst") or any person claiming an interest under or on behalf of such employees;
>
> (ii) all active, deferred vested and retired members of the Catalyst Paper Corporation Retirement Plan for Salaried Employees (Reg. No. 85400-1), the Catalyst Paper Corporation Retirement Plan "A" (Reg.

No. 85944-1) and/or the Catalyst Paper Corporation Retirement Plan "C" (Reg. No. 55234) (collectively, the "Catalyst Pension Plans"), or any person claiming an interest under the Catalyst Pension Plans; and

(iii) all non-unionized current and former employees of Catalyst and its predecessors with an entitlement under any other unregistered supplementary pension benefit, post-retirement benefit, health and dental benefit, life insurance benefit, long term disability benefit, short term disability benefit, death and dismemberment benefit or any other employee benefit sponsored by Catalyst or one of its predecessors (collectively "OPEBs"), or any person claiming an interest under an OPEB under or on behalf of such employees and former employees.

(collectively, the "Employee Creditors").

(b) Counsel to the CSE&P Committee will be considered an "Assistant" pursuant to paragraph 8(c) of the Amended and Restated Initial Order.

2 By memorandum dated March 5, 2012 I informed the parties that the application was dismissed with reasons to follow. These are those reasons.

Background

3 On January 31, 2012 the Court granted protection (the Initial Order) to the Petitioners pursuant to the *Companies' Creditors Arrangement Act*,

4 R.S.C. 1985, c. C-36 (the "*CCAA*"). The Initial Order was applied for in some haste because until a few days prior to January 31 it appeared that the Petitioners would be able to reorganize their affairs by means of a plan of arrangement pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). However, certain conditions precedent to the proposed *CBCA* plan of arrangement were not met and these proceedings resulted.

5 *The Initial Order was amended and restated by the R.I.A. Paragraph 12(c) of* the R.I.A. authorized and directed the Petitioners to make all normal employer cost contributions to defined benefit and defined contribution pension plans. Paragraph 12(d) authorized but did not require the Petitioners to make the special payments to pension plans set out in a letter from the Superintendent of Pensions (the "Superintendent") dated December 14, 2011 (the "Extension Letter") but prohibited the Petitioners from making any special or catch up payments on an accelerated basis without further court order made on notice to the D.I.P. Agent, to the Steering Committee for the 2016 Noteholders, and to counsel for the Ad Hoc Noteholders. (terms are as capitalized in R.I.A.)

6 The Extension Letter authorized the Petitioners to fund solvency deficiencies in the Petitioners' defined benefit pension plans nos. P085400-1 and P085994-1 (the "Defined Benefit Plans") over a seven year period, thereby extending the five year period within which such solvency deficiencies would otherwise have had to be funded pursuant to requirements of the *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 (the *PBSA*). It was therefore of significant benefit to the Petitioners' liquidity. However, the Extension Letter contained a provision that if the Petitioners filed for protection under the *CCAA*, it would be rescinded and all contributions and payments to the Defined Benefit Plans would be considered to be due and owing in accordance with s. 6 of the *PBSA*.

7 At an early stage of these proceedings I was informed that the Petitioners, representatives of the 2016 noteholders, the Superintendent, the D.I.P. lender and the Catalyst Timberwest Retired Salaried Employees Association ("RSEA") as representative of pension beneficiaries of the Defined Benefits Plans were in discussions to address the consequences of the *CCAA* filing. I was not provided with details of those discussions but was informed that one of the topics under discussion was the applicability and implications to this proceeding of the Ontario Court of Appeal decision in *(Re) Indalex Ltd.*, 2011 ONCA 265 (*Indalex)*.

8 On February 7, 2012, I was informed that the parties referred to in the preceding paragraph had reached an agreement to resolve these issues. The essential points of this agreement were that the Petitioners agreed to make additional payments of $550,000 on March 18 and April 15, 2012 to the trustees of the Defined Benefit Plans and the Superintendent waived her right to rescind the Extension Letter.

9 By order dated the same date, on the application of the Petitioners I made an order amending the R.I.A. to give effect to the settlement. I recognized RSEA as authorized representative of pension beneficiaries under Pension Plan no.

10 P085994-1. This is by far the larger of the Deferral Benefit Plans. At that time I proceeded on the basis that these arrangements were acceptable to the secured creditors, including the D.I.P. lenders and the 2016 noteholders, as well as the 2014 noteholders. It was implicit in that agreement that the pension beneficiaries agreed that the D.I.P. lender's security would rank in priority to any rights of the pension beneficiaries, including rights under the *PBSA* and under any fiduciary claim against the Petitioners and its management. Counsel for the applicants on this application attended that hearing by telephone and did not oppose the relief sought or seek to adjourn the application.

11 On February 14, the Petitioners applied for a final order granting the D.I.P. financing a priority charge on the working capital assets of the Petitioners, and granting the D.I.P. lenders' charge priority over any deemed trust under the *PBSA*, any claim in respect of breach of fiduciary duty and any future charge that might arise under ss. 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* (*B.I.A.*).

12 The provision granting priority over any claim for breach of fiduciary duty was sought to address any issue that might arise pursuant to *Indalex.* Counsel for the applicants on this application

attended that hearing and sought an order adjourning the application to February 23, the same date on which this application was heard.

13 I granted the order sought on February 14, 2012 because of the critical importance to the Petitioners of being able to access additional credit under the D.I.P. facility without further delay. Pursuant to paragraph 42 of the R.I.A. the amount available to be drawn under the D.I.P. facility was limited to $40,000,000 until certain condition ~~precedents~~ were met, one such condition being the granting of super priority to the D.I.P. lenders' charge. I was also of the view that the concerns of pension beneficiaries had been addressed to the satisfaction of their representative by the February 7, 2012 Order, which, as I have indicated, was not opposed by any party, including the present applicants.

14 I did, however, permit the applicants to make this application, which was heard on February 23, 2012.

15 Counsel for the applicants began his submission by submitting that I should approach these applications as a hearing *de novo* of the representation issue notwithstanding the February 7, 2012 Order.

16 Counsel then made seven points in support of the applications:

1. The applicants represent a ground up, grass roots group that is representative of a broad cross section of unorganized employees, former employees and persons with pension rights that had heretofore not been represented.
2. The relationship of the applicants and those they represent to the firm of Koskie Minsky is direct in that it is proposed that there be a direct solicitor client relationship between each member of the group and the firm.
3. Koskie Minsky has recognized experience and expertise in representing similar classes of creditors in other *CCAA* proceedings and with respect to pension issues generally.
4. The definition of persons interested in protecting pension rights contained in the February 7, 2012 Order was imprecise and ambiguous.
5. The proposed group for which representation was sought was a particularly vulnerable one.
6. There is a social benefit in having this group represented by counsel and by the efficiency of having one counsel represent it.
7. There was no prejudice to any one, and in particular no prejudice to RSEA, because RSEA could opt out of the representation order and had the resources to retain counsel to represent it.

17 With regard to the nature of this application, I agree that the fact that RSEA was named as representative of pension beneficiaries in the February 7 order should not deprive the applicants of

the ability to argue these applications on the merits. I therefore intend to approach the applications not on the basis that the applicants must show why RSEA should be displaced but on the basis of what order would be in the best interests of the affected group. However, in assessing this question I will have regard to what has transpired to date and in particular to whether RSEA has acted in an effective and efficient manner in representing the interests of pension beneficiaries to date. I also think it appropriate to take into account the additional cost of having a new firm familiarize itself with the circumstances of this proceeding.

18 RSEA's position is that it represents a significant majority of pension beneficiaries, that it has expertise and experience both in financial matters and matters relating to the Petitioners and the British Columbia forest industry, that it has chosen capable counsel and that it has demonstrated the ability to effectively represent the interests of pension beneficiaries. It also submits that the group that the applicants propose to represent is overly broad and that there are actual and potential conflicts within that group that make it inappropriate for them to have a single representative.

19 I do not think it is necessary to deal with each the seven points made by the applicants. In my view the critical issues are whether the orders sought are necessary to ensure fair and adequate representation of the group sought to be represented and whether the applicants had established that they have a mandate to represent the group as defined in the application.

20 The applicants have failed to persuade me that they should be designated as the authorized representative of the groups identified in the notice of application. The most pressing and important issue facing this group at present is the protection of their position as beneficiaries of the Defined Benefit Plans. While it is clear that all salaried employees enrolled in the Defined Benefit Plans have an interest in their future, I am persuaded that it is the current pensioners that have the most pressing and immediate interest in that issue.

21 The material filed on these applications shows that a significant majority of the current pensioners wish to have RSEA continue to represent their interests. The affidavit of Alan Statham states that as of February 21, 2012, 432 members and 4 non members of RSEA had delivered written authorizations to the board of RSEA authorizing it to represent their interests in this proceeding. While I agree that numbers alone should not be determinative of who is best placed to represent a group, the authorizations provided to RSEA do indicate a significant level of support for the actions it has taken to date.

22 I also accept that RSEA has a long history of dealing with pension issues and with Catalyst and its predecessors and that the board of RSEA has substantial experience in the British Columbia forestry sector as well as in financial management.

23 Given the substantial support that the board of RSEA has from its members it is likely that if I were to grant the applications there would be more affected retirees who opt out of the representation than remain within it.

24 In his submissions the applicants' counsel was very critical of the amendments to paragraph 55 of the R.I.A. that were granted in the February 14, 2012 Order granting the charges priority over pension claims. The thrust of the submission was that the priority granted to the charges over deemed trusts and claims for claims for breach of fiduciary duty were extremely onerous and unfair to pension beneficiaries. The implication of this was that RSEA had not adequately or effectively represented the interests of pension beneficiaries in the proceedings leading up to the making of that order.

25 I can see no basis for the criticism or the implication. The priority granted by paragraph 55 must be considered in the context of the overall objective of this proceeding; to permit the Petitioners to remain in business on a stable and sustainable financial foundation for the benefit of all stakeholders including pension beneficiaries. Nothing in the record of these proceedings leads to the conclusion that RSEA has not effectively and prudently represented the interests of pension beneficiaries.

26 I have also been persuaded that the governance structure of RSEA and the arrangement whereby its counsel has a single instructing client is a more efficient and effective means of representation of pension beneficiaries than the ad hoc committee and direct individual representation model proposed by the applicants.

27 I am satisfied that both law firms are well qualified to act in this matter. Koskie Minsky is well known for its expertise in *CCAA* and pension matters. However Hunter Litigation is well known to this Court as respected counsel with considerable experience in matters involving the British Columbia forest industry. I also note that while the applicants seek an order appointing Koskie Minsky as representative counsel, the existing order leaves the choice of counsel in RSEA's hands. Generally, I think it preferable to leave the choice of counsel up to a representative group rather than having the Court impose one. RSEA's demonstrated ability to retain and instruct counsel of its choice is a factor that favours continuing its representation of pension beneficiaries.

28 I am however satisfied the group which RSEA was authorized to represent was not adequately defined or inclusive of all pension beneficiaries. The group for which RSEA was entitled to make representations and be the authorized representative of in the February 7, 2012 Order was identified as "pension beneficiaries of the Company's Salaried Plan."

29 In his submissions, counsel for RSEA confirmed that he did not purport to represent current salaried employees of the Petitioners who have rights under the Defined Benefit Plans.

30 I agree that the group that RSEA represents does not capture all those persons who have a direct interest in the Defined Benefit Plans. It does not include current employees who have vested rights but are not yet receiving benefits from the plan. There are former salaried employees who have vested deferred rights under the Defined Benefit Plans who are not represented by RSEA.

31 In the course of argument it also emerged that the descriptions of the various beneficiaries

used by both parties were not consistent with the definitions contained in the *PBSA.* The *PBSA* defines such beneficiaries as follows:

> **"member"** means, in relation to a pension plan that has not been terminated, an employee, and in the case of a multi-employer plan includes a former employee,
>
> (a) who has made contributions to the plan or on whose behalf an employer was required by the plan to make contributions, and
> (b) who has not terminated membership or begun receiving a pension;
>
> **"former member"** means, in relation to a pension plan, an employee or former employee
>
> (a) whose membership has been terminated,
> (b) who has begun receiving a pension, or
> (c) whose plan has been terminated,
>
> and who retains a present or future entitlement to receive a benefit under the plan.

32 It can be seen from these definitions that RSEA considers that it represents plan former members but not plan members. Counsel for the applicants correctly points out that plan members have a real and substantial interest in the Defined Benefit Plans but do not have any authorized representative in these proceedings. He submits that it is unjust that they lack representation.

33 I can see the force of the applicants' counsel's submission in this regard. However I must consider the application that is actually before me. That application seeks to displace RSEA as the authorized representative of pension beneficiaries which under the *PBSA* definitions include plan former members. It would not be appropriate for me to make a representation order for a smaller class than was applied for.

34 When I was preparing these reasons, I had intended to indicate that I would consider a renewed application from the applicants to represent plan members. However, events have overtaken the necessity for such an application. On March 8, 2012, I made an order authorizing the Petitioners to make payments to the Catalyst Salaried Employees and Pensioners Group on account of their legal costs in *CCAA* matters in this proceeding. That order makes it unnecessary for me to consider a further application for representation of plan members.

35 I am persuaded, however, by the submissions made by counsel for the Superintendent of

Pensions that my order appointing RSEA should be amended to make it clear what group it is in fact representing. The definition of the group proposed by counsel is as follows:

> Plan former members, persons entitled to or in receipt of survivor benefits and designated beneficiaries of former members.

36 I accept that this is an accurate description of the group represented by RSEA, and is expressed in terms consistent with the definitions contained in the *PBSA*. I consider that I have the jurisdiction under s. 11 of the *CCAA* to make a remedial order clarifying the group that RSEA is authorized to represent. My order of February 7, 2012 is varied accordingly to substitute the above description for the words pension beneficiaries in paragraph 84(a) of the R.I.A.

37 In all other respects the application is dismissed.

R.J. SEWELL J.

cp/e/qlrds/qllmr/qlcas/qlhcs

TAB 9

Case Name:

Canwest Publishing Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.

[2010] O.J. No. 943

2010 ONSC 1328

65 C.B.R. (5th) 152

2010 CarswellOnt 1344

185 A.C.W.S. (3d) 865

Court File No. CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

March 5, 2010.

(28 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Administrative officials and appointees -- Appointment -- When required or justified -- Remuneration -- Motion by proposed representatives for appointment as representatives of former salaried employees and retirees of applicant, appointment of law firm and order applicant pay fees allowed -- Applicant granted protection under CCAA without requirement to pay employee and retirement benefit plans -- Former salaried employees and retirees had little means of pursuing claim without representation and could not afford counsel -- While applicant's Support Agreement did not permit payment of legal fees, agreement could not oust jurisdiction of court -- Staged payments starting at $25,000 ordered, to be paid prospectively and not for investigations of or claims against directors.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Motion by proposed representatives for appointment as representatives of former salaried employees and retirees of applicant, appointment of law firm and order applicant pay fees allowed -- Applicant granted protection under CCAA without requirement to pay employee and retirement benefit plans -- Former salaried employees and retirees had little means of pursuing claim without representation and could not afford counsel -- While applicant's Support Agreement did not permit payment of legal fees, agreement could not oust jurisdiction of court -- Staged payments starting at $25,000 ordered, to be paid prospectively and not for investigations of or claims against directors.

Statutes, Regulations and Rules Cited:

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

Income Tax Act, R.S.O. 1990, c. I.2,

Counsel:

Lyndon Barnes and Alex Cobb for the Canwest LP Entities.

Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

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

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

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

Anthony F. Dale for CAW-Canada.

Deborah McPhail for the Financial Services Commission of Ontario.

REASONS FOR DECISION

S.E. PEPALL J.:--

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

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

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

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

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

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

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

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

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

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

Issues

14 The issues on this motion are as follows:

(1) Should the Representatives be appointed?
(2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?
(3) If so, should the request for funding be granted?

Positions of Parties

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

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

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

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

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

those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

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

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

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

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

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

24 In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits.

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

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

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

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

28 Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to

TAB 10

COURT FILE NO.: 09-8503-00CL
DATE: 20091210

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 in the matter of Hollinger Canadian Publishing Holdings Co.

Applicant

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

Derek J. Bell and Raj S. Sahni, for the applicant
Heather Meredith, for Ernst & Young Inc.
Andrew Hatnay and Andrew McKinnon, proposed representative counsel

HEARD: December 10, 2009

Campbell J.

[1] This is an Application for an initial order under the CCAA in somewhat unusual circumstances.

[2] At one level the situation of the Applicant is complicated being one part of the former Hollinger empire. At the most basic level however matters are much simpler.

[3] The assets essentially represent cash or cash equivalents of approximately $33 million. The creditors are members of funded and unfunded pension plans of the Applicant, the beneficiaries being former retired employees. In addition, some employees are entitled to benefits for health and other benefits. The Applicant is a subsidiary of the former Sun-Times Media Group, in Chapter 11 proceedings in the U.S. and now in liquidation and had been managed by Sun-Times, which is no longer in a position to do so.

[4] I am satisfied that in the circumstances that this is an appropriate application of the CCAA powers. The company is insolvent with debts in excess of $5 million. I am satisfied that the aim of the restructuring is essentially to preserve pension and other retirement benefits for former employees.

[5] All of the proposals are consistent with that goal and the scheme of administration is intended to provide seamless, low cost, reliable continuance of services and benefits.

[6] I am satisfied that the proposed plan including the financial arrangements are appropriate in the circumstances.

[7] The proposed representative counsel and monitors appointment will assure governance. The draft initial order filed which I have signed will, I am satisfied, provide the necessary protection to all parties including potential claimants.

Campbell J.

Released: December 10, 2009

COURT FILE NO.: 09-8503-00CL
DATE: 20091210

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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 in the matter of Hollinger Canadian Publishing Holdings Co

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REASONS FOR JUDGMENT

Campbell J.

Released: December 10, 2009

TAB 11

Case Name:

Hollinger Canadian Publishing Holdings Co. (Re)

IN THE MATTER OF the Companies Creditors' Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER of a Plan of Compromise or Arrangement in the Matter of Hollinger Canadian Publishing Holdings Co., Applicant
APPLICATION UNDER the Companies Creditors' Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2010] O.J. No. 3494

2010 ONSC 4269

Court File No. 09-8503-00CL

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: July 27, 2010.
Judgment: July 27, 2010.

(11 paras.)

Counsel:

Derek J. Bell, for Hollinger Canadian Publishing Holdings Co.

Ryan Stabile, for the Monitor.

Andrew Hatnay, OPEB Representative Counsel.

Ian Dick and Terra Klinck, for PostMedia Network Inc.

Alena Thouin, for Financial Services Commission of Ontario.

Hugh O'Reilly, for Communication Workers of America / Syndicat des communications

d'Amérique ("CWA/SCA").

ENDORSEMENT
(Transcript of Handwritten Decision)

1 **C.L. CAMPBELL J.**:-- The motion by the Applicant, Hollinger Canadian Publishing Holdings Co. ("HCPH") for directions in respect of outstanding pension and other claim issues was supported by the Monitor and either consented to or unopposed by counsel for various interested parties.

2 I am satisfied on the material and submissions that an extension of the stay in place is appropriate in the circumstances.

3 The issues regarding pension entitlement as well as other benefit claims of the Hollinger Applicant are indeed complex and will require some time and effort to permit maximum recovery to those entitled.

4 As noted in the Monitor's Report to the Court, there are more than 2300 responses to the survey sent to former employees of HCPH and predecessor corporations with respect to their pensions and benefits.

5 I am satisfied, given the complexity of issues, that the role of Mr. Hatnay as representative counsel be expanded.

6 Given the fact that there is significant overlap between those advancing pension and benefit claims, both expedition and efficiency will be achieved with his expanded role.

7 Mr. O'Reilly appeared for one of the unions, CWA/SCA. I am satisfied based on submissions of counsel that his continued involvement should not lead to duplication of effort and that his participation will assist other counsel.

8 Mr. Dick appeared for PostMedia Network Inc., the purchaser of certain CanWest assets including pension obligations acquired by CanWest from Hollinger. I accept that it will take a little time for him to be brought up to speed and to advise the Court of his position.

9 As I advised counsel during submissions, the Court is mindful of the need to bring certainty to the position of pensioners in a timely fashion.

10 I am satisfied that counsel and their clients are mindful of this obligation and will do their best to expedite matters.

11 The draft order filed shall issue as signed.

C.L. CAMPBELL J.

cp/e/qllxr/qljxr

TAB 12

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-041305-117

DATE : February 17, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

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

HOMBURG INVEST INC.
HOMBURG SHARECO INC.
CHURCHILL ESTATES DEVELOPMENT LTD
INVERNESS ESTATES DEVELOPMENT LTD
CP DEVELOPMENT LTD

Debtors / Petitioners

And

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP
HOMCO REALTY FUND (88) LIMITED PARTNERSHIP
HOMCO REALTY FUND (89) LIMITED PARTNERSHIP
HOMCO REALTY FUND (92) LIMITED PARTNERSHIP
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HOMCO REALTY FUND (122) LIMITED PARTNERSHIP
HOMCO REALTY FUND (142) LIMITED PARTNERSHIP
HOMCO REALTY FUND (199) LIMITED PARTNERSHIP

Mis en cause

And

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

Monitor

And

STICHTING HOMBURG BONDS
STICHTING HOMBURG CAPITAL SECURITIES
Trustees

And

TABERNA EUROPE CDO I PLC
TABERNA EUROPE CDO II PLC
TABERNA PREFERRED FUNDIND VIII, LTD
TABERNA PREFERRED FUNDIND VI, LTD
Contesting Parties

REASONS FOR JUDGMENT

JS 1319

INTRODUCTION

[1] The amended motion of Stichting Homburg Bonds and Stichting Homburg Capital Securities (collectively « Stichting ») for the payment of fees of professional advisors was heard on February 13, 2012 at which time the Court indicated that the motion would be granted in part with an order and reasons to follow. These are the reasons for the order which issued on February 15, 2012 a copy of which is annexed hereto.

[2] On September 9, 2011, the Debtor filed and obtained an initial stay order (« Initial Order ») pursuant to sections 4, 5 and 11 of the Companies' Creditors Arrangement Act (« CCAA »)[1].

[3] The stay granted under the Initial Order has been extended several times and the most recent order of this Court extends the protection under the CCAA to March 16, 2012. The Honourable Mr. Justice Louis J. Gouin, j.s.c. is charged with the management of the case but due to a conflict of interest with the attorneys representing the Contesting Parties, the undersigned presided over the hearing of the motion referred to above.

[4] Stichting seeks an order of this Court providing for the advance by the Debtor of the reasonable fees of the trustees of Stichting as well as the attorneys and financial advisors engaged by them to represent Stichting in the matter of the present CCAA filing. The request is limited to fees incurred since December 3,

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[1] R.S.C., (1985), c. C-36.

2011. The advances of these fees will be set-off against payments to be made to Stichting under an eventual plan of arrangement.

[5] One creditor or group of creditors, Taberna Europe CDO 1 PLC and related entities (« Contesting Parties ») contested the motion although one of the main thrusts of such contestation was settled by the parties before the hearing and reflected in the drafting of the proposed order, as will be set forth in more detail herein below.

[6] Both the Debtor and the Monitor consented to the motion.

[7] The matter was heard on the basis of the affidavit supporting the motion and the documentary evidence filed by Stichting. The representative of the Monitor, Mr. Pierre Laporte, C.A., testified briefly before the undersigned.

FACTS

[8] Petitioners are two entities created under the laws of the Netherlands who act as trustees under three trust indentures which govern the issuance of three series of bonds : (i) corporate bonds, (ii) mortgage bonds and, (iii) capital securities.

[9] The indentures constitute Stichting as the trustee thereunder as the duly authorized representatives of the holders of the debt or bonds with the power to declare default, claim payment and agree to extensions of periods of payment, amongst other things.

[10] Most significantly for present purposes, the trustees also have the right to engage advisors including lawyers and accountants.

[11] The trustees have engaged Canadian litigation and corporate counsel, Dutch attorneys and a Canadian financial advisor.

[12] The trust indentures provide that the trustees' remuneration and that of its professional advisers, including legal fees, are payable by the Debtors.

POSITION OF THE CONTESTING PARTY

[13] The crux of the contestation by the Contesting Parties is that the holders of the corporate securities have « equity claims » and as such rank subordinate

to all other creditors[2] such that it is extremely unlikely that they will receive the payment of any dividend on their claims. This is significant since the motion is predicated on seeking an advance for purposes of paying professional fees, which advance will ultimately be reimbursed from the proceeds of a distribution by the Debtor.

[14] The Contesting Parties also took the position before the undersigned that notwithstanding the wording of the trust indentures, as a matter of Quebec law, the payment of professional or at least legal fees could not form part of the claims of any of the bondholders in the CCAA proceedings. No claims process has as yet been put in place and in the opinion of this Court, it would be at best, premature to deal with this issue at the present time.

DISCUSSION

[15] The Monitor indicated and it is common ground that there is presently or will be shortly, cash available to pay professional fees. The Debtor has or will shortly receive substantial funds following the purchase of its holdings in the Canmarc REIT. In any event, with the consent of all parties the order issued reflects that fees can only be paid out of available cash. If the Debtor was put in the position to borrow in order to advance fees to the bondholders, the Court would have been reticent to grant the Motion.

[16] There are approximately 9500 bondholders under the three indentures. They are mainly individuals (as opposed to corporations), resident in Holland. Each of the bonds is in a relatively small amount. The largest is 2,340,000 Euros; the average is 31,999 Euros.

[17] Despite the small individual amounts of the bonds, in the aggregate, this group constitutes the largest single creditor body in the present CCAA filing and may even have sufficient claims in dollars to carry an eventual vote on an arrangement.

[18] In the circumstances described above there is a combination of geographic, linguistic and financial barriers impeding the bondholders from proper representation by the appropriate professionals in this CCAA file. Though nothing might stop individual bondholders from engaging their own counsel, this is clearly unrealistic for the most part, in the circumstances. Without funding this important group of creditors will be denied appropriate representation.

[19] Most significantly, the uncontradicted proof in the record before the undersigned is that there will in all probability be a significant distribution to the

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[2] ss. 19 and 2 CCAA and s. 140.1 Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

bondholders. The possible exception of course being the holders of the corporate securities who in the submission of the Contesting Parties hold equity claims which would be subordinated to all other claims.

[20] As stated above the request for the advance of fees is premised on a reimbursement. The hesitation of the Court and the preoccupation of the Contesting Parties was that in the event there is no distribution to the holders of the corporate securities then there would be no practical means to seek reimbursement of the advance made to them for fees. This concern has been addressed by the drafting of the order which provides that reimbursement of any fees advanced is to be made by way of set-off (or compensation) against the aggregate payment to the three classes of bondholders. Accordingly should the holders of corporate securities not receive a distribution their share of the advance for fees would be reimbursed to the Debtor by the holders of the other two classes of debt.

[21] The foregoing should not be misinterpreted. The Court makes no determination or finding at this time as to whether the rights under the corporate securities are equity claims. The Contesting Parties or any other party may seek to make such argument at the appropriate time.

[22] The advance of fees sought herein is not strictly provided on a literal reading of the CCAA. Section 11.52(1)(c) provides for the possibility of granting a security or charge over the assets of the Debtor to secure the payment of fees. The rationale is to allow the effective participation of a class of creditors that might otherwise be denied the possibility of representation when such class of creditors is a significant stakeholder[3].

[23] It appears to the Court that the rationale for the payment here is the same as the underpinning of Section 11.52(1)(c). If the Court has the power to grant a charge to secure payment by the Debtor, surely the general jurisdiction under Section 11 allows for an order of payment of such amounts. This is *a fortiori* when the payments to be made will be advances subject to reimbursement.

[24] As stated, the circumstances described above justify the making of such an advance. The group of creditors is significant, if not the most significant group of creditors. Because of the factors enumerated above the group requires professional representation and it is impractical to canvass 9,500 members to contribute to a fund for the payment of the professional fees.

[25] The jurisdiction to order the payment of fees in such circumstances has been recognized by the courts. In *Nortel*[4], the Court ordered the CCAA Debtor to pay the fees of the lawyer of three thousand five hundred employees. In the

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3 Bill C-55 : Industry Canada, clause by clause briefing book.

4 *Re Nortel Networks Corp.*, (2009) 53 C.B.R. (5th) 196 (Ont. S.C.J.).

ABCP Commercial Paper case[5], the CCAA Debtor was ordered to pay the fees of counsel to retail purchasers of asset-backed commercial paper. Equally, in *Edgeworth*[6], the Debtor was ordered to pay counsel representing four thousand Asian investors.

[26] The undersigned is aware of the decision of the Hon. Mr. Justice Clément Gascon, j.s.c. in the matter of *Mecachrome*[7] where he refused to allow security for the payment of the legal fees of the board of directors, the banking syndicate and certain other groups of creditors. Mr. Justice Gascon felt that no adequate explanation had been given to justify such treatment and most significantly nothing was demonstrated to him that would indicate that the participation of these groups in the CCAA process would be jeopardized by the failure to grant them the benefit of a charge for the payment of legal fees[8]. In the present case, it has been demonstrated to the undersigned that because of the large number of relatively small denomination of bonds held by foreign individuals, the advances for the fees of professionals appointed to represent such bondholders is essential to their effective participation in the present CCAA process.

CONCLUSION

[27] For all of the foregoing reasons the motion was granted and the attached order was issued.

[28] Costs were not sought and the nature of the contestation by way more of intervention does not merit the awarding of costs against the Contesting Parties.

MARK SCHRAGER, j.s.c.

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5 *Re Metcalfe & Mansfield*, n° 08-CL-7440, Order, Re Appointment of Representative Counsel in ABCP, (Ont. S.C.J.), 15 avril 2008, j. Campbell.

6 *Re Edgeworth*, n° CV-11-9409-00CL, Initial Order, (Ont. S.C.J.), 10 novembre 2011, j. Campbell.

7 *Re Mecachrome International Inc.*, C.S. Montréal, n° 500-11-035041-082, 13 janvier 2009, j. Gascon.

8 *Re Mecachrome*, *id.*, par. 79 à 81.

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SUPERIOR COURT
(Commercial Division)

C A N A D A
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-11-041305-117

DATE: February 15, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

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

HOMBURG INVEST INC.
HOMBURG SHARECO INC.
CHURCHILL ESTATES DEVELOPMENT LTD.
INVERNESS ESTATES DEVELOPMENT LTD.
CP DEVELOPMENT LTD.
Debtors

-and-

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP
HOMCO REALTY FUND (88) LIMITED PARTNERSHIP
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HOMCO REALTY FUND (122) LIMITED PARTNERSHIP
HOMCO REALTY FUND (142) LIMITED PARTNERSHIP
HOMCO REALTY FUND (199) LIMITED PARTNERSHIP
Mis-en-cause

-and-

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.
Monitor

-and-

STICHTING HOMBURG BONDS
STICHTING HOMBURG CAPITAL SECURITIES
Trustees

ORDER ON THE TRUSTEES' AMENDED MOTION FOR THE PAYMENT OF FEES, DISBURSEMENTS AND EXPENSES

FURTHER to the court hearing held on February 13, 2012 and the representations of counsel to Stichting Homburg Bonds and Stichting Homburg Capital Securities (the "**Trustees**") as well as counsel to other interested parties;

CONSIDERING the Trustees' *Amended Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief* (the "**Motion**");

CONSIDERING the Initial Order issued by the Court on September 9, 2011 (the "**Initial Order**"), as extended and amended by the First Extension Order issued on October 7, 2011 and the Second Extension Order issued on December 8, 2011;

CONSIDERING the:

a. Trust Indenture made as of May 31, 2006, between Homburg Invest Inc. ("**HII**") and Stichting Homburg Bonds, as supplemented by several Supplemental Indentures (the "**Corporate Bonds Indenture R-1**"), pursuant to which four series of corporate bonds were issued (the "**Corporate Bonds**");

b. Trust Indenture made as of December 15, 2002, between Homburg ShareCo Inc. and Homburg Stichting Homburg Mortgage Bond, as supplemented by several Supplemental Indentures (the "**Mortgage Bonds Indenture R-2**"), pursuant to which four series of mortgage bonds were issued (the "**Mortgage Bonds**");

c. Trust Indenture made as of February 28, 2009, between HII and Stichting Homburg Capital Securities (the "**Capital Securities Indenture R-3**"), pursuant to which capital debt securities were issued (the "**Capital Securities**");

(the Corporate Bonds, Mortgage Bonds and the Capital Securities, collectively the "**Securities**");

CONSIDERING that the Trustees have retained the services of:

a. Mr. Henk Knuvers, Ms. Marian Hogeslag, Mr. Wouter de Jong, Mr. Hendrik Stadman Robaard and Mr. Karel de Vries, to act as directors of each Trustee;

b. Stikeman Elliott LLP ("**Stikeman**") and Cox & Palmer ("**C&P**"), as Canadian counsel, and Van Doorne N.V. ("**Van Doorne**"), as Dutch counsel, in order to assist in connection with these CCAA proceedings and advise the Trustees as to their duties, rights and remedies, as well as, in the case of Stikeman, to represent the Trustees before this Court;

c. PricewaterhouseCoopers Inc. ("**PwC**"), through Stikeman, to act as financial advisors in connection with these CCAA proceedings and assist the Trustees in reviewing financial data, evaluating available options and preparing for discussions and negotiations with the stakeholders involved in these proceedings;

(collectively, and together with any other director, legal, financial, or other advisors of the Trustees, the "**Trustees' Advisors**");

CONSIDERING the 5th Report to the Court submitted by Samson Bélair/Deloitte & Touche Inc., in its capacity as Monitor; and

CONSIDERING the powers granted to this Court under the *Companies' Creditors Arrangement Act* and more specifically section 11 thereof.

FOR THESE REASONS, THE COURT:

[1] **GRANTS** the Trustees' Motion, in part;

[2] **ORDERS** that the Petitioners shall advance from the available cash of the Debtors, on the same payment terms as the fees and disbursements payable by the Petitioners pursuant to paragraph [41] of the Initial Order dated September 9, 2011 as amended and/or restated, amounts equivalent to the reasonable fees and expenses incurred as and from December 3rd, 2011 in connection with the CCAA proceedings and the Restructuring by the Trustees' Advisors, the aggregate of which advances (the "**Stichting Advances**") up to the maximum amount to be distributed or paid (i) shall become due and payable to the Debtors immediately prior to any distribution or payment, including pursuant to a sale of assets, liquidation or realization of security or otherwise (each a "**Distribution Event**"), to be made to or for the benefit of the holders of the Securities, as the case may be, (ii) shall be set-off/compensated against the aggregate of any distribution to be made to or for the benefit of the holders of Securities pursuant to any such Distribution Event and (iii) shall be allocated, as between the holders of Securities, on a pro-rata basis, based on the amount, if any, to be distributed or paid in respect of each of the Corporate Bonds, Mortgage Bonds and Capital Securities as a percentage of the total amount to be distributed in respect of all Securities.

THE WHOLE WITHOUT COSTS.

Mark Schrager

MARK SCHRAGER, J.S.C.

TAB 13

Case Name:

Target Canada Co. (Re)

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

[2015] O.J. No. 1205

2015 ONSC 1028

2015 CarswellOnt 3274

23 C.B.R. (6th) 303

252 A.C.W.S. (3d) 11

Court File No.: CV-15-10832-00CL

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

Heard: February 11, 2015.
Judgment: February 18, 2015.

(41 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Directions -- Motion by the Pharmacy Franchisee Association

of Canada for a direction that the disclaimer of the Franchise Agreements be set aside dismissed -- In January 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements, seeking to shut down the pharmacies in Target Canada store locations within 30 days -- Setting aside the disclaimer might provide limited assistance to the pharmacists, but it would come at the expense of other creditors, and that was not a desirable outcome.

Commercial law -- Franchising -- Franchise agreement -- Motion by the Pharmacy Franchisee Association of Canada for a direction that the disclaimer of the Franchise Agreements be set aside dismissed -- In January 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements, seeking to shut down the pharmacies in Target Canada store locations within 30 days -- Setting aside the disclaimer might provide limited assistance to the pharmacists, but it would come at the expense of other creditors, and that was not a desirable outcome.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 32(2), s. 32(4)

Counsel:

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

Jay Swartz, for the Target Corporation.

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

Susan Philpott, Employee Representative Counsel for employees of the Applicants.

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

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

Andrew Hodhod, for Bell Canada.

Harvey Chaiton, for the Directors and Officers.

ENDORSEMENT

1 G.B. MORAWETZ R.S.J.:-- 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 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 ancilliary 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.

G.B. MORAWETZ R.S.J.

TAB 14

Case Name:

Muscletech Research and Development Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended AND IN THE MATTER OF Muscletech Research and Development Inc. and those entities listed on Schedule "A" hereto

[2006] O.J. No. 3300

25 C.B.R. (5th) 218

33 C.P.C. (6th) 131

150 A.C.W.S. (3d) 534

[2006] O.T.C. 737

2006 CarswellOnt 4929

2006 CanLII 27997

Court File No. 06-CL-6241

Ontario Superior Court of Justice
Commercial List

R.E. Mesbur J.

Heard: July 31, 2006.
Judgment: August 16, 2006.

(45 paras.)

[Editor's note: Supplementary reasons for judgment were released September 13, 2006. See [2006] O.J. No. 5305.]

Counsel:

Fred Myers and David Bish for the applicants

Kevin P. McElcheran for the "Representative Plaintiffs"

James H. Grout and Kyla Mahar for Krys Osborne, on behalf of herself and all other similarly situated California consumers, (the "California Consumers")

Derrick Tay for Iovate Health & Sciences, the DIP Lender

Jeff Carhart for the Ad Hoc Tort Claimants Committee

Natasha MacParland for the Monitor, RSM Richter Inc.

[Editor's note: A corrected version was released by the Court September 13, 2006; the corrections have been made to the text and the corrigendum is appended to this document.]

ENDORSEMENT

R.E. MESBUR J.:--

Nature of the motions:

1 These motions raise the question of whether plaintiffs in uncertified class actions may file claims in the claims process in this CCAA proceeding on behalf of themselves and all other similarly situated plaintiffs. The applicant, the Monitor, the DIP lender and the Ad Hoc Tort Claimants Committee all take the position that claims filed in this manner are a nullity, and should be forever barred.

2 Mr. McElcheran, on behalf of four plaintiffs in four yet-uncertified US class actions, and Mr. Grout and Ms. Mahar for a plaintiff in a yet-uncertified class action in California all are of the view that there is jurisdiction under the CCAA to permit such representative claims, and either the claims should be permitted, or alternatively, the stay of proceedings imposed by the CCAA should be lifted to allow them to proceed to certification motions in the United States for their respective actions. I will refer to Mr. McElcheran's clients as the "Representative Plaintiffs", and Mr. Grout's clients as the "California Consumers".

Some history:

3 The applicants, whom I will refer to collectively as "Muscletech", are comprised of the applicant, Muscletech, and its various subsidiaries and related companies listed in Schedule "A". Muscletech is a Canadian company. Historically, it was in the business of the manufacture and sale of dietary supplements. Some of these supplements contained the chemical ephedra, while others contained what have been referred to as prohormones. Muscletech was not alone in selling supplements containing these compounds. A number of American companies did so as well. Because of problems surrounding the compounds, Muscletech's products have ceased to contain them since 2002. Nevertheless, there was significant litigation, particularly in various states in the United States, brought by the consumers of these products, against both Muscletech and other companies.

4 The litigation is essentially of two kinds. The ephedra litigation primarily concerns those consumers of products containing ephedra who allege they have suffered physical damages as a result of using these products. The parties here refer to that litigation as the Products Liability litigation. The prohormone litigation has been brought by consumers of products containing prohormone

who allege either that the product failed to produce the promised increased muscle mass, or alternatively, produced the promised increased muscle mass, but in doing so, must have contained a controlled substance, namely anabolic steroids. In the first instance, the prohormone consumers complain of being the victims of false and misleading advertising. In the second, they complain of being illegally sold a controlled substance.

5 For the purposes of this motion, there are several of these lawsuits that are important. First, there is the group of four yet to be certified class actions relating to prohormone claims. These have been described as the Hannon Claim, the Hochberg Claim, the Rodriguez Claim and the Guzman Claim, or collectively, the Representative Plaintiffs' Claims.

6 The Hannon Claim was commenced in the State of Florida. The Hochberg and Rodriguez claims were commenced in New York State, and the Guzman claim was commenced in California. Using the multi-district litigation (MDL) provisions available in the United States, all four proceedings have been moved to the United States District Court for the Southern District of New York (the "U.S. District Court") in New York City, to be managed, along with all the other related ephedra litigation by Justice Rakoff of that court. As I have said, I will refer to these four claims as the "Representative Plaintiffs' Claims", and to the plaintiffs in them as the "Representative Plaintiffs".

7 In addition to the Representative Plaintiffs' Claims, there is a further yet-to-be-certified class action in the United States that is germane to this motion. It has been described as the California Consumers' Claim. Unlike the Representative Plaintiffs' Claims, the California Consumers' Claim is an ephedra claim, seeking damages for personal injuries. I refer to this action as the "California Consumers' Claim", and its plaintiffs as the "California Consumers". The California Consumers participated on the motion simply to support the Representative Plaintiffs' position; they seek no relief themselves.

8 In January 2006, Muscletech sought and was granted CCAA protection in this court. The initial stay has been extended throughout the proceedings to August 11, 2006.[1] As the applicants' factum puts it, seeking CCAA protection was done "principally as a means of achieving a global resolution of the large number of product liability and other lawsuits" against the applicants and others. These lawsuits relate to the products that Muscletech and others sold.

9 Once the initial order was granted, the Monitor commenced ancillary proceedings in the USA under Chapter 15 of the U.S. Bankruptcy Code. These proceedings are before the U.S. District Court as well. As a result of these ancillary proceedings, there is a similar stay in the U.S.

10 At the same time, the Monitor also applied for a Temporary Restraining Order and Preliminary Injunction (TRO/PI Application) in the U.S. District Court, to prohibit anyone commencing or continuing any products liability actions. The TRO/PI application was granted. That application is referred to as the "Adversary Proceeding" under Chapter 15 of the U.S. Bankruptcy Code.

11 On February 8, 2006, an Ad Hoc committee of products liability claimants sought and was granted representative status in this CCAA proceeding. On March 3, 2006, this court made a Call for Claims order. American counsel for both the Representative Plaintiffs and the California Consumers were served with the motion and draft order in relation to the Call for Claims order, just as they have been served throughout these CCAA proceedings. Although many interested parties made submissions concerning the terms of the order both before the hearing and at the hearing itself, counsel for the Representative Plaintiffs and California Consumers did not. They took no steps, as

did the Ad Hoc Committee, to obtain representative status, or direction as to how they might put forward their claims.

12 As I have mentioned, Muscletech sought and obtained an order in the USA bankruptcy court, recognizing and enforcing the Ontario CCAA order, including its automatic stay. The Call for Claims order was similarly recognized and approved by Judge Rakoff in the U.S. District Court on March 22, 2006. Judge Rakoff is managing all the ephedra litigation, as well as the motions to recognize and enforce orders made here under these CCAA proceedings, and the Adversary Proceeding as well.

13 The Call for Claims order established a process for calling for what were defined as both "claims" and "product liability claims". The object of the order was to identify everyone with any kind of claim against Muscletech, its affiliates, and some defined Third Parties. The process envisions "a person" completing a proof of claim, with particulars of the claim, and sending it to the Monitor.[2] In this way, the Monitor could identify what Mr. Tay for the DIP lender has called the "total universe of potential claims". The Call for Claims order does not set the process for deciding on the validity of any of the claims. Its purpose is simply to identify them.

14 The Call for Claims order set out comprehensive definitions of what constitutes both types of claims, as well as an elaborate method of giving broad notice to anyone who might have a claim. In this case, the order required the Monitor to send a package containing a proof of claim and other necessary information to all known creditors of Muscletech. It also required that the Monitor file these documents and the Call for Claims order electronically on the U.S. District Court's website in all three pieces of litigation there. These are described in the Call for Claims order as the "U.S. Chapter 15 Proceedings", the "U.S. Chapter 15 Adversary Proceedings" and the "U.S. MDL Proceedings". The order required the Monitor to publish notices to creditors in the national edition of the *Globe and Mail* newspaper, the *Wall Street Journal,* and *USA Today.* The Monitor was also required to post copies of the documents and Call for Claims order on the Monitor's website. The Monitor did all these things.

15 All proofs of claim were to be filed by May 8, 2006. This date was defined in the order as the Claims Bar date. Any creditor who has not filed a proof of claim by that date is forever barred from making or enforcing any claim, and is not entitled to participate as a creditor in the CCAA proceedings, or to vote at any meeting of creditors. Prior to the Claims Bar date, the members of the Ad Hoc Tort Claimants Committee filed individual proofs of claim. The California Consumers also filed individual proofs of claim.

16 On May 8, the Representative Plaintiffs, (that is, Hannon, Hochberg, Rodriguez and Guzman), filed proofs of claim, claiming to do so on their own behalves, and "on behalf of all other similarly situated persons". Unlike the Representative Plaintiffs, the California Consumers filed individual proofs of claim. Even though they have done so, they support the Representative Plaintiffs' position on this motion.

17 The monitor received some 33 ephedra claims, both from the California Consumers individually, and from others, including the members of the Ad Hoc Tort Committee. The only prohormone claims the monitor has received are from the Representative Plaintiffs. No other individual claims relating to prohormones have been filed.

18 After the claims bar date, this court made a Claims Resolution order. That order, dated June 8, 2006, provided, among other things, for a method for the monitor to review proofs of claim, ac-

cept or reject them, and for a claims resolution process for resolving disputed claims. The Claims Resolution order is subject to an earlier Mediation Order, which provided for mediation of ephedra claims. Of the 33 ephedra claims filed, 30 have already been settled through the mediation process. The mediation process is part of a larger mediation process in New York, in the context of the much broader ephedra litigation that Judge Rakoff is managing. This litigation is referred to as the MDL, or multi-district litigation, in the U.S.

19 No one has appealed the Call for Claims order. No one moved to vary its terms, prior to the claims bar date. No one has appealed the Claims Resolution order. None of the Representative Plaintiffs have taken any steps in the United States (where their class actions are pending), to lift the stay of proceedings there to permit their actions to proceed to certification.

The parties and their positions:

20 On these motions the applicants take the position that the proofs of claims by the Representative Plaintiffs are a nullity, since there is no provision in either the CCAA or any of the court orders that permit these claims to be made either as representative claims, or class action claims. They say that to allow these claims would unreasonably delay the CCAA process, and would undermine the process that has already been established, which all stakeholders rely on.

21 The DIP lender supports the applicants' position. The DIP lender takes the position that if the proposed claims were allowed, there is a potential for significant prejudice to the DIP lender who is funding the process, and will ultimately fund any plan of compromise. The DIP lender has already settled with a significant number of other tort claimants (albeit ephedra, as opposed to pro-hormone claimants). The DIP lender says it reached its settlement on the basis of a particular "known universe" of claims. It suggests that allowing these indeterminate claims, and claimants, at this late date, would prejudice its position.

22 The Ad Hoc Committee of Tort Claimants supports the applicants as well. The Committee takes the position that even before the Call for Claims order was made, it was able to obtain an order allowing it to participate as a Committee in the CCAA process and obtain what is called representative status in the proceedings. It says that if the Ad Hoc Committee was able to do so within the CCAA process, these other proposed claimants could, and should have done the same. Since the other proposed claimants did not, and took no steps to appeal the Call for Claims order, and indeed, declined to participate in the motion in which its terms were set, they should be barred from doing so at this late date.

23 The Monitor also supports the applicants' position, saying the CCAA process gave the Representative Plaintiffs adequate opportunity to file individual claims. The forms were readily accessible in plain English. The Products Liability claimants, that is, the members of the Ad Hoc Committee, were able to put individual claims forward in the CCAA process and the Representative Plaintiffs had the same opportunity to participate in exactly the same way. Lastly, the Monitor says that the CCAA process is far more economic than the lengthy process of certification of class actions, particularly in the USA, where certification would have to take place. To allow this new process to be overlaid on the existing CCAA process would be cumbersome, excessively expensive and time consuming.

24 All those opposing the Representative Plaintiffs' Claims and California Consumers suggests that the real motivation for putting these claims forward is to obtain and secure payment of significant legal fees for the lawyers involved, rather than to reap any meaningful benefits for any class

participants. I need not comment on what is essentially a bald allegation. I mention it only to make the record of the parties' positions complete.

25 Both the Representative Plaintiffs and the California Consumers take a contrary view. They say their clients' claims should not be defeated on what they describe as essentially procedural grounds. They suggest that fairness requires that they be permitted to file in this way. They say the current CCAA process is not so far advanced that there would be undue prejudice to any of the other stakeholders, if their proofs of claims were allowed to be filed as representative claims.

The law and analysis:

26 The first question to consider is whether the CCAA permits representative claims, or class action claims. The next issue is whether this particular CCAA process adequately protected the interests of this potential group of claimants. Lastly, given the inherent jurisdiction of the court, I must also address whether this case might be an appropriate case to exercise my discretion and permit the Representative Plaintiffs' Claims to proceed in some fashion at this time.

Does the CCAA permit representative claims?

27 The CCAA neither expressly permits nor forbids representative claims. The CCAA defines "claim" in s. 12(1). It says that for the purposes of the CCAA, "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act.*" Thus, to determine what a CCAA "claim" is, one must turn to the *Bankruptcy and Insolvency Act,* and the definition of debts "provable in bankruptcy".

28 Section 121(1) of the BIA deals with "claims provable", and says:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason on any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

29 The BIA has a mechanism to determine whether a contingent or unliquidated claim is a provable claim. The mechanism is found in section 135(1.1), which provides:

> The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

30 A determination under s. 135(1.1) is "final and conclusive", unless within a thirty day period after the trustee serves a notice of disallowance, the person to whom the notice of disallowance was sent appeals the trustee's decision.

31 Section 124 of the BIA deals with the proof of claims. First, it provides in subsection (1) that creditors shall prove claims. It says: "Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made." The section goes on, in subsection (3) to deal with who may make proof of claims. The subsection says: "The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of

the creditor, and, if made by a person authorized, it shall state his authority and means of knowledge."

32 The term "creditor" is not specifically defined in the CCAA. The applicants therefore point to the definition of "creditor" in the Call for Claims order itself. There, creditor is defined as "any *Person* having a Claim or a Product Liability Claim" [emphasis added]

33 From the interplay of the sections of the CCAA and the BIA, together with the definition in the Call for Claims order, the applicants infer that only individual creditors may make claims, unless they have authorized someone else to do so on their behalf. Since there is no question the Representative Plaintiffs' Claims have not been authorized by the group of people whom they purport to represent, they have no authority to do so, and the applicants say these claims must therefore be declared a nullity, at least to the extent that they purport to advance claims for other than Hannon, Hochberg, Rodriguez and Guzman personally.

34 While this interpretation may be technically correct, it is also clear that representative orders of some kind have been used in other CCAA proceedings[3], and even in this case.[4] In addition, there have been cases in which a stay has been lifted in order to permit a potential class proceeding to file certification materials,[5] while in other cases, a motion to lift the stay for that purpose and to file a class claim have been denied.[6] As yet, however, there are no examples in Canada where a class proof of claim has been specifically permitted.[7]

35 It is noteworthy here, that even though Farley J. made an order granting a "representation and ancillary order regarding funding" to the Ad Hoc Committee in this proceeding, there was no order permitting "representative" claims to be filed; each member of the committee filed an individual proof claim with the monitor.

36 From this I conclude that while it is possible at least to have a limited representation order in CCAA proceedings, it is by no means clear that representation orders have been extended to permit a "representative" proof of claim to be filed. Canadian courts have not yet permitted a filing of a proof of claim by a plaintiff in an uncertified class proceeding on behalf of itself and other members of the class. At best, our courts have at least once lifted a stay to permit the filing of certification materials. Any steps beyond that would be the subject of a further motion.[8] In the case of *Re Air Canada,* however, there was no suggestion that certification motions were going to be made in a foreign jurisdiction, as would be the case here.

37 While a representative claim may therefore be possible, the next question is whether this is a proper case to either permit this kind of "representative" claim, without the necessity of the individual members of the class filing claims, or whether the stay should be lifted to permit certification motions to proceed in the United States. This involves a discussion first of whether the orders here gave adequate protection to this potential group or groups of creditors, and second, whether this might be an appropriate case for the court to exercise its discretion and grant the relief the Representative Plaintiffs seek.

Did the CCAA process adequately protect the interests of these potential claimants?

38 When I consider the CCAA process here, I am drawn inescapably to the conclusion that it adequately protected the interests of these potential claimants, had they availed themselves of the process as other claimants did.

39 The Ad Hoc committee obtained a representation order, and participates on that basis, although its members filed individual proofs of claim. Even the California Consumers filed individual claims. If the members of the Representative Plaintiff's proposed class had wished to file proofs of claim, they had as much notice and opportunity to do so as anyone else. This is particularly so since the required notices were published not only in two American nation-wide newspapers, but also in three locations on the U.S. District Court's website. Not a single "similarly situated" person, other than Hannon, Hochberg, Rodriguez and Guzman filed a proof of claim . They easily could have. They did not. I cannot conclude that the absence of additional claims implies the process was somehow unfair or flawed. To the contrary, the absence of even a single additional claim suggests there may be no other claimants at all. The process adequately protected the interests of these potential claimants. They simply chose not to utilize that process.

Should the court exercise its discretion?

40 While the court clearly has a broad discretion in CCAA matters[9], I am not persuaded that this is a proper case to exercise that discretion either to allow the representative claims as they are, or to lift the stay to permit certification motions to proceed.

41 First, representative claims *per se,* have not been recognized in Canadian jurisprudence in the context of CCAA proceedings. It is clear that rule 10 of the *Rules of Civil Procedure* permits the court to "appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

42 Rule 10, however, is generally used in estates and trusts cases, or as what has been described as the "simplified procedure" version of proceedings under the *Class Proceedings Act,* particularly in pension fund disputes.[10] I was referred to no case in which the rule was specifically used in CCAA proceedings to permit the filing of a representative or class claim. I do not see rule 10 as useful in these CCAA proceedings, which has created its own process and procedures. Here, a structure was established by court order, on notice to the very parties who now wish to alter the process fundamentally, after all stakeholders have relied on the structure that was established.

43 Changing and increasing the landscape of claimants after the settlement of 30 of the ephedra claims after the claims bar date could cause prejudice to the eventual success of the CCAA process. Simply put, all the arguments made by the Representative Plaintiffs and California Consumers should have been made before Farley J. when the Call for Claims order was made, or earlier motions should have been made to deal with these issues before the Call for Claims order was even made.

44 The process gave adequate opportunity for anyone with a claim to file a proof of claim. The forms were accessible, in plain English. The products liability claimants all managed to make individual claims, even though they might have been involved in class actions. No other prohormone claimants have filed a proof of claim. To allow representative or class claims at this date would be prejudicial to the entire claims process, and would impair the integrity of the CCAA process here. I decline to exercise my discretion in these circumstances.

Disposition:

45 The applicants' motion is therefore granted, and the representative plaintiffs' motion is dismissed. To be clear, the "representative" claims are to be considered as individual claims for each of

Hannon, Hochberg, Rodriguez and Guzman. As the parties have agreed, there will be no order as to costs.

R.E. MESBUR J.

* * * * *

SCHEDULE "A"

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Formulations Ltd.

MT Canadian Supplement Trademark Ltd.

Mt Foreign Supplement Trademark Ltd.

MC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a NEW HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

* * * * *

Corrigendum
Released: September 13, 2006

The Court has issued the following correction:

CORRECTION TO ENDORSEMENT

[1] Ms. MacParland and Ms. Mahar have brought to my attention two inaccuracies in my endorsement dated August 16, 2006. First, the reference in paragraph 13 of the endorsement to counsel for the DIP Lender should be to Mr. Tay, rather than Mr. Carhart.

[2] Second, apparently the California Consumers did not file individual proofs of claim. Their proofs of claim were similar to those filed by the Representative Plaintiffs. Ms. Mahar points out that the California Consumers' claim is a false advertising claim that seeks restitution, rather than damages for personal injury. Their claim is not the same nature as those filed by the Representative Plaintiffs. The statutory scheme in California (namely the Business & Professions Code Section 17203) apparently expressly authorizes Ms. Osborne to act as the representative of other parties, and thus she filed a proof of claim on behalf of herself and other simnilarly situated California consumers. The California Consumers did not file any affidavit material on the motion, and counsel did

not make this clear at the hearing. However, these changes should be incorporated into my earlier endorsement.

1 Since hearing this motion, I have granted an order extending the stay to November 10 of this year. Judge Rakoff has made a similar order in the corresponding US litigation.

2 See "Notice to Creditors Re: Notice of Call for Claims and Product Liability Claims", Schedule "E" to the call for claims order.

3 See, for example, *Canadian Red Cross Society/Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (S.C.J. Commercial List). See also the order of Blair J. in *Canadian Red Cross Society* dated July 29, 1998, in which he appointed representative counsel for various groups of claimants. It is noteworthy, however, that he did not provide for the filing of representative proofs of claim in the order.

4 see the reasons of Farley J. dated February 6, 2006, at paragraph 8, in which he says: "I understand that later this week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]" Again, nothing in the order permitted a representative *claim* to be filed.

5 *Re Air Canada,* Court File # 03-CL-4932. Endorsement of Farley J dated. September 24, 2003.

6 *Re Canadian Red Cross, supra*

7 *Re Canadian Red Cross,* note 2, above, at page 197

8 *Re Air Canada,* note 5, above at paragraph 18.

9 The *CCAA* has been described as having a "broad remedial purpose", and cases have stated the Act should be given a large and liberal interpretation. See Holden & Morawetz *The 2006 Annotated Bankruptcy and Insolvency Act,* [Carswell, 2006] pp 1163-64, and these cases referred to there.

10 see *Overview* to rule 10, Killeen, Morton and James, *Ontario Superior Court Practice*

TAB 15

Case Name:

League Assets Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, As Amended
AND IN THE MATTER OF the Business Corporations Act, S.B.C. 2002, c. 57, As Amended
AND IN THE MATTER OF the Canada Business Corporations Act, R.S.C. 1985, c. C-44, As Amended
AND IN THE MATTER OF A Plan of Compromise and Arrangement of League Assets Corp. and Those Parties Listed on Schedule "A", Petitioners

[2013] B.C.J. No. 2458

2013 BCSC 2043

234 A.C.W.S. (3d) 837

7 C.B.R. (6th) 74

2013 CarswellBC 3408

Docket: S137743

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: October 25, 2013.
Judgment: November 8, 2013.

(84 paras.)

Counsel:

Counsel for the Petitioners: D.E. Gruber, T.M. Tomchak, R. Morse, T.C. Louman-Gardiner.

Counsel for PricewaterhouseCoopers Inc. as Monitor: J.R. Sandrelli, T.R.M. Jeffries.

Counsel for Quest Mortgage Corp., Quest Capital Management Corp.: C.D. Brousson.

Counsel for BCMP Mortgage Investment Corporation and Interior Savings Credit Union: K.E. Siddall.

Counsel for TCC Mortgage Holdings Inc. FCC Mortgage Associates Inc.; Citizens Bank of Canada; First Calgary Financial Credit Union Limited, Firm Capital Mortgage Fund Inc.: Geoffrey Thompson, R.B. Dawkins.

Counsel for Canadian Western Bank: A. Frydenlund.

Counsel for Romspen Investment Corporation: S.H. Stephens.

Counsel for Business Development Bank of Canada: D.B. Hyndman.

Counsel for Timbercreek Mortgage Investment Corporation: William C. Kaplan, Q.C., H. Sevenoaks.

Counsel for Ad Hoc Committee of Convertible Promissory Noteholders of League Opportunity Fund Ltd.: W.E.J. Skelly.

Counsel for Export Development Canada, Bank of Montreal and Churchill Real Estate Inc.: H. Ferris.

Counsel for Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (Proposed DIP Lenders): G.J. Gehlen.

Counsel for Maxium Financial Services: P.J. Reardon.

Counsel for Roynat Inc.: D.K. Fitzpatrick.

Counsel for Proposed Representative Counsel for Investors: J. Grieve.

[Editor's note: Schedule "A" was not attached to the copy received by LexisNexis Canada and therefore is not included in the judgment.]

Reasons for Judgment

S.C. FITZPATRICK J.:--

Introduction

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

2 The organization of the petitioner group of companies (the "League Group") is exceedingly complex, as I will describe in more detail below. In broad terms, there is a complicated corporate structure comprised of real estate investment trusts, limited partnerships and corporations involved in the development and/or management of various real estate projects in British Columbia, Alberta, Ontario and Quebec. The assets of the League Group include certain securities and income producing and development properties which have been said to have an "implied" equity of over $210 million. Liabilities of the League Group are in excess of $410 million, including claims from approximately 3,200 investors who paid approximately $352 million for various interests.

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

charges fees.

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

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

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

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

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

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

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

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

Secured Creditor's Objections

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

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

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

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

b) Statutory Prerequisites: it is argued that individual entities within the League Group do not meet the definition of "debtor company" in s. 2 of the

CCAA (i.e. they are not "insolvent") and therefore, those entities do not qualify to file for protection under s. 3. I note, however, that this particular issue was addressed before Brown J. prior to the granting of the Initial Order.

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

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

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

Unfortunately, the exclusion of these "Enforcing Mortgagees" has engendered a response by the other secured creditors who, not surprisingly, wish to be treated in the same fashion. The fact that they are being treated differently has given rise to the other secured creditors taking the position that these proceedings are, unfairly, affecting only them in terms of their ability to enforce their security. In addition, it is only their security which is being primed by the various charges granted in these proceedings, since the security of the Enforcing Mortgagees has been exempted from the Administration Charge and the Directors' Charge and it is also proposed to be exempted from any DIP Lender's Charge or Representative Counsel Charge.

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

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

d) The "White Boxes" Entities: The secured creditors also make certain arguments in respect of certain members of the League Group who are *not* part of the petitioning group. I have already referred to the extremely complex structure of the League Group. The organizational chart includes various entities marked in yellow which are part of the League Group and who are also petitioning debtors. Many other entities are identified in what have been called the "white boxes" on the organization chart which include those entities that were not part of the petitioning debtor group. I have

already referred to some of these "white box" entities above, but it is said by Mr. Gant that they also generally include firstly, shell companies where there are no assets and secondly, entities where the sole liability is to investors and as such, they are not insolvent.

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

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

e) Conflicts: Last, but not least, the secured creditors have raised a number of conflicts on the part of counsel involved in these proceedings. It is clear to me that these conflicts have significantly coloured the perceived fairness of these proceedings from the outset. The original counsel for the League Group (who has since withdrawn) disclosed, after the Initial Order was granted, that she has also acted in the past for Quest. Some of the secured creditors intend to argue at the comeback hearing that there was material nondisclosure of this conflict to Brown J. and that this relationship between the law firm and Quest may have affected the League Group's decision to exclude Quest from the stay.

> In addition, in the days following the granting of the Initial Order and in the face of the League Group's application for DIP financing, it was disclosed that the law firm acting for the Monitor (who ceased to act at the end of this hearing) had also undertaken to act for the DIP Lenders in respect of the preparation of financing documents. The explanation is that the DIP Lenders urgently required counsel to address the League Group's pressing need for this DIP financing. Although screens were put in place between the individual lawyers at the law firm, it has unfortunately resulted in the perception that the Monitor's support of the DIP financing, or at least the legal advice relating to the Monitor's support, has been influenced by that relationship. This turn of events was extremely unfortunate, particularly in light of the unquestioned duties of the Monitor as an officer of this court and its overriding duty to act fairly in respect of all stakeholders, whether they are in support of or opposed to the DIP financing.
>
> Finally, current counsel for the League Group has disclosed that his law firm is an unsecured creditor. I am not aware of any objections arising from this fact. However, it does appear that the law firm was giving legal advice to the DIP Lenders at one point.

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

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

21 Accordingly, it is my intention to proceed to hear and decide these applications before me based on the Initial Order being extant and based on the updated and current circumstances of the League Group. I have specifically rejected the suggestion of one of the secured creditors to grant

these orders on a "without prejudice" basis.

DIP Financing

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

23 Despite this, the League Group only sought a DIP Lender's Charge of $1.6 million which was said to be the amount of emergency funding that was urgently needed to get to the comeback hearing on November 18. The DIP Lenders supported this restricted charge, based on their submissions that they had no intention of funding, save and except with a DIP Lender's Charge. I understand that given the urgency, and despite the objections of the secured creditors, the DIP Lenders are prepared to immediately fund this amount and in doing so, waive the following conditions: that advances would only be made after expiry of the appeal period and that certain administrative matters, such as insurance, be in place.

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

> **Interim financing**
>
> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge -- in an amount that the court considers appropriate -- in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **Priority -- secured creditors**
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **Priority -- other orders**

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

Factors to be considered

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

(*a*) the period during which the company is expected to be subject to proceedings under this Act;

(*b*) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

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

26 As a preliminary matter, no one has challenged the adequacy of the efforts by the League Group to obtain satisfactory interim financing. Nor is there any challenge to the appropriateness of

the business terms arranged with the DIP Lenders, including the term, interest rate and level of various fees for monitoring the commitment itself and professionals. The Monitor comments favourably on the process by which the DIP financing was sought by the League Group and the reasonableness of the terms proposed by the DIP Lenders.

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

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

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

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

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

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

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

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

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

33 Not surprisingly, most of the counsel for the secured creditors appearing on this application voiced their clients' lack of confidence in the League Group's management. However, these types of

bald assertions, without more, and without evidence, do little to provide the court with a satisfactory basis upon which to assess this factor. In addition, the position of the secured creditors must be considered in the context of other evidence that suggests that they are fully secured and that payments owed to them by the League Group are current: *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49(c).

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

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

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

36 The cash flow forecast indicates that in the period leading up to November 18, approximately $1.6 million will be required in respect of corporate operating expenses. A large portion of that amount, $1.1 million, will be required for payroll, with the first payroll of approximately $550,000 due the very date of the hearing and the second payroll being due on November 8, 2013. The cash flow forecast indicates proposed payments of $339,000 for "project funding" which I am advised relates to supporting certain income producing properties which are operating on a negative cash flow basis. Notwithstanding that the evidence on the project operating expenditures is somewhat thin, in my view, it is reasonable to expect that the League Group has some ongoing operations in the specific projects that require support in this interim period. Again, I would emphasize that it is the overarching intention of the League Group to conduct business in the ordinary course, at least in the initial period of the restructuring until a longer term strategy can be formulated.

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

38 Finally, the cash flow forecast anticipates restructuring and financing costs of $1.45 million until the comeback hearing. There are strenuous objections to payment of these amounts; however, it cannot be argued that professionals who are assisting in the restructuring of these proceedings should be denied payment of their reasonable remuneration on an ongoing basis, if such payments

are possible: *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 66. The amounts are large but not unusual given the complexity of these proceedings and the issues raised. These professionals should not be required to simply rely on a court ordered charge to protect their outstanding fees. The Administration Charge in any event would not have been sufficient to cover the amounts expected to be incurred to the date of the comeback hearing.

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

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

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

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

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

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

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

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

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

liquidation should occur on an orderly and controlled basis.

45 In addition, as pointed out by counsel for the League Group, the nature of the assets is such that even if the secured creditors were to take steps to realize on their security, they would inevitably be incurring some of the same types of expenses, including professional fees, as are currently being proposed to be paid in accordance with the cash flow forecast: *Pacific Shores Resort & Spa Ltd.* at para. 49(f).

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

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

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

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

a) Marketable Securities: those amounts are based on recent trading prices of units in the Partners REIT, which are publicly traded;
b) The Income Producing Properties: the ascribed values of these properties are supported by appraisals, although it is apparent that some of those appraisals are dated. In addition, the Monitor notes that most of the appraisals have been prepared for financing purposes which in their experience, tend to be higher than values recoverable in the market. Nevertheless, the Monitor concludes that there appears to be "significant positive equity available in these properties"; and
c) The Development Properties: the values ascribed are based on book values which represent the monies the League Group has spent to date to develop the properties. Again, based on the Monitor's experience, if the development is not completed, the recovery for these projects will be substantially less than the costs incurred to date. With respect to the Colwood Development specifically, the Monitor is of the view that even if the League Group completes the project, it is unlikely that the project costs

> will be fully recovered. Accordingly, the Monitor states that the $129.9 million "implied" equity in the development properties is overstated, although it is unclear at this time to what degree.

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

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

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

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

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

54 In light of the concerns expressed by the secured creditors, the League Group, with the support of the Monitor, has proposed certain allocation provisions in the order authorizing DIP financing, should an allocation issue arise in the future. In accordance with these provisions, costs that may be specifically attributed to a certain asset shall be allocated to that asset. Costs that are not

attributable to any asset are to be allocated as follows: firstly, to unencumbered or not fully encumbered assets and secondly, to assets generally based on a *pro rata* allocation based on the actual value of an asset.

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

(g) The Monitor's report

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

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

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

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

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

60 The same considerations discussed in *Timminco Ltd.* are at play here. It is unreasonable to expect that any DIP lender would advance the required DIP financing, save and except with a charge having priority over existing creditors. As stated by the League Group and as confirmed by the Monitor, this DIP financing is necessary and urgently required to continue the operations of the League Group for a very short period of time until the comeback hearing. Failure to obtain that financing will result in a liquidation scenario - one which, given the different stakeholder groups and the complexity of the assets, will no doubt result in a multiplicity of realization proceedings at great cost. In that liquidation scenario, there will likely be prejudice to those who are said, at this time, to be the stakeholders who have significant equity in the assets.

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

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

Representative Counsel

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

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

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

66 The Monitor has already fielded over 100 enquiries from various investors. On October 23, 2013, the Monitor scheduled and held a conference call for the purpose of informing investors of

the *CCAA* proceedings and the anticipated process and also to answer any questions. I am advised that over 460 investors participated in that call. At that time, the investors were introduced to counsel from Faskens and the concept of a representative counsel was discussed.

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

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

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

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

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

71 The appropriateness of such orders has been considered numerous times by the Ontario Superior Court of Justice (Commercial List): see *Nortel Networks Corp. (Re)* (2009), 53 C.B.R. (5th) 196, 2009 CarswellOnt 3028, *Fraser Papers Inc. (Re)*, [2009] O.J. No. 4287, 2009 CarswellOnt 6169, *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 6437, 2009 CarswellOnt 9398, and *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663 and by this court: *Catalyst Paper Corp. (Re)*, 2012 BCSC 451.

72 In *Canwest Publishing Inc. (Re)*, 2010 ONSC 1328, Pepall J. (as she then was) summarized many of the factors that have been considered in granting these types of order:

> [21] Factors that have been considered by courts in granting these orders include:
>
> - the vulnerability and resources of the group sought to be represented;
>
> - any benefit to the companies under CCAA protection;
>
> - any social benefit to be derived from representation of the group;
>
> - the facilitation of the administration of the proceedings and efficiency;
>
> - the avoidance of a multiplicity of legal retainers;
>
> - the balance of convenience and whether it is fair and just including to the creditors of the Estate;
>
> - whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared tc act for the group seeking the order; and
>
> - the position of other stakeholders and the Monitor.

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

74 In *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, Mr. Justice D.M. Brown appointed representative counsel in those *CCAA* proceedings for some 1,200 clients who were investors in one of the debtor companies (para. 38). Representative counsel were also appointed in

the Eron Mortgage Corporation proceedings for certain investor groups: see *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage Corp.* (1998), [1999] 4 W.W.R. 375 (S.C.) at para. 3.

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

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

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

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

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

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

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

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

Disposition

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

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

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

S.C. FITZPATRICK J.