Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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 SINO-FOREST CORPORATION

Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF THE APPELLANTS, INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC., MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE AND MONTRUSCO BOLTON INVESTMENTS INC.

(Motion for Leave to Appeal from E&Y Settlement Approval Order and Representation Dismissal Order)

May 10, 2013

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TO: THE SERVICE LIST

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TAB 1

COURT OF APPEAL FOR ONTARIO

CITATION: 1250264 Ontario Inc. v. Pet Valu Canada Inc., 2013 ONCA 279
DATE: 20130503
DOCKET: C55949

Winkler C.J.O., Armstrong and Hoy JJ.A.

BETWEEN

1250264 Ontario Inc.

Plaintiff (Respondent)

and

Pet Valu Canada Inc.

Defendant (Appellant)

Geoffrey B. Shaw and Derek Ronde, for the appellant Pet Valu Canada Inc.

Lawrence G. Theall and Bevan Brooksbank, for the appellant franchisees

David Sterns and Jean-Marc Leclerc, for the respondent

Heard: February 26, 2013

On appeal from the order of Justice George R. Strathy of the Ontario Superior Court of Justice, dated July 27, 2012, with reasons reported at 2012 ONSC 4317, 112 O.R. (3d) 294, and on appeal from his costs order, dated September 11, 2012, with reasons reported at 2012 ONSC 5029.

Winkler C.J.O.:

A. OVERVIEW

[1] This is an appeal from an order made by a motion judge concerning the validity of the opt-out process in a class proceeding certified under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*").

[2] Section 9 of the *CPA* provides class members with the right to opt out of a class proceeding. The right to opt out must be exercised during a finite period which is set out in the certification order and spelled out in the court-approved notice to class members of the certification of the action. Critical to the integrity of the opt-out process is the right of individual class members to make a fully informed and voluntary decision about whether to remain as a member of the class or to exercise the right to opt out.

[3] The disputed opt-out process in this case followed the certification of a class proceeding brought on behalf of franchisees against the appellant franchisor, Pet Valu Canada Inc. Towards the end of the opt-out period, a group of Pet Valu franchisees who opposed the class action and who called themselves "Concerned Pet Valu Franchisees" ("CPVF")[1] waged a concerted campaign to try to persuade class members to opt out. After the CPVF's campaign began, the

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[1] Twelve franchisees who were founding members of the CPVF were named as respondents in the plaintiff's amended notice of motion, dated February 13, 2012 (amended June 19, 2012).

number of returned opt-out notices increased dramatically. By the end of the opt-out period, more than half of the class had submitted opt-out notices.

[4] A considerable time after the opt-out period ended, Robert Rodger, the principal of the representative plaintiff, 1250264 Ontario Inc., moved for an order setting aside the received opt-out notices. The motion judge granted the motion in part and invalidated any opt-out notices received on or after the beginning of the CPVF's opt-out campaign. The motion judge provided for a new opt-out period to take place after the final disposition of the action on its merits.

[5] The motion judge's remedial order followed from his conclusion that there was a "reasonable probability" that many franchisees decided to opt out due to misleading information and unfair pressure amounting to intimidation resulting from the CPVF's campaign. The motion judge found there was no evidence that the defendant Pet Valu was responsible for, or connected to, this misleading information or unfair pressure. Rather, he exclusively attributed the impugned conduct to activities of the members of the CPVF.

[6] Both the defendant Pet Valu and 12 non-party franchisees who were members of the CPVF ("appellant franchisees") appeal from the motion judge's order. The motion judge based his decision that the conduct of the CPVF undermined the opt-out process on the following considerations: his analysis of the content of the CPVF's web site and its telephone campaign; his inference

that class members were coerced or intimidated by the conduct of the campaign; and his finding that the campaign resulted in misinformation due to its lack of objectivity.

[7] In my view, the motion judge erred in two material respects: drawing the inference in the absence of any direct evidence and holding the CPVF to a standard of objectivity. The information disseminated amounted to no more than opinion as to the advisability of the lawsuit from a business perspective. It did not purport to comment on the legal merits of the action. Information relating to the action was already available through neutral court approved notices. The communications here were simply acceptable intra-class debate. Therefore, the motion judge misapplied the fully informed and voluntary test enunciated in the jurisprudence. I would allow the appeal and set aside the order invalidating the opt-out notices. My reasons follow.

B. FACTUAL BACKGROUND

[8] The factual background is well-stated by the motion judge at paras. 5-55, and, for the most part, I simply repeat the relevant details from his reasons.

[9] The Pet Valu chain consists of specialty stores selling pet food and supplies. The certified class consists of 256 Pet Valu franchisees who operated stores in Ontario and Manitoba between December 31, 2003 and March 28, 2011. At the time of certification, there were 155 Pet Valu franchised stores, with

145 in Ontario and 10 in Manitoba. Pet Valu also operated a total of 214 corporate stores, about 144 of which were under the "Pet Valu" banner, with the remainder operating under other trade names.

[10] The motion judge presided over a number of case conferences and several motions. Pet Valu has vigorously defended the action and the motion judge characterized the atmosphere on motions and case conferences as highly adversarial. The plaintiff has a pending motion for partial summary judgment. Pet Valu has indicated that it proposes to bring a motion to de-certify the class proceeding. It has also filed a competing motion for summary judgment.

[11] The motion judge certified the action in January 2011: see reasons reported at 2011 ONSC 287, 16 C.P.C. (7th) 52. The central common issue that was certified is whether Pet Valu breached its contractual duty to class members by failing to share with its franchisees certain volume discounts and rebates that it received from suppliers and manufacturers during the class period.

[12] Following certification, communication with class members was an extremely contentious subject. A case conference was held in February 2011, which included a discussion of communications with class members. The minutes of the conference state:

> His Honour expressed his general concern about communications to the class and advised that there was to be no communications to the class without court approval.

[13] The formal certification order issued on June 29, 2011 incorporated a Plan of Proceeding. The Plan of Proceeding includes provisions dealing with communications with class members. There was a concern on both sides, which the motion judge shared, that communications with the class between certification and the end of the opt-out period should be carefully supervised.

[14] Pet Valu had to be able to communicate with franchisees due to their ongoing commercial relationship. However, each party was extremely distrustful of the other and neither wanted the other to be able to sway class members' freedom to make their own decision about whether to opt out. The Plan of Proceeding therefore provided:

> Communications with the Class Members before the expiry of the opt-out period are subject to the direction of the class proceedings judge.

[15] The certification order and the Plan of Proceeding did not purport to curtail the right of other franchisees – including Pet Valu's franchisee association known as the Canadian Franchise Council ("CFC") – from communicating about the class action.

[16] Section 17(6)(b) of the *CPA* provides that the right to opt out of a class proceeding must be exercised during a finite period which is set out in the certification order and spelled out in the court-approved notice to class members of the certification of the action. In the present case, the certification notice approved by the case management judge was distributed to class members on

July 15, 2011. The notice specified that the opt-out period would be a 60-day opt-out period, expiring on September 15, 2011.

(1) The Opt-Out Process

[17] At an annual general meeting of the CFC held in August 2011 (during the opt-out period), there was considerable discussion amongst franchisees about the merits of the class action. Some class members, including Mr. Rodger, spoke in favour of the action while others, including members of the Executive Committee of the CFC, voiced opposition.

[18] The Executive made a motion to authorize it to present its view of the class action to those attending the annual general meeting. The motion carried and the Executive read a statement indicating in strong terms its opposition to the lawsuit as being harmful to franchisees' businesses and profitability, and their financial futures. A motion to have the entire membership of the CFC vote on a resolution to support the Executive's unanimous statement was withdrawn.

[19] In early September 2011, 10 of the 11 members of the Executive Committee of the CFC, as well as a spouse of an Executive member and two other franchisees, became founding members of the CPVF. The sole purpose of the CPVF was to encourage other Pet Valu franchisees to opt out of the class action.

[20] The campaign mounted by the CPVF had two major fronts. First, beginning on the Labour Day weekend, the founding members did a telephone blitz, calling every franchisee to encourage them to opt out of the class action. The calls followed a standard script. CPVF members identified themselves and explained that they were calling to encourage the franchisee to opt out. The caller asked whether the franchisee had already opted out and also asked whether, if the franchisee was opting out, the CPVF could publish his/her name. The caller also directed the franchisee to the CPVF's website.

[21] Second, in conjunction with the telephone campaign, in early September 2011, the CPVF launched a website. The motion judge set out much of the content of the website at para. 53 of his reasons.

[22] The website included a tally of the number of franchisees who had opted out of the action and a list of the names and store locations of the franchisees who had declared their intention to opt out. In addition, it contained statements voicing strong opposition to the class action based on beliefs that it would: hurt profitability; damage the brand; divert time and resources away from building a stronger franchise; place walls between franchisees and the new management who were described as being committed to improving the brand; and would reduce growth by deterring prospective purchasers of the franchise: see motion judge's reasons, at para. 53. The website also stated that class members who opt out "still have the right to individually or collectively pursue [their] rights." It

continued: "This will not waive your rights or stop you from pressing forward with issues individually or through the CFC, although statutory time limits can prevent how far a court can 'look back'."

[23] By September 4, 2011, only 37 opt-out forms had been received from class members. After the start of the CPVF's campaign, there was a noticeable spike in the delivery of opt-out forms. By the end of the opt-out period on September 15, 2011, a total of 140 forms were received, which amounted to about 65 percent of current franchisees and 10 percent of former franchisees.

(2) The Plaintiff's Motion

[24] On November 16, 2011, two months after the end of the opt-out period, the plaintiff served a notice of motion, without any supporting affidavit or other material, requesting an order setting aside all the opt-out notices. On February 13, 2012, the plaintiff served a further notice of motion with the supporting affidavit of Mr. Rodger. The plaintiff filed an amended notice of motion in June 2012, almost a year after the certification order was made. The motion was heard on July 4, 2012.

[25] In cross-examination on his affidavit, Mr. Rodger acknowledged that he knew that the CPVF's campaign was going on during the opt-out period, but he did not seek direction from the motion judge during the opt-out period.

C. REASONS OF THE MOTION JUDGE

[26] The motion judge observed that the question before him was whether the opt-out process was "so irreparably impaired as to justify the extraordinary measure of judicial intervention" (at para. 2).

[27] He attributed the dramatic increase in the number of opt-out notices that were received in the last two weeks of the opt-out period to "a well-organized, systematic and highly effective campaign by the CPVF to deal a death blow to the class action by persuading other franchisees to opt out" (at para. 24).

[28] The motion judge found that the CPVF's website contained statements that had no factual basis and that were exaggerated or misleading. He expressed nine specific concerns about the content of the CPVF's website, at para. 54, which are set out below, at para. 53 of my reasons. He concluded, at para. 55, that the CPVF's telephone campaign and website "were an unabashed attempt to destroy the class action", "made no attempt to provide [franchisees] with any information concerning the positive aspects of the class action", and gave franchisees "more misinformation and added to the confusion".

[29] Based on the conduct of the CPVF and the content of its website, the motion judge concluded that there was "a reasonable probability ... that many franchisees decided to opt out as a result of misleading information and unfair

pressure amounting to intimidation" (at para. 75). He was not swayed by the affidavit evidence of some class members that they did not experience pressure.

[30] Significantly, however, the motion judge found there was no evidence indicating that Pet Valu was somehow controlling the members of the CFC or the CPVF, or that Pet Valu had exerted any form of pressure on class members to opt out: see paras. 27, 31, 65-66.

[31] Turning to the issue of remedy, the motion judge concluded that an extraordinary remedy was warranted by the need to protect the integrity of the court process and the rights of all class members to make an informed and voluntary choice about whether to opt out (at paras. 80-81). He declared invalid any opt-out notice received on or after September 5, 2011. He further declared that opt-out notices received prior to that date were presumptively valid, but were subject to the right of a franchisee to move to set aside his or her opt-out. Finally, he made an order for a new opt-out process that would occur following the release of the court's decision on the summary judgment motion, or other final disposition of the action on its merits.

[32] In fashioning this remedy, the motion judge dismissed the concern that his order would undo the *res judicata* effect of the *CPA* by permitting class members to wait and see if the action is successful before deciding whether to opt out, thereby giving them a "second kick at the can" either individually or collectively.

In his view, if the class action were dismissed on the merits, it would be highly unlikely that any subsequent action, individual or collective, would succeed (at para. 86).

[33] The motion judge acknowledged that the plaintiff may have delayed in bringing the motion and that Mr. Rodger may have engaged in unsanctioned communication. However, he did not find these concerns determinative, noting that this did not detract from his conclusion that the appellant franchisees' actions had impaired the opt-out process (at para. 87).

[34] Finally, the motion judge dismissed concerns that had been raised about franchisees' rights of association pursuant to s. 4(1) of the *Arthur Wishart Act (Franchise Disclosure), 2000,* S.O. 2000, c. 3 ("*Franchise Disclosure Act*"). He found that in the unique circumstances of this case the exercise of these rights had interfered with the rights conferred by the *CPA* such that relief was necessary (at para. 88).

[35] In separate reasons prepared after receiving written submissions on costs, the motion judge awarded $60,000 in costs to the plaintiff, payable jointly and severally by Pet Valu and the appellant franchisees: see reasons reported at 2012 ONSC 5029.

D. ISSUES

[36] The appellants allege that the motion judge made the following errors of law:

1) He failed to hold the plaintiff to the civil standard of proof.

2) He erred in requiring that communications by the appellant franchisees satisfy a legal standard of objectivity and impartiality, which applies to court-approved notices under ss. 17-20 of the *CPA*.

3) He erred in failing to accept the uncontroverted evidence of the appellant franchisees and independent affiants that franchisees were not intimidated or coerced by the CPVF's campaign.

4) He erred in disregarding the association rights of the appellant franchisees provided by s. 4(1) of the *Franchise Disclosure Act* and he failed to exercise his statutory authority in conformity with the right of association provided by s. 2(d) of the *Charter*.

5) He erred in granting equitable relief without giving any weight to the plaintiff's failure to pursue the motion expeditiously or the misconduct of the plaintiff in engaging in unsanctioned communication with class members during the opt-out period.

6) He erred in deferring the opt-out period until after the final determination of the case on its merits, thereby eviscerating the *res judicata* principles of the *CPA*.

7) He erred by ordering an extraordinary remedy where more appropriate alternative measures were available, such as the holding of a new opt-out period without delay.

[37] The appellants further argue that the motion judge committed palpable and overriding error in finding that class members were misled and pressured into opting out when there was no evidentiary basis capable of supporting this finding.

[38] No issue was taken with the appellant franchisees' standing on the motion or the appeal. As former class members who have opted out of the class proceeding, the appellant franchisees are not parties as of right. There was no judicial order conferring intervener status on them. The only order against them was the motion judge's costs order, which the appellant franchisees have not appealed and which, in any event, I would set aside. Accordingly, in my view, the appellant franchisees were not proper parties on the motion and are not proper appellants. However, nothing turns on this lack of standing for purposes of dealing with the merits of the appeal. In oral argument before this court, the appellant Pet Valu adopted the submissions of the appellant franchisees in their entirety.

[39] Only Pet Valu seeks leave to appeal the costs award. It argues that the plaintiff's notice of motion contained serious allegations of misconduct on the part of Pet Valu that were unsubstantiated and that deserved the sanction of costs.

E. ANALYSIS

(1) Section 12 of the *CPA* and the *A&P* Test

[40] The motion judge's order was an exercise of his "broad, discretionary jurisdiction" under s. 12 of the *CPA*: *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767, at para. 42. A discretionary decision to safeguard the fairness of a class proceeding is entitled to receive significant deference from this court. It may only be set aside if it is based on an error of law, a palpable and overriding error of fact, the consideration of irrelevant factors or the omission of factors that ought to have been considered, or if the decision was unreasonable: *Aventis Pharma S.A. v. Novopharm Ltd.*, 2005 FCA 390, 44 C.P.R. (4th) 326, at para. 4.

[41] In making his remedial order, the motion judge properly recognized the need to protect the interests of the absent class members in the opt-out process. He stated, correctly, that class members "ought to be free to exercise their right to participate in or abstain from the class action on an informed, voluntary basis, free from undue influence", citing *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), affirmed (2004), 70 O.R.

(3d) 182 (Div. Ct.), leave to appeal refused (May 11, 2004), Court File No. M31109 (Ont. C.A.), at para. 74 (emphasis added by the motion judge). As explained in *A&P*, at paras. 75-76:

> The primary protection for the absent class members in the class proceeding process is the right to opt out of the class action. It is axiomatic that no class member need participate in a class action against his or her will. However, to ensure the integrity of the opt out process, absent class members must be fully informed of the issues in the proceeding and the impact on them as individuals.
>
> Where ... a communication constitutes misinformation, a threat, intimidation, coercion or is made for some other improper purpose aimed at undermining the process, the court must intervene.

[42] The reason why the opt-out decision must be informed and voluntary is that the choice to opt out of a class proceeding involves a serious access to justice issue. Once a class member opts out of a class proceeding, that person is either left to pursue his or her rights individually, which may be an unrealistic possibility depending on the nature of the claim, or the class member must relinquish the right to participate in any remedy that may be obtained for the underlying conduct of the defendant.

[43] Where class members engage in conduct that amounts to misinformation, threats, intimidation, coercion or that reveals some other improper purpose in an attempt to undermine the opt-out process, the court may intervene to restrain and remediate the effect of such conduct. The court may do so based on the

jurisdiction under s. 12 of the *CPA* to protect the fair determination of the proceeding.

[44] Where the parties become aware that class members or former class members are engaging in tactics that may demand judicial scrutiny during the opt-out period, the representative plaintiff should promptly seek the intervention of the supervising judge. As well, the defendant may not sit idly by in the face of such conduct without running the risk that a court will invalidate opt-outs based on the application of the informed and voluntary test established in *A&P*.

(2) Application to the Present Case

[45] The purpose of the opt-out process is to provide class members with the opportunity to make an informed and voluntary decision as to whether they wish to remain as participants in the class action.

[46] The motion judge was rightly motivated by a concern for protecting the fairness of the opt-out process and by the goal of ensuring that opt-out decisions were not the product of misinformation or intimidation. He was deeply troubled that the "CPVF telephone campaign and website were an unabashed attempt to destroy the class action" (at para. 55). In his decision awarding the plaintiff its costs of the opt-out motion, the motion judge stated, at para. 20, that the "survival of the class action depended on the outcome of the [opt-out] motion."

[47] These comments reveal that the motion judge was proceeding on an erroneous principle, at least to the extent that his analysis was premised on the view that the survival of the class action depended on the outcome of the opt-out motion. The motion judge believed that because slightly more than half the class had opted out, the very survival of the class action was at stake on the plaintiff's motion. He did not explain exactly what he meant by "the survival of the class action". In his reasons on the opt-out motion, he mentioned, at para. 6, that the defendant had raised the prospect of bringing a decertification motion.

[48] If by the survival of the class action the motion judge was referring to the prospect of decertification, he did not explain why the number of class opt-outs could undermine the evidence satisfying the certification criteria. Indeed, other than perhaps in the most extreme cases, I fail to see any reason why the number of opt-outs would be a basis for decertification. Alternatively, if he meant the viability of the class action somehow depends on the number of remaining class members, there is no basis for this concern. A certified class proceeding will continue regardless of the diminished size of the class and the correspondingly diminished damages award or settlement amount that might follow therefrom.

[49] The motion judge evaluated the fairness of the opt-out process based on an incorrect belief that the viability of the class action was in peril. From that viewpoint, the CPVF's actions would have appeared more troubling than they actually were.

[50] The motion judge's view that the survival of the class action was at stake on the opt-out motion – although incorrect – reflected the CPVF's motivation for waging the opt-out campaign. They were at least in part trying to end the class action by encouraging class members to opt out.

[51] Given these misconceptions about the nature of the opt-out process, I think it is important to emphasize that the *CPA* does not contemplate the politicization of the opt-out process. The opt-out process is not analogous to the labour context where majority support or opposition is required to certify or decertify a union. Within the statutory framework of the *CPA*, there is no legitimate purpose that can be achieved by politicizing the opt-out process. As explained in *A&P*, at para. 32, certification motions are not determined through a referendum of the class members. Nor is the viability of the class action dependant on majority support. Just as the percentage of support amongst class members is not an element of certification, opting out cannot stop a class action. The number of opt-outs does not in itself provide a basis for decertifying a class action.

[52] In a class proceeding, a representative plaintiff seeks to obtain court approval through certification of the action to pursue a remedy for a group – the class – who have suffered a common wrong. Once the action is certified, as it was here, the representative plaintiff is obliged to pursue the action on behalf of the class, subject to receiving court approval to withdraw. The opt-out process is not a vote on whether the class action should go forward. It is simply a process

by which members of the class can individually elect not to have the representative plaintiff continue to act and pursue the claim on their behalf and in so doing, forego any right to share in the success of the lawsuit. Once a class member has opted out of the class proceeding, he or she is a stranger to the lawsuit and has no standing before the court. Thus, the person who has opted out has no say about how the action is conducted or whether or not it will continue to go forward.

[53] The motion judge was right to be attuned to the possibility that the CPVF was attempting to undermine the opt-out process by politicizing it. He was also right to analyze this possibility by applying the *A&P* test. However, he erred in his portrayal of the impact of the opt-out process. He also erred in imposing on the class members the obligation to communicate in an objective manner and in his interpretation of the campaign as a whole.

[54] The motion judge identified the following nine specific concerns about the misleading and intimidating nature of the language of the CPVF's website, at para. 54:

> (a) The identification of the names of opt-outs was clearly designed to put pressure on those who had not opted out – the message was, "get on the bandwagon, because almost everyone else has and you don't want to be one of the few left standing at the end."
>
> (b) The message of the website was that the CPVF had determined that the class action was bad for franchisees and the implication was that anyone who

did not opt out (and who would be readily identifiable as a non-conformist) was damaging the business, harming other franchisees, and undermining the efforts of the CFC.

(c) The message that the class action would "create walls" between the franchisees and the franchisor was designed to enhance the position of the Executive as the sole voice of Pet Valu franchisees and to exploit franchisees' concerns about the power imbalance between themselves and the franchisor. It in fact runs contrary to McNeely's evidence... that Pet Valu intended to treat all its franchisees fairly and equally, regardless of their participation in the class action.

(d) There was no attempt to provide any form of informational balance or to discuss the issues in the class action – the fact that, if the action was successful, every class member might have a right to substantial damages, was not even mentioned.

(e) The website disparaged class counsel – references were made to lawyers "creating walls", receiving "25% if not more" out of any settlement or judgment and referred to them as "lawyers who seek to assert claims focused upon allegations of past misconduct." The message was: "This is all driven by class action lawyers trying to make money".

(f) The suggestion that the lawsuit was motivated by a "desire to punish" the former owners has no factual basis. The liability of Pet Valu in this action is a corporate liability, which is obviously distinct from the ownership of the corporation.

(g) The suggestion that the issue of volume rebates could be addressed by the CFC is contrary to the evidence on certification that the CFC had been either unable or unwilling to do so. There is no evidence at all that Pet Valu as a corporation, under new management or otherwise, is prepared to address this issue voluntarily and without being required to do so as a result of this action.

> (h) The alleged consequences of the class action, including its impact on franchisee profitability, its effect on Pet Valu, and its effect on the brand, were exaggerated and lacked any factual or evidentiary foundation.
>
> (i) The statement that opting out would not prevent franchisees from individually or collectively pursuing their rights was misleading. It failed to address the reality, to which I averted in my decision on certification at para. 111, that individual claims by franchisees would be impractical. Collective pursuit would almost certainly be ineffective without the clout of a class action, given that Pet Valu continues to vigorously contest the franchisees' rights to share in volume rebates.

[55] He went on to make the following findings about the CPVF's campaign, at para. 55:

> The CPVF telephone campaign and website were an unabashed attempt to destroy the class action. The campaign made no pretence of giving franchisees an opportunity to make a private, considered and informed decision. It made no attempt to provide them with any information concerning the positive aspects of the class action. While expressing concern about franchisees being "confused or misinformed", the CPVF gave them more misinformation and added to the confusion. In an environment in which communications to the class by the parties had been strictly curtailed at the request of the parties and with the court's approval, the CPVF was able to use its influence and its opinions to advance what it perceived to be the interests of franchisees, which it aligned with the interests of the franchisor.

[56] In the Plan of Proceeding, the motion judge had restricted communications by the plaintiff and the defendant. He did not impose restrictions on members of the class. I agree that in the present case there was a real risk that the CPVF's

opt-out campaign could cross the line of pressuring or intimidating class members into opting out on an uninformed or involuntary basis.

[57] Despite this risk, however, a finding that the CPVF's campaign crossed the line described in *A&P* was unavailable to the motion judge on the record before him. It is instructive to describe the nature of the evidence of the defendant's conduct in *A&P* and the representative plaintiffs' response to it, and to compare these circumstances to the present case.

[58] In *A&P*, the plaintiff franchisees brought a certification motion as well as a motion seeking an order restricting communications by the defendant franchisor with class members during the opt-out period. After granting the certification order, the court considered whether it was appropriate to grant the extraordinary relief requested by the plaintiffs on their additional motion.

[59] The plaintiffs in *A&P* introduced affidavit and *viva voce* evidence indicating that, prior to the certification motion, the defendant franchisor had "engaged in a course of conduct that is intimidating, threatening, and coercive, and in consideration of the information vacuum, sufficiently misleading to vitiate any notion that the franchisees executing releases are doing so on an informed basis" (at para. 80). The evidence showed that the defendant had monitored franchisees' legal services, imposed unlawful and unilateral rent increases on non-cooperative franchisees, and had arranged for franchisor executives to

personally visit franchisees to solicit releases of their claims. Based on this evidence, the court made an order restricting the franchisor's communications with franchisees and prohibiting it from circulating its new franchise agreements to, or entering into releases with, class members during the opt-out period.

[60] In the present case, both parties became well-aware of the CPVF's opt-out campaign soon after it began. Either party could have sought the motion judge's intervention to determine if the CPVF's telephone campaign and website were misleading, or if its tactics were threatening, intimidating or coercive. The motion judge had given the parties an open invitation to seek his direction regarding communications with class members. Yet neither side acted on this invitation during the opt-out period.

[61] Here, unlike the pre-emptive approach of the moving party in *A&P*, the plaintiff waited for two months after the expiry of the opt-out period to file a notice of motion questioning the fairness of the opt-out process. Supporting material for the motion was not delivered until three months later, in February 2012. The motion was not made returnable until July 4, 2012, almost ten months after the opt-out period had expired and more than a year after the certification of the action.

[62] This dilatory conduct by the representative plaintiff is very troubling. Post-certification, the representative plaintiff represented all class members up until

the time that they chose to opt out of the proceeding. Prior to that point, the representative plaintiff had a duty to protect their interests. In the present circumstances, this duty included a responsibility to alert the motion judge to any communications that appeared to coerce, intimidate or mislead class members into opting out. The purpose behind ensuring that the opt-out decision is made voluntarily and with full information is not to protect the size of the class for the benefit of the representative plaintiff or his counsel. If the representative plaintiff had concerns about the nature of the CPVF's communications during the opt-out period, it was incumbent upon the representative plaintiff to bring the issue to the attention of the motion judge as soon as possible.

[63] Also distinguishing this case from *A&P* is the lack of evidence adduced by the plaintiff capable of establishing that class members had been misled or intimidated. The plaintiff filed no direct evidence from any class member going to the issue of whether their opt-out decisions were voluntary and informed. Considering that the only issue on the plaintiff's motion was whether the opt-outs were involuntary or misinformed because of the CPVF's campaign, it is strange indeed that no evidence was adduced from a single opt-out to the effect that any one of them felt intimidated or misled into opting out.

[64] The only affidavit evidence filed in support of the motion consisted of Mr. Rodger's affidavit, which refers to unnamed franchisees allegedly having experienced pressure from members of the CPVF to opt out. The motion judge

did not rely on this evidence in coming to his conclusions (at para. 89). Thus, the motion judge's finding that the telephone campaign and the public disclosure on the CPVF's website of the names and store locations of opt-outs had a coercive effect on the rest of the class was not based on direct evidence from any class member.

[65] Instead, the motion judge's conclusion was based on an inference that class members were misled or pressured into opting out by the CPVF's campaign. His reasons, at paras. 68 and 70, illustrate this:

> The CPVF exploited this [vulnerability of the relationship between franchisor/franchisee] by asking for an electronic show of hands on the website – asking, in effect, "are you with us and your fellow franchisees or against us?"
>
> ...
>
> The CFC, wearing the hat of the CPVF, mounted a campaign designed to kill the class action. It did so by putting subtle and not-so-subtle pressure on hold-outs by prominently listing the "growing" list of names of opt-outs. A franchisee who did not pledge allegiance to the CPVF and promise to opt out could reasonably conclude that he or she would be outed as part of an identified minority who were pursuing their own selfish interests, who were not team players and who were indifferent to the concerns of the majority.

[66] There can be no doubt that there was evidence that the CPVF were attempting to persuade and pressure the class members to opt out of the proceeding. The issue is whether this evidence is capable of supporting an

inference that the campaign was coercive. In relying on the posting of names of opt-outs as supporting the inference of coercion, the motion judge did not take into account the following evidence: that the CPVF's telephone callers asked class members for permission to publish their names; that the website listed the number of franchisees who had opted out but who preferred to remain anonymous; and that the certification order, posted on class counsel's website, required class counsel to serve on Pet Valu a list of the names of opt-outs. In short, the CPVF's website explicitly respected class members' anonymity and did not divulge any information about class members that Pet Valu was not otherwise entitled to receive pursuant to the certification order.

[67] There was no evidence that any class member perceived a threat that Pet Valu might take retaliatory action against them for remaining in the class. To the extent that the motion judge's inference that pressure to opt out took advantage of the vulnerability inherent in the franchisor/franchisee relationship, this is inconsistent with his finding that Pet Valu was not linked to the impugned conduct of the CPVF. The motion judge made multiple findings to this effect:

> I did not accept the plaintiff's submission that the CFC or the Executive is somehow under the control of Pet Valu. It receives some modest operational funding from Pet Valu, but it is otherwise independent (at para. 27).
>
> ...
>
> There is no evidence that Pet Valu has taken any repercussions against any franchisee as a result of the

> class action. Indeed, Pet Valu's evidence is that it treated its franchisees equally and impartially, regardless of their support of the class action (at para. 31).
>
> ...
>
> I also accept Pet Valu's assurances that it was not party to the activities of the CPVF. An extensive affidavit was sworn by McNeely [the Chief Executive Officer] of Pet Valu. On the basis of that affidavit, which is largely unchallenged, I conclude that Pet Valu itself did not interfere with the integrity of the opt-out process or attempt to influence franchisees to opt out of the class action. I also conclude that Pet Valu did not directly encourage the CFC or the CPVF to do so. That said, McNeely was clearly aware of what CPVF was up to and was content to let it continue unabated (at para. 65). [Emphasis in original.]

[68] The motion judge's inference that class members were intimidated into opting out by the public disclosure of the names of opt-outs is also inconsistent with his acceptance of the evidence of Mr. McNeely, the CEO of Pet Valu, that: Pet Valu "had not taken and would not take repercussions against a franchisee as a result of his or her or its participation in the class action"; and he "consistently" told franchisees that whatever their decision on the class action, it would not affect their relationship with him or Pet Valu (at para. 66). The motion judge commented that while this attitude was "commendable", it is "inconsistent with the message delivered to franchisees by the CFC and the CPVF." However, the CPVF could not, and did not, speak on behalf of Pet Valu. Any inference to

the effect that it did is inconsistent with the motion judge's findings concerning the absence of involvement by Pet Valu in the campaign.

[69] Appellate intervention is warranted where an inference of fact is not supported by any evidence and where an improper inference has a material effect on the outcome: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 22-23. The conclusion reached by the motion judge, at para. 75, that there is "a reasonable probability" that many franchisees decided to opt out due to "unfair pressure amounting to intimidation" is based on the inferences he drew. In my view, these inferences lack a valid evidentiary basis and, given their significance to the outcome of the motion, must be set aside.

[70] The motion judge also erred in law in holding the CPVF to a standard of objectivity in the circumstances. He concluded, at para. 54(d), that the CPVF's campaign rendered the opt-out process unfair because there was no attempt on the website "to provide any form of informational balance or to discuss the issues in the class action". He noted: "the fact that, if the action was successful, every class member might have a right to substantial damages, was not even mentioned."

[71] However, unlike the situation in *A&P*, the CPVF's campaign took place following certification. At the start of the opt-out period, the class members received a court-approved notice of certification describing the nature of the

proceeding and indicating that damages were being sought on their behalf. The notice describes the opt-out process and the consequences of opting out. In addition, the notice has a link to class counsel's website and advises class members that a copy of the statement of claim and the rulings by the court in the action are available on that site. Thus, the class members had readily-available information about the possible benefits of the class proceeding through the court-approved notice of certification and class counsel's website.

[72] Indeed, had the representative plaintiff brought his concerns before the motion judge in a timely fashion, the motion judge could have dealt with any problem of improper communications whether by relieving the plaintiff from the terms of the "gag order", by giving some form of direction to the parties, or by reminding the parties and the class members that objective information regarding the lawsuit was available through the sources just discussed. The motion judge was not afforded the opportunity to do so.

[73] When the motion judge was eventually asked to deal with the plaintiff's concerns, he should not have held the CPVF's communications to a standard of objectivity. These former class members had an unassailable right to speak out in opposition to the class proceeding in an attempt to convince other class members to opt out, subject only to the overriding principles set out in *A&P*.

[74] The CPVF's website to which the motion judge took exception, at para. 54, contains assertions of belief that the class action is not in the best interests of franchisees and that it is driven by lawyers with a large financial stake in the outcome. The comments amount to no more than the CPVF members expressing their opinion on the undesirability from a business perspective of pursuing the lawsuit, as opposed to denigrating the technical merits of the action. The opt-out provision is the appropriate mechanism for class members to voice these types of objections to the wisdom of a class action: see *Fairview Donut Inc. v. TDL Group Corp.*, (2008) CanLII 60983 (On. S.C.), at para. 11. Class members are able to consider such objections in the context of the other information made available to them in the notice of certification and on class counsel's website. Apart from attempting to persuade other class members to forego their legal recourse against a defendant in a class proceeding, this interaction has no effect on the lawsuit other than reducing the number of persons in the class.

[75] The motion judge's application of the fully informed and voluntary test from *A&P* was flawed in these circumstances where there was no evidence linking the defendant to the impugned conduct and where the communications amounted to the type of intra-class debate that is acceptable during the opt-out period.

F. CONCLUSION AND DISPOSITION

[76] For these reasons, despite the deference that is owed to a discretionary decision by the motion judge, I would allow the appeal and set aside the order at issue.

[77] It was within the purview of the motion judge to scrutinize the CPVF's campaign according to the fully informed and voluntary test as enunciated in *A&P*. In so doing, the motion judge found that the appellant Pet Valu was not implicated in the CPVF's campaign. Given the evidentiary record on the motion, the power imbalance inherent in the franchisor/franchisee relationship was not properly considered in assessing the effect of the CPVF's communications on class members.

[78] At the start of the opt-out period, the class members were provided with a court-approved notice of certification and had access to class counsel's website with full particulars regarding the action. In this manner and in accordance with the statutory scheme, they were afforded access to objective information regarding the legal proceeding.

[79] The CPVF's campaign only dealt with the opinion as to the advisability of the legal proceeding from the business perspective of the franchisees. The campaign had as its central theme the suggestion that the class members should give the franchisor's new management team a chance to deal with the complaint

underlying the primary common issue certified in the proceeding. The CPVF's campaign advocated as a matter of opinion that it was not in the interests of the class members to have an outstanding lawsuit between them and the franchisor because it would distract the franchisor from running the business, would harm the Pet Valu trademark and would devalue their assets. In other words, the campaign did not attempt to address the technical merits of the lawsuit.

[80] The motion judge ought not to have held the CPVF's campaign to a standard of objectivity but should only have considered if the conduct of the campaign constituted misinformation, threats, coercion, intimidation or was otherwise unlawful. As explained, there is no evidence to support a finding that the opt-outs by individual class members were not voluntary or fully informed.

[81] The representative plaintiff was aware of the campaign by the CPVF to encourage class members to opt out of the action during the opt-out period. Nonetheless, he took no action to bring the campaign to the motion judge's attention until months after the opt-out period had expired. When he finally argued his motion to invalidate the opt-out decisions, he was unable to tender evidence from a single other class member indicating that the CPVF's campaign improperly influenced the decision to opt out of the proceeding in the sense contemplated by the test established in *A&P*.

[82] I would therefore allow Pet Valu's appeal and set aside the order invalidating the opt-out notices. I would also set aside the motion judge's cost award against Pet Valu and the members of the CPVF.

[83] The appellant Pet Valu shall have its costs of the appeal fixed in the amount of $10,000, inclusive of disbursements and HST.

[84] As noted, the appellant franchisees had no standing on the motion or the appeal. As such, they are not entitled to their costs of the motion or the appeal.

Released: "WKW" May 3, 2013

"W.K. Winkler C.J.O."
"I agree Robert P. Armstrong J.A."
"I agree Alexandra Hoy J.A."

TAB 2

1998 CarswellOnt 1548, 20 C.P.C. (4th) 346

C

1998 CarswellOnt 1548, 20 C.P.C. (4th) 346

Attard v. Maple Leaf Foods Inc.

Frank Attard and Michael Svab and the Applicants named in the Schedule "A" to the Notice of Motion herein, Applicants and Maple Leaf Foods Inc. and Canada Trust Company, Respondents

Kip Connolly, Stan Henderson and Tim Hosford, on their own Behalf and on Behalf of all Members of the United Food and Commercial Workers International Union who are or were Members or Beneficiaries of the Maple Leaf Foods Inc. Employees Retirement Plan 100, Applicants and Maple Leaf Foods Inc., Respondent

Ontario Court of Justice, General Division [Commercial List]

Spence J.

Heard: April 6, 1998
Judgment: April 16, 1998
Docket: 98-BK-001240, RE-7264/96, B362/96

Counsel: *Paul B. Fox* and *Fernando Souza*, for the Applicants Frank Attard et al.

Daniel J. Shields and *R.V. Bauslaugh*, for the Respondent Maple Leaf.

John R. Evans, for the Applicants Kip Connolly et al.

Subject: Labour and Employment; Civil Practice and Procedure

Practice --- Parties — Representative or class actions — Procedural requirements

Union group made application to court to determine entitlement to pension surplus — Members of union brought application seeking order allowing them to be represented by chosen representative on entitlement application — Application was granted — Union member who would otherwise have standing in court does not lose right because

of union membership — Union members would have had standing to come before court on entitlement issue — Union group and union members may have different interests and may choose different approaches to settlement and litigation strategy issues — Principles of judicial economy did not dictate that members would have to accept determination of union group on such matters.

Cases considered by *Spence J.*:

Dayco (Canada) Ltd. v. C.A.W., 14 Admin. L.R. (2d) 1, (sub nom. *Dayco (Canada) Ltd. v. CAW-Canada)* [1993] 2 S.C.R. 230, (sub nom. *Dayco (Canada) Ltd. v. C.A.W.-Canada)* 102 D.L.R. (4th) 609, (sub nom. *Dayco v. C.A.W.)* 93 C.L.L.C. 14,032, 63 O.A.C. 1, 152 N.R. 1, 13 O.R. (3d) 164 (note) (S.C.C.) — applied

Pilon v. International Minerals & Chemical Corp. (Canada) (1996), 31 O.R. (3d) 210, 141 D.L.R. (4th) 72, 97 O.A.C. 286 (Ont. C.A.) — applied

Weber v. Ontario Hydro (1995), 95 C.L.L.C. 210-027, 12 C.C.E.L. (2d) 1, 24 C.C.L.T. (2d) 217, 30 Admin. L.R. (2d) 1, 24 O.R. (3d) 358 (note), 125 D.L.R. (4th) 583, 183 N.R. 241, 30 C.R.R. (2d) 1, 82 O.A.C. 321, [1995] 2 S.C.R. 929 (S.C.C.) — applied

Statutes considered:

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

Generally — referred to

Rules considered:

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

R. 10 — considered

APPLICATION for representation order on application for entitlement to pension surplus.

***Spence J.*:**

1 The Union Group seeks a representation order under Rule 10 with respect to the present application. The issue in the application concerns the entitlement to the surplus in the pension plan. The standing of the Union to seek such an order is based on its status in respect of the collective agreement with the respondent employer, Maple Leaf Foods Inc. which has maintained the pension plan. The present dispute is only at as to whether the representation order in favour of the Union should have the effect of excluding the Attard Group from having its own separate representative as well.

2 The Attard Group seeks only to have Mr. Attard represent those who have provided them with written authorizations to do so. It appears there are authorizations from around 600 plan members. This seems like a large enough number to satisfy the test in Rule 10, which refers to persons who cannot readily be served.

3 It is argued that the Union Group is the only proper representative because the issues on the application arise out of the Collective Agreement and the statutory regime for labour relations gives exclusive authority to the Union on behalf of the members in respect of such matters. That would be the case where the matter is to be dealt with pursuant to the grievance arbitration procedures under the *Ontario Labour Relations Act*. Here, however, the Union Group has made an application to the court to determine the entitlement to the pension surplus. It is not suggested that the entitlement issues to be decided involve or fall within the jurisdiction of the O.L.R.B. or that they involve the interpretation or application of the *Labour Relations Act*. The entitlement issues could be said to relate to the collective agreement in that the pension plan has apparently been the subject of collective bargaining. The pension plan has been in existence since about 1948 and the references in the affidavit material to collective bargaining do not refer to such bargaining occurring before the year 1972, so the plan may antedate the agreement. Of greater importance, there seems to be no contention that the surplus entitlement matters should be before the O.L.R.B. That is understandable, since it appears they involve issues of trust law which are subject to the jurisdiction of this court. Counsel referred to the cases of *Dayco* (S.C.C. 1993); [*Dayco (Canada) Ltd. v. C.A.W.* (1993), 14 Admin. L.R. (2d) 1 (S.C.C.)] *Weber* (S.C.C. 1995) [*Weber v. Ontario Hydro* (1995), 95 C.L.L.C. 210-027 (S.C.C.)] and *Pilon* (Ont. C.A. 1996) [*Pilon v. International Minerals & Chemical Corp. (Canada)* (1996), 31 O.R. (3d) 210 (Ont. C.A.)]. In view of these cases, it is clear that a Union member may not come to court on a matter relating to the collective agreement where, because of that relationship to the collective agreement, the court has no jurisdiction to hear the matter. The situation in the present case is quite different. The Union Group itself has invoked the jurisdiction of the court on the very issue which the Attard Group also seeks to bring to court. There is no suggestion that the court lacks jurisdiction on the entitlement issue. I do not understand the cases to say that where the court's jurisdiction is properly invoked, a union member who would otherwise have standing loses that right because of union membership.

4 The members of the Attard Group apparently would have standing to come before the court on the entitlement issue. They have already commenced proceedings. They assert they are beneficiaries of the pension surplus. They should be able to advance that claim through their chosen representative unless there is some principle on which the Union Group should instead be recognized as their representative, against their wishes. It was submitted that there is a principle of judicial economy that should operate here. Such a principle warrants consolidating the two proceedings, that of the Union Group and the Attard Group, and that should be done. But no reason is evident why the Attard Group should be denied their own representative and as a related matter, counsel of their own choice. I note also (although I do not think this consideration is determinative) that the Attard Group seeks to dispute the contribution holidays taken by the company, and that issue is apparently not raised by the Union Group. It is quite possible that the Union Group and the Attard Group would have different interests and choose different approaches to settlement prospects and other litigation strategy issues. A principle of judicial economy does not dictate that the Attard Group should have to accept the determination of the Union Group on these matters.

5 For these reasons, an order should go that the Union Group is to be appointed the representative for all of the

pension plan members other than the persons who have signed written authorizations in favour of the Attard Group proposal and Mr. Attard is to be appointed the representative for those persons.

6 The Trustee submitted that it is premature at this stage to order costs, since it is not yet clear whether there is any entitlement to call for any payment of surplus from the plan and the interests of plan members could therefore be adversely affected by any order for payment of costs out of the plan. The court was advised that the Union Group would not seek costs at this stage. Subject to written submissions from the Attard Group within 15 days, costs will be reserved to the court hearing the matter.

Application granted.

END OF DOCUMENT

TAB 3

1986 CarswellOnt 2124, 17 O.A.C. 127, 57 O.R. (2d) 77

1986 CarswellOnt 2124, 17 O.A.C. 127, 57 O.R. (2d) 77

Bruce (Township) v. Thornburn

The Corporation of the Township of Bruce, Plaintiff and Alex Thornburn, A. Ernest Greer, Kenneth B. MacLean, Gary McGillivary, Harry Schildroth, The Corporation of the Township of Kincardine, The Corporation of the Township of Huron, The Corporation of the Township of Greenock, The Corporation of the Township of Elderslie, The Corporation of the Village of Tiverton, The Corporation of the Village of Paisley, The Corporation of the Town of Port Elgin, The Corporation of the Town of Kincardine, The Corporation of the Township of Arran, The Corporation of of the Township of Brant and The Corporation of the Township of Saugeen as representing the inhabitants and ratepayers of the said municipalities and John Bryce, H. Winston Shoemaker, Hardie Young and Ernie Young as representing the unascertained class of persons who may be entitled to be recognized as "subscribers" of the Bruce Municipal Telephone System, Defendants

Ontario Divisional Court

Southey, White, Bowlby

Heard: July 7-8, 1986
Judgment: September 5, 1986
Docket: 934/84

Counsel: *T. Kerzner, Q.C., R. D. Cheeseman,* for the appellants (the defendants Thornburn, Greer, MacLean, McGillivray and Schildroth)

S. N. Lederman, Q.C., for the respondents, Bryce, Shoemaker, Hardie Young and Ernie Young, (added defendants)

B. H. Kellock, Q.C., for the respondent (plaintiff), Township of Bruce

L. D. Ryder, for the respondent (defendant), Town of Port Elgin

Subject: Civil Practice and Procedure

1986 CarswellOnt 2124, 17 O.A.C. 127, 57 O.R. (2d) 77

Civil practice and procedure --- Parties — Representative or class proceedings not under class proceedings legislation — Defendant authorized by court to defend — Adding or substituting defendants

Civil practice and procedure --- Costs — Particular orders as to costs — General principles

Telephone system restricting admission of subscribers in 1975 -- Subscribers subsequently deciding to sell system -- Landowners excluded by 1975 restrictions claiming right to be considered subscribers -- Added as parties by High Court Judge to represent "unascertained class of persons" possibly entitled to be recognized as subscribers -- Plaintiff's appeal allowed -- Class too broad for representation order -- Possibility of conflict of interest with other members of group.

Telephone system freezing subscribers in 1975 -- Subscribers subsequently deciding to sell system -- Landowner excluded by 1975 restrictions claiming right to be considered subscribers -- Added as representative parties -- Costs ordered to be paid regardless of outcome by plaintiff -- Plaintiff's appeal allowed -- Subscribers similar neither to trustees nor to shareholders in derivative action -- No ground for making exception to rule of costs following cause -- Order as to costs to be reserved for trial Judge.

Cases considered by *Southey J.*:

Beddoe, Re (1893), [1893] 1 Ch. 547, 62 L.J. Ch. 233 (Eng. Ch. Div.) — distinguished

Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc. (1985), 51 O.R. (2d) 23, 15 Admin. L.R. 86, 2 C.P.C. (2d) 117, 19 D.L.R. (4th) 356, 11 O.A.C. 8, 17 O.M.B.R. 411, 1985 CarswellOnt 386 (Ont. Div. Ct.) — followed

Turner v. Mailhot (1985), 50 O.R. (2d) 561, 28 B.L.R. 222, 1985 CarswellOnt 136 (Ont. H.C.) — considered

Wallersteiner v. Moir (No. 2) (1975), [1975] 1 All E.R. 849, [1975] 1 Q.B. 373, [1975] 2 W.L.R. 389, 119 Sol. Jo. 97 (Eng. C.A.) — considered

Statutes considered:

Business Corporations Act, 1982, S.O. 1982, c. 4

s. 246(d) — referred to

Courts of Justice Act, 1984, S.O. 1984, c. 11

s. 141(1) — considered

Telephone Act, R.S.O. 1980, c. 496

Generally — considered

s. 1(i) "subsccriber" — referred to

s. 47(1) — referred to

s. 47(3) — referred to

s. 47(5)(b) — referred to

s. 47(6) — considered

Rules considered:

Rules of Civil Procedure, O. Reg. 560/84

R. 10.01 — considered

R. 57.01(2) — considered

***Southey J.*:**

1 This is an appeal from an Order of The Honourable Judge McKay, dated December 12, 1985, sitting as a local judge of the High Court of Justice for Ontario at Walkerton, in which he added the respondents John Bryce, H. Winston Shoemaker, Hardie Young and Ernie Young (hereinafter collectively called the "Bryce group"), as defendants in this action to represent "the unascertained class of persons who may be entitled to be recognized as 'subscribers' of the Bruce Municipal Telephone System". The local judge also ordered that the added defendants should have their reasonable incurred and future costs of this action on a solicitor and a client basis to be paid by the Bruce Municipal Telephone System upon final judgment in this action.

2 The action was brought by the Township of Bruce for a declaration identifying the "subscribers" of the Bruce Municipal Telephone System (the "BMTS" or the "System"), under the Ontario *Telephone Act*, or declaring that the subscribers of the BMTS cannot be ascertained. The issues on the appeal are:

1. Whether the local judge was right in adding anyone to represent the class of persons defined by him; and

2. Whether the local judge was right in ordering that the reasonable incurred and future costs of the Bryce group should be paid by the BMTS upon final judgment in the action, regardless of the outcome.

3 The BMTS was established in 1911 by the Township of Bruce under the *Telephone Act*. The Township was acting as the "initiating municipality" under the Act in response to a petition of local residents who undertook financial responsibility for the cost of establishing, operating and maintaining the System, and were the initial subscribers of the System. As provided in the Act, ownership of the System is vested in the Township in trust for the benefit of subscribers, but the System is under the control and management of commissioners elected by the subscribers. The appellants, Thornburn, Ernest Greer, MacLean, McGillivray and Schildroth are the present commissioners. They were appointed under an earlier order by the local judge made on September 14, 1984, to represent all persons presently recognized by the commissioners as subscribers of the BMTS.

4 The BMTS has grown, particularly since the construction of a nuclear generating station in the area, and there are now more than 9,000 telephone users in the System. These users reside not only in the Township of Bruce, but in the other defendant municipalities. The number of persons recognized as subscribers by the present commissioners is only 714, due in part to steps taken by the then commissioners to freeze the number of subscribers in 1975, and later to revise the criteria for identifying subscribers. The plaintiff alleges that these steps were taken without any statutory authority.

5 The significance of being recognized as a subscriber has been enhanced by the decision of the subscribers to sell the System for about $10,000,000.00. That sale has been approved by the Ontario Telephone Service Commission, as required by s. 103 of the *Telephone Act*, but with the direction that the proceeds be held in trust until there has been a determination of those entitled to share in it. An application for leave to apply to a single judge of the High Court for judicial review of the decision of the Ontario Telephone Service Commission approving the sale was dismissed by Craig J. on February 8, 1985, but with the term that consummation of the sale of the System be stayed until the Divisional Court has heard the application for judicial review.

6 The proceeds of the sale fall to be distributed in accordance with s. 47(5)(b) of the Act, which reads as follows:

> (5) The proceeds of the sale or other disposition not required for the purposes mentioned in subsection (3) shall,
>
> . . . . .
>
> (b) in the case of a sale or other disposition of the whole of the system, belong to the subscribers and be distributed among them in such manner and on such basis, having regard to their separate interests, as the Commission directs.

7 Section 47(3) provides for the proceeds to be used first for the payment of debts. The BMTS has accumulated about $2,000,000.00 in cash. If the 714 persons presently recognized as subscribers are the only persons who qualify as subscribers of the System, each subscriber will receive almost $17,000.00 from the sale.

8 Section 47(6) will apply if the Township of Bruce cannot determine who the subscribers are. That subsection reads as follows:

(6) Where from absence or loss of records or other cause the council of the initiating municipality is unable to ascertain who the subscribers are and is therefore unable to obtain their approval to a sale or other disposition of the whole or part of the system, the council, with the approval of the Commission upon proof of the fact and upon proof that the assets of the system and the proceeds of the sale or other disposition of the whole or part of the system will be sufficient to meet any outstanding debenture debt and other indebtedness and liabilities incurred in respect of the system, may authorize the sale or other disposition notwithstanding the absence of such approval, and the proceeds of the sale or other disposition not required for the purposes mentioned in subsection (2) shall,

(a) in the case of a sale or other disposition of part only of the system, belong to the system and be applied and used according to the directions of the council of the municipality or the commissioners, as the case may be; and

(b) in the case of a sale or other disposition of the whole of the system, be held, applied, used, distributed and disposed of in accordance with the directions of the council or the commissioners, as the case may be, and the approval of the Commission.

9 Section 47(1) provides for the sale of the System to be authorized by by-law of the initiating municipality, in this case, the plaintiffs. Such by-law has not been passed for the reasons stated as follows in paragraph 12 of the statement of claim:

12. The criteria established from time to time by the Defendant Commissioners and their predecessors to determine the persons to be recognized as subscribers do not comply with the provisions of the Telephone Act and accordingly, the Plaintiff is not in a position to enact a By-law to implement a sale and is not in a position to determine the persons entitled to share in the proceeds of any such sale.

The relief sought is declaratory, as follows:

13. The Plaintiff therefore claims:

(a) a declaration identifying the subscribers of the System in accordance with the Telephone Act, R.S.O. 1980, Chapter 496; or

(b) a declaration that the subscribers of the System cannot be ascertained and that the Plaintiff is accordingly unable to obtain their approval to a sale or other disposition of the System.

10 The issue as to the identification of subscribers entitled to vote on the proposed sale, and to participate in the distribution of the proceeds thereof, depends upon the interpretation of the somewhat complicated definition of "subscriber" contained in s. 1(i) of the Act, and then on the determination of the facts relevant to the claims of various persons that they should be recognized as subscribers under the interpretation found by the court to be correct.

The plaintiff, as trustee for all subscribers, is required to maintain an even hand between the various classes of persons claiming to be recognized as subscribers. In the first representation order made on September 14, 1984, the local judge authorized the plaintiff to bring the action on behalf of, or for the benefit of, the inhabitants and ratepayers of the Township of Bruce. He also ordered that the defendants Thornburn, Greer, MacLean, McGillivray, and Schildroth as commissioners of the System, be appointed to defend on behalf of, or for the benefit of, all persons presently recognized by such commissioners as subscribers of the System, subject to any other order this court may hereafter make should it appear that there is any conflict or potential conflict among said subscribers. The defendant municipalities were appointed to defend on behalf of the inhabitants and ratepayers of the respective municipalities, save the subscribers, subject to any order this court may hereafter make should it appear that there is any conflict or potential conflict among the said inhabitants and ratepayers.

11 The defendant municipalities have taken a passive role in the litigation. The only one of them represented on the appeal to this court was the Town of Elgin, which supported the order under appeal. It is believed that there were originally ten Port Elgin properties that were subscriber properties. Counsel for the Town submitted that his client found itself in a position of conflict in attempting to represent the potential interests of the original ten subscribers, the interests of those persons in the Town who might qualify as potential subscribers and the persons in the Town who might not qualify as potential subscribers. He also submitted that the Town does not have the funds to advance aggressively the conflicting interests of its inhabitants, and that the matter of the telephone system is a complex one little understood by the inhabitants and subject to media and political pressures which make it difficult for elected municipal officials to deal with it.

12 The legal expenses of the appellants (the commissioners) are being paid by the BMTS.

13 The members of the Bryce group are well-regarded landowners, each of whom has received telephone service from the BMTS for many years, personally, or through his ancestors or his predecessors in title, but who have been refused recognition as subscribers by the commissioners of the BMTS.

14 The following definition of "subscriber" is found in s. 1(i) of the *Telephone Act*:

> (i) "subscriber", in respect of a municipal telephone system, means a landowner who has signed a petition to the council of a municipality praying for the establishment or extension of a telephone system that is afterwards established or extended pursuant to the petition or upon whose property an annual rate is or may be levied and collected for the purpose of paying the cost of establishing and maintaining the system or the extension or any reconstruction, replacement or alteration of the system or any part thereof, and also means a person who, being a subscriber as defined above, has fully paid all annual rates in respect of the establishment of the system or of its extension and the cost of maintenance during the period for which debentures have been issued to pay the cost of the establishment or extension and who continues thereafter to take telephone service from the system on the basis of paying such charges therefor as are approved.

15 The affidavit filed in support of the application by the Bryce group to be added in a representative capacity refers to an admission of one of the present commissioners as follows:

> ...prior to the adoption of a resolution in 1975 that the BMTS would sign on no new subscribers, a person who purchased property in the Serviced Area, received telephone service from the BMTS and requested that he be listed as a subscriber would be added to the BMTS' list of subscribers...

16 The guidelines adopted in 1975 for the determination of subscriber rights imposed a number of restrictions. They read as follows:

> (1) Subscriber rights may not be transferred from one property to another.
>
> (2) When a property is severed the subscriber rights go with the larger section.
>
> (3) If there is no dwelling left in which to instal a telephone the subscriber may either have a fictitious number and continue to pay multi-party rates, or, secure a release.
>
> (5) If a subscriber property is subdivided the developer must get a release of subscriber rights.

17 When the subscriber list was revised in 1981, only people who should have been on the subscriber list prior to the 1975 resolution were eligible to be added to the list of subscribers.

18 There is evidence that the proposed sale has made the controversy as to what persons qualify as subscribers of the BMTS, a matter of great public interest in the area serviced by the BMTS. The undertaking of the Bryce group, as contained in the affidavit of John Bryce, was in the following terms:

> 14. I hereby undertake to diligently represent, with the assistance of Ernie Young, H. Winston Shoemaker and Hardie Young, the interests of the potential subscribers to the BMTS in the event this Honourable Court sees fit to appoint representatives with an indemnity as to costs from the BMTS. If appointed by this Honourable Court I propose to publicize our role in this action and hold a series of public meeting to obtain the views of the people served by the BMTS and to obtain information that they may have relevant to the issues in this action.

19 The application of the Bryce group to be added as defendants in a representative capacity was conditional upon the court ordering them to be entitled to recover their costs on a solicitor and client basis, regardless of the ultimate determination of the action. The affidavit of John Bryce contained the following statement:

> 12. I verily believe that unless this Honourable Court grants an indemnity as to costs as a condition of any representation order it may be disposed to making no individual or group of individuals in the area served by the BMTS will be willing to act as representatives of the potential subscribers of the BMTS because the large legal costs necessarily incurred to vigorously advance this position are more than such a group will accept responsibility for.

20 The local judge gave full and careful reasons for his order granting the application. He said he had no problem in finding that the Bryce group should be added as party defendants to represent the interests of unknown and

unascertained subscribers, but that the more difficult question was whether he had jurisdiction at this point in the proceedings to award costs.

21 The local judge then examined the law relating to the proposed order for the payment by the BMTS of the future costs of the Bryce group on a solicitor and client basis regardless of the outcome of the action, and concluded:

> ...In my judgment, the principle to be applied to the case at bar is analogous as to that which the Court applied in RE BEDDOE [1893] 1 Ch. 547, which concerned the costs incurred by a trustee in an action respecting the trust estate. In the case at bar, the action does not relate to the trust estate, but, the dealing with the "trust estate" by trustees who may in law not qualify as trustees and without the concurrence of the known or unascertained Subscribers who would become trustees.
>
> Having considered the combination of facts in this case and particularly the freeze by the then Subscribers in 1975 to any additional persons qualifying as Subscribers; the redefining of Subscriber qualifications August 12th, 1975; the revision of the Subscriber list in January, 1981 in accordance with the criteria determined by the then Subscribers, I can find nothing in the the TELEPHONE ACT which authorizes the Commissioners to take such action.
>
> For these Reasons I direct that John Bryce, Ernie Young, H. Winston Shoemaker and Hardie Young, be added as defendants to represent the unascertained class of persons who may be entitled to be recognized as "Subscribers" of the Bruce Municipal Telephone System. The added defendants shall have their reasonable incurred and future costs of this action on a solicitor and client basis to be paid by the Bruce Municipal Telephone System upon final judgment in this action.

22 With great respect to the local judge, I have concluded that his order cannot stand for two reasons.

23 First, the class of persons which the Bryce group has been appointed to represent is not, in my view, an appropriate one for a representation order under Rule 10.01. The class is described as "the unascertained class of persons who may be entitled to be recognized as 'subscribers' of the Bruce Municipal Telephone System". No attempt was made to describe the essential characteristics of the members of the Bryce group which give them the claim to subscriber status which they assert, and to limit the class being represented by them to persons having the same characteristics. It is as though the court appointed someone in a wills case to represent all persons claiming to be entitled under the will, instead of appointed persons to represent those claimants having a common basis for their claims for entitlement. For example, a person might be appointed to represent all persons claiming as third cousins.

24 It is difficult to see how the Bryce group can avoid serious conflicts of interests, if they are to represent all possible claimants. The fewer the persons who are ultimately recognized as subscribers, the larger will be the share of each subscriber in the proceeds of the sale. Without in any way questioning the good faith of the members of the Bryce group, it is my view that they should not be put in a position where they are required to advance claims for subscriber status which it is in their interests to see defeated. Nor should they be left in a position where they must advance all claims brought to their attention, regardless of merit, or alternatively, to make decisions as to which claims should be prosecuted in the action and which are so unworthy that they should not occupy the time of the

court or counsel.

25 The class to be represented should be described in terms such that all members of it will succeed if the Bryce group succeeds. Persons whose claims rest on a basis different from those of the Bryce group should be in a different class with different representation.

26 Secondly, it is my respectful opinion that the local judge erred in concluding from the authorities that this was a case in which he had power to provide in advance for the payment of solicitor and client costs that had not yet been incurred, regardless of the outcome of the proceedings. The learned judge quoted extensively from the reasons for judgment of the Divisional Court in *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* (1985), 51 O.R. (2d) 23 (Ont. Div. Ct.) ("*Save the Valley*"), in which it was held that the power to award costs may not be used to provide intervenor funding in order to ensure effective opposition, but concluded that this case was analogous to a trustee case, which was found by the Divisional Court to be one of the exceptions to the general rule.

27 *Save the Valley* involved an application to quash an order for intervenor funding made by a joint board which had statutory power to award the costs of a proceeding before it, to order by whom and to whom costs are to be paid, and to fix the amount of the costs or direct that they be taxed. The Divisional Court held that the joint board had no special powers with respect to costs beyond those traditionally exercised by courts. John Holland J., delivering the judgment of the court, defined the normal legal meaning of costs as follows, at p. 32:

> The characteristics of costs, developed over many years are:
>
> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
>
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
>
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
>
> (4) They are not payable for the purpose of assuring participation in the proceedings.

28 This exposition must be modified by Rule 57.01(2) which provides as follows:

> (2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

29 John Holland J. then went on to discuss a number of special cases where an award of costs has been made without regard to one or some of the characteristics he had listed. The only one of these exceptions that might be relevant in this case is Trustee cases, as to which John Holland J. said:

(B) Trustee cases

These cases recognize that the trustee, in litigious proceedings, is entitled to be indemnified from a common fund as to costs incurred without regard to the result when acting not on his own but in preservation of trust property or in a derivative position.

30 The local judge, in the passage quoted above, decided that the case at bar fell within the exception of Trustee cases, because it was analagous to the case of *Beddoe, Re*, [1893] 1 Ch. 547 (Eng. Ch. Div.), which was referred to in the authorities on which John Holland J. relied in connection with this exception. *Beddoe, Re* was a case in which a trustee who unreasonably defended an action against him in respect of trust property was held not to be entitled to retain out of the trust estate the costs of the action beyond the amount which he would have incurred by applying for leave to defend it. The judges of the Court of Appeal were of the view that if the trustee had applied to the court before defending for directions as to whether he should have defended the action, no judge would have authorized him to defend. He would, however, have been entitled to indemnification out of the trust estate for the costs of the motion for directions.

31 I am unable to understand how the position of subscribers, present or potential, in the present case, can be likened to that of trustees. Each present subscriber stands to realize a substantial personal benefit if the proposed sale of the BMTS is completed. The same is true of each member of the Bryce group, if it is held that they should be recognized as subscribers, and of any other presently unrecognized persons who are similarly successful. All have personal pecuniary interests in being held to be subscribers. Their position is analogous to that of beneficiaries or *cestuis que trust*; they are not like trustees, who act for the protection of the trust property, or for the benefit of the beneficiaries, without prospect of personal gain. This case is not like a trustee case, and, in my judgment, the analogy by the local judge to *Beddoe, Re* was inappropriate.

32 Nor are the persons claiming to be subscribers asserting claims analogous to those of shareholders bringing a derivative action. Such an action is brought to enforce the rights of the corporation. If the action is successful, it is the corporation which benefits. In this case, the persons claiming to be subscribers are seeking to enforce alleged personal, individual rights. Such claims are not in respect of derivative rights, and would be analagous to those asserted in an action to determine who are the shareholders of a corporation, rather than those asserted in a derivative action in which a shareholder sues in respect of a wrong done to the corporation.

33 In my judgment, this case does not fall within the Trustee cases, or any of the other exceptions referred to in the decision of the Divisional Court in *Save the Valley*. It is my opinion that *Save the Valley* constitutes binding authority against the award of costs made by the local judge in this case.

34 It was submitted by Mr. Lederman that *Save the Valley* did not close the list of possible exceptions to the general rule respecting costs. Even if that were so, I can see no valid ground for attempting to establish another class of exceptions to cover the situation that has arisen in this case. One of the purposes of the general rule respecting costs is to discourage claims that have no reasonable chance of success. There is no reason why that factor should be prevented from exercising its beneficial influence in this case.

35 As I implied in connection with the first point, the order of the local judge might be construed as giving the Bryce group a free hand, or perhaps impose a duty upon them, to advance all claims brought to their attention, regardless of merit. Even if the class to be represented is restricted to persons who have claims on the same grounds as those of the Bryce group, I am not persuaded that such claims should occupy the time of the court, if no person or group has enough confidence in their merit to submit to the normal risks respecting costs. At probably more than $10,000.00 per subscriber, the rewards of winning would not be trifling. Even if the representatives were unsuccessful on the merits, they might well be awarded party and party costs as court appointed representatives, unless their claims turned out to be without any merit.

36 Section 141(1) of the *Courts of Justice Act* deals with the jurisdiction to award costs as folows:

> **Costs**
>
> **141.-(1)** Subject to the provisions of and Act or rules of court, the costs of an incidental to a proceeding or a step in a proceeding are in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid.

37 In *Beddoe, Re* , *supra,* at p. 554, Lindley L.J. considered a similar provision in the English Rules. He quoted the relevant words:

> Subject to the provisions of the Act and these rules, costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge.

He continued with the question:

> What Court or Judge? I apprehend the meaning of the rule is quite obvious, that in every proceeeding in the Court the costs of that proceeding are in the discretion of the Judge who has to deal with it - who has to try it. He knows the facts of the case he knows the conduct of the parties and the nature of the controversy, and the costs of every proceeding are, therefore, placed in the discretion of the Judge who tries the proceeding. It does not mean that the costs in a proceeding are to be in the discretion of the Court of Judge before whom these costs may incidentally come, upon an application to have them borne by some fund or some person not before the Court in the proceedings in which they have been incurred - that is not the meaning of the rule. Although costs are costs when they are incurred, the moment you come to ask that they shall be borne as expenses by a particular fund, or by persons not parties to the proceedings in which they were incurred, they become, not costs, but charges and expenses, and when once you get them into the category of charges and expenses this rule and this enactment do not apply to them.

38 The court now has express statutory powers under s. 246(d) of the *Business Corporations Act*, 1982, (Ont.) c. 4, to make an order at any time that the corporation pay the reasonable legal fees and other costs incurred by the claimant to whom leave has been given to commence a derivative action. (See *Turner v. Mailhot* (1985), 50 O.R.

(2d) 561 (Ont. H.C.)). In *Wallersteiner v. Moir (No. 2)*, [1975] 1 All E.R. 849 (Eng. C.A.), the Court of Appeal held that similar relief could be given to the plaintiff in a derivative action in England in the absence of any stautory provision therefor. As stated above, this is not a derivative action, or analogous thereto. In my judgment, neither of the two cases just mentioned provide authority for making an order in this case that would remove from the trial judge the normal responsibility for determining the disposition of costs.

39 For the foregoing reasons, an order will go allowing the appeal and setting aside the order of the local judge. The disposition of costs in this court and below will be reserved to the trial judge.

40 The plaintiff, as trustee for all subscribers, shall be at liberty, if so advised, to move for approval of the further steps, if any, which it may consider should be taken to determine what classes of persons claim to be subscribers. No doubt the plaintiff would be entitled to be indemnified out of the funds of the BMTS for the costs of such motion and of any steps proposed and approved by the court.

41 The representation order of September 14, 1984, shall remain in force, and any persons seeking orders to represent classes of persons claiming to be recognized as subscribers shall be at liberty to bring the appropriate motions. The definition of any class to be represented, and the provision for costs should be in accordance with these reasons.

***White*:**

42 I agree.

***Bowlby*:**

43 I agree.

END OF DOCUMENT

TAB 4

2009 CarswellOnt 9398,

2009 CarswellOnt 9398

Canwest Global Communications Corp., Re

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

In the Matter of a Proposed Plan of Compromise or Arrangement of Canwest Global Communications Corp. and the Other Applicants listed on Schedule "A"

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: October 27, 2009
Docket: CV-09-8396-00CL

Counsel: Lyndon Barnes, Shawn Irving, for Applicants

Alan Merskey, for Special Committee of the Board of Directors

David Byers, Maria Konyukhova, for Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett, for Ad Hoc Committee of Noteholders

Hilary Clarke, for Bank of Nova Scotia

Steve Weisz, for CIT Business Credit Canada Inc.

Hugh O'Reilly, Amanda Darrach, for CHCH Retirees

Douglas Wray, Jesse Kugler, for Communications, Energy and Paperworkers Union of Canada

Deborah McPhail, for FSCO

2009 CarswellOnt 9398,

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Statutes considered:

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

s. 11 — referred to

Rules considered:

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

R. 10 — referred to

***Pepall J.*:**

Relief Requested

1 The CMI Entities seek an order appointing David Cremasco, Rose Stricker and Lawrence Schnurr as representatives of certain retirees ("Retirees"). The Retirees are all former employees of the CMI Entities (or their predecessors) or their surviving spouses who receive or are entitled to receive a pension from a pension plan sponsored by a CMI Entity or who, prior to October 6, 2009, were entitled to receive non-pension benefits from a CMI Entity. The proposed order would encompass former members of the Communications, Energy and Paper-workers Union of Canada ("CEP") who are entitled to benefits under the Global Communications Limited Retirement Plan for CH Employees (the "CH Employees Plan") but not otherwise. They are referred to as the CH Employees. Put differently, the proposed representatives do not plan to represent former unionized employees (or their surviving spouses) who were represented by CEP when they were active employees other than those who were entitled to benefits under the CH Employees Plan, namely the CH Employees. The CMI Entities also request an order appointing the law firm of Cavalluzzo Hayes Shilton McIntyre & Cornish LLP as representative counsel for the Retirees. It is proposed that the CMI Entities provide funding for this representation.

2 The CEP seeks an order appointing it and the law firm of CaleyWray to represent current and former members of the CEP who are employed or who were formerly employed by the CMI Entities[FN1] but not including the aforementioned CH Employees. It also requests funding by the CMI Entities and a charge over their property for this representation. It further requests that the claims bar date established in my order of October 14,2009 be extended from November 19, 2009.

Brief Outline of Facts

3 Since the date of the Initial Order, the CMI Entities have paid and intend to continue to pay:

(a) salaries, commissions, bonuses and outstanding employee expenses;

(b) current service and special payments with respect to the active defined benefit pension plans; and

(c) post-employment and post-retirement benefit payments to former employees who were represented by a union when they were employed by the CMI Entities.

4 That said, certain former employees are affected by the CMI Entities' discontinuance or proposed discontinuance of employee related obligations and it is intended that they be assisted by the granting of the order requested by the CMI Entities. Approximately 81 former non-unionized employees have been advised that the CMI Entities propose to cease making all post-employment and post-retirement benefit payments in relation to claims incurred after November 13,2009. There are also 2 out of IS beneficiaries of the Canwest Global Communications Corp. and Related Companies Retirement Compensation Arrangement Plan who will not have received the entire present value of their entitlement under that plan.

5 In addition, the CMI Entities purported to terminate the CH Employees Plan when they sold CHCH TV effective August 31, 2009. 120 former employees or spouses received a pension or were entitled to receive a deferred vested pension under this plan. OSFI has directed CMI to prepare without delay a valuation report for the CH Employees Plan effective as of December 31, 2008 to establish additional amounts to accrue from January 1, 2009 which may need to be funded through special payments. The CMI Entities anticipate that the valuation will identify an unfunded liability. Currently, special payments are not contemplated in the cash flow projections for that unfunded liability and a shortfall is anticipated to exist on the filing of the termination report for the plan.

6 Some former employees of CHCH TV have established a committee representing union and non-unionized former employees. Committee members include the proposed representatives. Rose Stricker is a non-unionized deferred vested member of the CH Plan. David Cremasco is a formerly unionized retiree with entitlement to post-retirement benefits and Lawrence Schnurr is a formerly salaried employee with entitlement to post-retirement benefits. If appointed, they will seek to form a broader committee with a member from each of the major population centres in which the Retirees reside and with at least one additional formerly unionized member.

7 Cavalluzzo LLP acts for about 100 retired participants in the CH Employees Plan, 30 to 40 of whom were not previously represented by a union and 60 to 70 of whom were. Other than those 100, most other Retirees are not represented by counsel in this CCAA proceeding.

8 The CMI Entities request that Cavalluzzo LLP be appointed as representative counsel to assist the Retirees.

9 CEP represents 1000 bargaining unit employees employed by the Applicants. It intends to facilitate and advance the claims of both its current members and its former members (but not including the CH Employees). CEP states that as a result of the current economic crisis, it has had to incur significant costs in representing its current

and former members in CCAA proceedings. This is particularly so given the union's strong presence in the forestry and media industries and the degree to which they have been impacted by the state of the economy. CEP states mat the costs have been substantial and have adversely affected its financial position. CEP states that its ability to provide effective representation in these proceedings is dependent on receipt of funding. In the past 6 months, CEP has spent about $250,000 on legal costs in connection with different CCAA proceedings. Furthermore, former members do not pay union dues and their representation, although part of the union's internal mandate, creates costs that are outside CEP's cost structure. In addition, over the past 12 months, CEP has lost approximately 12,000 members due to economic conditions. This obviously has a negative impact on union revenues. Faced with these conditions, CEP seeks funding.

10 CEP requests that CaleyWray be appointed as representative counsel. It also requests a charge or security over the property of the CMI Entities to cover the costs of CEP and its counsel although it did not press this point on learning that no such charge is proposed for the Cavaluzzo representation order.

11 Lastly, CEP requests that the claims bar date be extended to provide it with additional time to identify, value and process claims.

Issues

12 The issues to consider are:

(a) Should the representatives and Cavalluzzo LLP be appointed to represent the interests of the Retirees and should Cavalluzzo LLP be provided with funding for such representation?

(b) Should CEP and Caley Wray be appointed on behalf of CEP's current and former members (not including the CH Employees) and provided with funding and a charge over the property of the CMI Entities for such representation?

(c) Should the claims bar date be extended as requested by CEP?

Discussion

(a) Cavalluzzo LLP

13 No one opposes the motion of the CMI Entities. The Monitor and the Ad Hoc Committee of 8% Noteholders support the request and others are unopposed to the relief requested. CIT has agreed to a variation of the cash flow in this regard as well.

14 Dealing firstly with the representation component of the order, in my view, the order requested should be granted. I have jurisdiction under Rule 10 of the Rules of Civil Procedure and section 11 of the CCAA. The balance of convenience favours the granting of the order and it is in the interests of justice to do so. The Retirees are a par-

ticularly vulnerable group and without professional and legal resources, they are likely at risk of being unable to understand and protect their interests in the restructuring. Clearly there is a social benefit associated with them being represented. The appointment of a single representative counsel will facilitate the administration of the proceedings and provide for efficiency. Cavalluzzo LLP is experienced in this area, has a considerable reputation, and is fully qualified to act.

15 As for funding, the CMI Entities propose that, subject to fee arrangements agreed to by the CMI Entities and Cavalluzzo LLP, reasonable legal, actuarial and financial expert and advisory fees and other incidental fees and disbursements be paid by the CMI Entities on a monthly basis. Funding for such representation should be provided by the CMI Entities. I am satisfied that the moving parties have established that such an order is beneficial. I accept the evidence before me to the effect that most individual Retirees likely do not have the means to obtain actuarial and/or benefit experts and would benefit from the assistance offered by representative counsel and its pension expert. Absent such an order, there would likely be a multiplicity of lawyers acting for various Retirees, stress and inconvenience for those who could ill afford such representation, no representation for some, and the disorganization and inefficiency associated with multiple representation of substantially similar interests. A single counsel diminishes the likelihood of "overlawyering" and funding of such representation is a recognition of that desirable objective. It is fair and just to grant such an order.

(b) CEP and CaleyWray

16 CEP requests a separate representation order for all current and former CEP members other than the CH Employees and an order that CaleyWray be appointed as representative counsel funded by the CMI Entities.

17 Again, there is no issue that CaleyWray is experienced and well equipped to act for these individuals. Similarly, the union may appropriately represent its members and former members.

18 CEP intends to facilitate and advance the interests of both its members and former members. It is of the view mat it has no conflict of interest as all of the aforementioned may ultimately have unsecured claims. It clearly already represents its current members and plans to represent its former members. In that sense, they are not vulnerable. I do not see the need for a representation order particularly with respect to current members. To the extent, if any, that it is necessary to do so, and given that no one opposes the request, it and CaleyWray are authorized to represent CEP's current and former members (but not including the CH Employees).

19 As for funding, as I indicated in the *Fraser Papers* case, it should only be provided for the benefit of those former employees who otherwise would have no legal representation. Here, CEP intends to represent its current and former members (except for the CH Employees). But for this desire and subject to the agreement of Cavalluzzo LLP to act, there is no principled reason for separate representation. It arises by choice not out of necessity. Furthermore, this is an insolvency. Absent a clear and compelling reason such as the existence of an obvious conflict of interest, the general rule should be that funding by applicant debtors should only be available for one representative counsel. Even if one disagrees with that proposition, in this case, the CMI Entities have paid and intend to continue to pay, amongst other things, salaries, current service and special payments with respect to the defined benefit pension plans and post-employment and post-retirement benefit payments. Based on the materials before me, there are approxi-

mately 9 CEP members who were recently terminated and who have been advised that they will no longer receive salary continuance. In essence, the evidentiary support that might merit a funding request is absent. As noted in the factum of the CMI Entities, if they should change their position with respect to employee related obligations, the need for funding could be addressed at that time. I am also not persuaded that funding should be granted to pay for CEP's costs for outstanding grievances. No one else including the Monitor supports the requested order and I do not believe that it should be granted.

20 As mentioned, no charge is being requested or granted with respect to the Cavalluzzo representation order and none should be given here. In addition, the Term Sheet as described in the materials restricts the granting of a charge absent the agreement of others including the Ad Hoc Committee.

(c) Claims Bar Extension

21 The last issue to consider is whether the claims bar date contained in my order of October 14, 2009, should be extended as requested by CEP. Based on the evidence before me, I am not persuaded that such an extension is necessary at this time.

Conclusion

22 In conclusion, the CMI Entities' motion is granted except that the third and last sentences of paragraph 2 are to be subject to any further or other order. The CEP motion is dismissed although authorization to represent current and former members (excluding the CH Employees) is granted.

***Pepall J.*:**

On a last unrelated issue, I would like counsel to give some thought to the following suggestion. For future time sensitive motions brought by the CMI Entities, it would be helpful in situations where interested parties do not have time to file a factum if, before the return date, those opposing filed with the court a 1 to 2 page memo *(maximum)* outlining their respective positions. Interested parties are not obliged to do so but the court would consider this to be of assistance.

FN1 In its materials, CEP uses the term "Applicants" but for consistency, I have used the term "CMI Entities".

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TAB 5

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2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152, 185 A.C.W.S. (3d) 865

Canwest Publishing Inc./Publications Canwest 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.

Ontario Superior Court of Justice [Commercial List]

Pepall J.

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

Counsel: Lyndon Barnes, Alex Cobb for Canwest LP Entities

Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

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

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

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

Anthony F. Dale for CAW-Canada

Deborah McPhail for Financial Services Commission of Ontario

2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152, 185 A.C.W.S. (3d) 865

Subject: Insolvency; Civil Practice and Procedure

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

In January 2010 LP Entities obtained order pursuant to Companies' Creditors Arrangement Act staying all proceedings and claims against them — Order permitted, but did not require, payments to employees and pension plans — There were approximately 45 non-unionized employees who were still owed termination and severance payments, as well as accrual of pensionable service — There were further nine employees who were, or would be, entitled pursuant to executive pension plan to pension benefits in excess of those under main pension plan — Moving parties sought order permitting them to represent those employees, for appointment of counsel, and for funding of counsel — Respondents did not object to appointment representatives or counsel, but opposed funding of counsel — Motion granted — All four proposed representatives had claims against LP Entities that were representative of claims that would be advanced by former employees — Individuals at issue were unsecured creditors whose recovery expectations might be non-existent, however they found themselves facing legal proceedings of significant complexity — Evidence was that members of group had little means to pursue representation and were unable to afford proper legal representation at this time — Employees were vulnerable group and there was no other counsel available to represent their interests — Canadian courts did not typically appoint unsecured creditors committees — It would be of considerable benefit to have representatives and representative counsel who could represent interests of salaried employees and retirees — There were three possible sources of funding: LP Entities, Monitors, or senior secured lenders — Court had power to compel senior secured lenders to fund or alternatively to compel LP Administrative Agent to consent to funding — Source of funding other than salaried employees themselves should be identified now — Funding would be prospective in nature and would not extend to investigation of or claims against directors — Counsel were directed to communicate with one another to ascertain how best to structure funding and report back to court by certain date.

Statutes considered:

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

Generally — referred to

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

Generally — referred to

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

***Pepall J.*:**

Reasons for Decision

Relief Requested

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

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

Facts

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

4 There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

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

tirees 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 recov-

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

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

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

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

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

Motion granted.

END OF DOCUMENT

TAB 6

2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 177 A.C.W.S. (3d) 634

2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 177 A.C.W.S. (3d) 634

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

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: April 20, 2009
Judgment: May 27, 2009[FN*]
Docket: 09-CL-7950

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

Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor

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

Alan Mersky, Derrick Tay for Applicants

2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 177 A.C.W.S. (3d) 634

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

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

Leanne Williams for Flextronics Telecom Systems Ltd.

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

Gail Misra for Communication, Energy and Paperworkers Union of Canada

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

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

G.H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

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

Subject: Insolvency

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

Appointment of representative counsel — Telecommunication company entered protection under Companies' Creditors Arrangement Act — Telecommunications company ceased paying former employees with unsecured claims — Several groups of employees claimed entitlement to assets of company, including current working employees, and pensioners — Several law firms maintained that different classes should be established representing employees with different interests, with different legal representatives for each — Five law firms brought motions regarding representation — Law firm KM appointed representative for all potential classes of employee — Court has broad power to appoint representative counsel — Employees and retirees were vulnerable creditors, and had little means to pursue claims beyond representative counsel — No party denied choice of counsel as employees entitled to obtain individual counsel — No current conflict of interest between pensioned and non-pensioned employees — Many classes of employee had similar interest in pension plan — Claims under pension, to extend it was funded, not affected by CCAA proceedings — Pension claims by terminated employees creating conflict with other claims was only hypothetical — All former employees had community of interest.

Cases considered by *Morawetz J.*:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — considered

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

Generally — referred to

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

Generally — referred to

Rules considered:

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

R. 10 — referred to

R. 10.01 — considered

R. 12.07 — considered

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

***Morawetz J.*:**

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

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks

Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

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

(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 num-

ber 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 pension-

ers is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

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

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

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

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

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

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

be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

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

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

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

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

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

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

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

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

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

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

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

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

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

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual

who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

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

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

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

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

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

(4th) 12 (Alta. Q.B.), para 31.

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

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

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

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

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

Order accordingly.

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

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TAB 7

2007 CarswellOnt 7288, 38 C.B.R. (5th) 284

C

2007 CarswellOnt 7288, 38 C.B.R. (5th) 284

Ravelston 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 THE RAVELSTON CORPORATION LIMITED AND RAVELSTONMANAGEMENT INC.

AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

Ontario Superior Court of Justice

Cumming J.

Heard: November 7, 2007
Judgment: November 8, 2007
Docket: 05-CL-005863

Counsel: Richard B. Jones, Lisa Corne for Class A and Class B Preferred Shares of Argus Corporation Limited

A. MacFarlane, J. Dietrich for RSM Richter

Roslynn Kogan for Conrad Black

Derek J. Bell for Sun Time Media Group Inc.

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Bankruptcy and insolvency --- Receiving order — Miscellaneous issues

Appointing counsel in receivership proceedings — ACL was wholly owned subsidiary of RCL, and each owned 61 per cent and 17 per cent respectively, of common shares of H — R was appointed receiver and manager, interim receiver and monitor of RCL and ACL in April and May 2005 — On August 30, 2005, receiver sent notice to all preference shareholders of ACL seeking establishment of concerned preference shareholders as organized collective group with representative counsel, which led to present ACL preference shareholder group ("APSG"), representing 52 per cent of all preference shareholders, and made up of 61 per cent of Class A and 49 per cent of Class B preference shareholders — APSG moved to appoint solicitor to act as independent counsel to represent interests of all Class A and Class B shareholders in receivership proceedings of RCL — Motion dismissed — 48 per cent of ACL preference shareholders were not represented by APSG and had not been served with respect to motion — Order sought was overreaching and sought to vary terms of receivership order under which R was appointed by elevating solicitor to position of quasi receiver — Receiver was not in actual or fairly perceived conflict of loyalties in being receiver to both RCL and ACL — Motion was premature inasmuch as it should await determination as to whether H had any real value to its common shareholders RCL and ACL — Alleged wrongdoing by officers and directors of ACL and RCL with causes of action accruing to Class A preference shareholders was not good reason to grant motion — Interests of Class A preference shareholders, as stakeholder in receiverships, were fairly and competently represented by receiver, and APSG could continue to represent interests of their clients in receiverships without motion being granted.

Cases considered by *Cumming J.*:

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Ravelston Corp., Re (2007), 152 C.R.R. (2d) 91, 2007 CarswellOnt 755, 29 C.B.R. (5th) 34, 84 O.R. (3d) 611 (Ont. S.C.J. [Commercial List]) — referred to

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135, 85 O.R. (3d) 175 (Ont. C.A.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

Rules considered:

2007 CarswellOnt 7288, 38 C.B.R. (5th) 284

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

R. 10.01(1)(f) — pursuant to

R. 12.08 — pursuant to

MOTION by certain preference shareholders to appoint independent counsel to represent interests of all Class A and Class B shareholders in receivership proceedings.

***Cumming J.*:**

The Motion

1 Some 61% of the Class "A" and 49% of the Class "B" preference shareholders ("Argus Preference Shareholder Group") of Argus Corporation Limited ("Argus") bring a motion to appoint Richard B. Jones, Q.C. of Aylesworth LLP ("Aylesworth") to act as independent counsel ("Representative Counsel") to represent the interests of *all* Class "A" and Class "B" shareholders in the receivership proceeding of Ravelston Corporation Limited ("RCL") (other than representing RCL itself and any person related to RCL).

2 Argus is a wholly owned subsidiary of RCL. Argus has some 61% of the common shares of Hollinger Inc. ("Hollinger"). RCL owns some 17% of the common shares of Hollinger. Lord Conrad Black has the controlling interest in RCL. RSM Richter Inc. ("Richter") was appointed receiver and manager, interim receiver and monitor of RCL and Argus in April and May, 2005. The extensive background to the receivership of RCL and its history are set forth in *Ravelston Corp., Re*, [2007] O.J. No. 414 (Ont. S.C.J. [Commercial List]), aff'd. (Ont. C.A.) and *Ravelston Corp., Re*, [2007] O.J. No. 536 (Ont. S.C.J. [Commercial List]), leave to appeal denied (Ont. C.A. [In Chambers]).

3 This motion was initiated September 20, 2007, at which time the motion contemplated that the fees and disbursements of the intended Representative Counsel would form a charge on Argus' property ranking *pari passu* with the Receiver's Charge (overlooking the interests of RCL's secured creditors). In the alternative, Aylesworth suggested that there be a charge on any distributions to Argus preference shareholders (overlooking the fact that this could mean diminishing the distribution to preference shareholders who had no notice of the motion). After a case conference the motion was deferred for further consideration by Aylesworth as to whether the motion would be pursued.

4 On the return of the motion November 7, Aylesworth advised that its new position was that the requested Court order provide only that "the issues regarding the payment of reasonable fees and disbursements...be determined at such time and on such terms as to notice as this Court may hereafter order."

5 Approximately 48% of the Argus preference shareholders are not represented by the 52% Argus Preference Shareholder Group bringing the motion at hand. The unrepresented group have not been served in respect of the motion at hand. The Receiver opposes the motion in part upon the basis of lack of service of the motion materials.

6 On August 30, 2005, working with CIBC Mellon, Argus' transfer agent, the Receiver sent a notice to all preference shareholders of Argus, at the expense of the estate, and included a letter from Mr. George G. Stevens, a preference shareholder and the affiant for the moving party. The letter gave notice of seeking the establishment of concerned Argus preference shareholders as an organized, collective group with representative counsel, such initiative being dependent upon contributing a *pro rata* share of funds to defray the costs of representation on behalf of the preference shareholders. This initiative led to the present Argus Preference Shareholder Group which, as noted above, represents only 52% of all preference shareholders. They have been effectively represented in the RCL receivership proceedings since that time by counsel. They have recently changed counsel and are now represented by Aylesworth.

7 There are, in my view, four problems with the motion at hand.

8 First, the new, present motion materials should have been sent by mail to all of the Class A and Class B preference shareholders. This could be done through obtaining an updated list from CIBC Mellon and could be done at an estimated modest cost of perhaps $5,000. A newspaper advertisement could also have been utilized as a means of communication to preference shareholders who could not be reached by a mailing.

9 The motion is nominally brought pursuant to Rule 12.08 of the Rules of Civil Procedure but from my reading of the Rules is in reality properly to be bought under Rule 10.01(1) (f). This allows for an order to be made appointing a representative in a proceeding in respect of persons who "cannot be readily ascertained, found or served." This is not the case here.

10 Aylesworth suggested in the course of submissions that a 'comeback clause' in the proposed order would suffice, but this implies a mailing in all events. A mailing of the proposed motion would be far superior to a mailing after the fact.

11 Second, in my view, the draft of the requested order is overreaching and seeks, in effect, to vary the terms of the receivership order under which Richter was appointed by elevating Mr. Jones (nominally to be Representative Counsel) to the position of a quasi receiver with a corresponding restriction upon the powers and obligations of Richter as Receiver.

12 For example, the draft order suggests Richter in its capacity as Receiver would not be able to pursue any proposed course of action, agreement, proceeding or an asset disposition if the Representative Counsel disagreed (and in such event would have to seek directions and approval from the Court). For example, Richter would be obligated to provide access to all information and the voluminous extant documentation notwithstanding relevancy, cost and possible concerns as to privilege. There should not be fetters put upon the Receiver which add delay, inconvenience, extra costs and inefficiencies.

13 Richter has been effectively consulting with all stakeholders (including the Argus preference shareholders) in the related receiverships in respect of matters which may affect their interests. As noted above, the Receiver has encouraged the Argus preference shareholders to have the advantage of their own counsel since the commencement

of the receivership.

14 Third, Aylesworth in its submissions asserts that the Receiver is in a conflict of loyalties in being receiver to both RCL and Argus. I disagree. In my view, there is no actual or fairly perceived conflict. The Receiver's goal has always been to maximize the value at Hollinger. The interests of the Argus preference shareholders and RCL are identical in this regard. If Hollinger has no or minimal value then both the Argus preference shareholders and RCL will as common shareholders of Hollinger have shares of no indirect value to their own shareholders. The evidentiary record to date suggests that Hollinger is insolvent. At this time, the chance of any return to Hollinger's common shareholders seems remote.

15 Even if there is ever any such return it also seems probable that the insolvency of RCL and Argus means there would not be any distribution to their own respective shareholders. The point is, the motion at hand is, at the least, premature inasmuch as it should await the determination as to whether Hollinger has any real value to its common shareholders, RCL and Argus.

16 Fourth, Aylseworth asserts that there has been wrongdoing by the officers and directors of Argus and RCL with causes of action accruing to the Argus preference shareholders. I do not see this as a good reason to grant the motion. I mention that access to the courts has always been available, of course, through the preference shareholders being able, if they so chose, to commence a class action under the *Class Proceedings Act*, 1992, S.O. 1992, c.6. Assuming certification, all Argus preference shareholders could be included in the class (with a right of opt-out). This approach would incidentally have avoided the present concern of the Argus Preference Shareholder Group that some 48% of preference shareholders (ie. the 48% not in the Group) may get a 'free ride' through the efforts of counsel for the Group, with counsel only being funded by members of the Group. Seeking leave for a derivative action on behalf of Argus has been an alternative possibility.

Disposition

17 For the reasons given, the motion is dismissed. I emphasize that, in my view, the interests of the Argus preference shareholders, as a stakeholder in the receiverships, are fairly and competently being represented by Richter as Receiver. Moreover, counsel for the Argus Preference Shareholder Group has represented, and can continue to effectively represent, the interests of their clients in the receiverships without the motion being granted. In my view, dismissing the motion is in the best interests of *all* stakeholders in the receiverships and results in no disadvantage to the moving party.

Motion dismissed

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Court of Appeal File No.: M42399
Commercial Court File No.: CV-12-9667-00CL

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

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File No.: M42399
Superior Court File No.: CV-10-414302CP

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, et al.
Plaintiffs

-and-

SINO-FOREST CORPORATION, et al.

Defendants

COURT OF APPEAL FOR ONTARIO

(Proceeding Commenced at Toronto)

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