Court File No.: CV-20-00634911-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE WITH RESPECT TO CELADON GROUP, INC. AND THE AFFILIATED ENTITIES LISTED IN FOOTNOTE "1" HERETO

APPLICATION OF CELADON GROUP, INC. PURSUANT TO PART XIII OF THE *BANKRUPTCY AND INSOLVENCY ACT* AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.-43, AS AMENDED

BOOK OF AUTHORITIES
(Motion for Employee Representation Order, returnable January 23, 2020)

January 22, 2020

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
P.O. Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay LS#: 31885W
ahatnay@kmlaw.ca
Tel: 416-595-2083 / Fax: 416-204-2872
Demetrios Yiokaris LS#: 45852L
dyiokaris@kmlaw.ca
Tel: (416) 595-2130 / Fax: (416) 204-2810

Counsel to Jeff Sippel and the other employees of Hyndman Transport Limited

[1] In addition to Celadon, the Chapter 11 Debtors are A R Management Services, Inc., Bee Line, Inc., Celadon Canadian Holdings, Limited ("**CCHL**"), Celadon E-Commerce, Inc., Celadon International Corporation, Celadon Logistics Services, Inc., Celadon Mexicana, S.A. de C.V., Celadon Realty, LLC, Celadon Trucking Services, Inc., Distribution, Inc., Eagle Logistics Services Inc., Hyndman Transport Limited ("**Hyndman**"), Jaguar Logistics, S.A. de C.V., Leasing Servicios, S.A. de C.V., Osborn Transportation, Inc., Quality Companies LLC, Quality Equipment Leasing, LLC, Quality Insurance LLC, Servicios Corporativos Jaguar, S.C., Servicios de Transportacion Jaguar, S.A. de C.V., Stinger Logistics, Inc., Strategic Leasing, Inc., Taylor Express, Inc., Transportation Insurance Services Risk Retention Group, Inc. and Vorbas, LLC

TABLE OF CONTENTS

2009 CarswellOnt 3028
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3028, [2009] O.J. No. 2166, 177 A.C.W.S. (3d) 634, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

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

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

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

Morawetz J.

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

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees
Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Alan Mersky, Derrick Tay for Applicants
Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay
M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits 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.)

Morawetz J.:

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

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

3 The proposed representative counsel are:

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

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

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

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

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

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

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

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

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

9 These motions give rise to the following issues:

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

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

Issue 1 - Representative Counsel and Funding Orders

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

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

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

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

14 I am in agreement with these general submissions.

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

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

Issue 2 - Who Should be Appointed as Representative Counsel?

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

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

> (a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:
>
> (b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and
>
> (c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

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

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

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

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

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

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

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

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

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

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

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

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

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

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

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

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

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

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

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

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

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

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

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

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

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

(b) the Health Care Plan;

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

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

(e) severance and termination pay ; and

(f) TRA payments.

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

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan,

TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

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

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

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

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

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

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

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

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

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if

the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;

2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.

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

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

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

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

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

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

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

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

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

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

Order accordingly.

Footnotes

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

2009 CarswellOnt 6169
Ontario Superior Court of Justice [Commercial List]

Fraser Papers Inc., Re

2009 CarswellOnt 6169, [2009] O.J. No. 4287, 181 A.C.W.S. (3d) 256

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 WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

Pepall J.

Judgment: September 17, 2009
Docket: CV-09-8241-OOCL

Counsel: M. Barrack, D.J. Miller for Applicants
R. Chadwick, C. Costa for Monitor
D. Wray, J. Kugler for Communications, Energy and Paper Workers Union of Canada
D. Wray, J. Kugler (Agent) for Pink Larkin
C. Sinclair for United Steelworkers
T. McRae, S. Levitt for Steering Committee of Fraser Papers' Salaried Retirees Committee
M.P. Gottlieb, S. Campbell for Committee for Salaried Employees and Retirees
M. Sims for Her Majesty the Queen in Right of the Province of New Brunswick as represented by the Minister of Business of New Brunswick
Chriss Burr for CIT Business Credit Canada Inc.
D. Chernos for Brookfield Asset Management Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Table of Authorities
Cases considered by *Pepall J.*:
Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered
Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to
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.) — referred to
Statutes considered:
Bankruptcy Code, 11 U.S.C. 1982
Generally — referred to

Chapter 15 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — referred to

Employee Retirement Income Security Act, 1974, 29 U.S.C.
Generally — referred to
Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

Pepall J.:

Relief Requested

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

2 The motions are brought by the following moving parties:

(a) the USW who seeks to represent its former members. It already represents its current members.

(b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.

(c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.

(d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.

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

Discussion

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

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

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

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

and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(A) USW and CEP Motions

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

9 In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.

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

(b) Nelligan/Shibley and Davies

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

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.

2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.

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

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

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

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

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

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

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

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

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

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

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

19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

Summary

20 In summary, the USW, CEP and Davies representation requests are granted. Only the Davies funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants

to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

Footnotes

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

2 29 U.S.C.

3 (Ont. S.C.J. [Commercial List]).

4 (2005), 15 C.B.R. (5th) 307 (Ont. C.A.)

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

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

SUPERIOR COURT OF JUSTICE - ONTARIO

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

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

BEFORE: Regional Senior Justice Morawetz

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

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

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

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

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

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

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

HEARD: June 16, 2014

ENDORSEMENT

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

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

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

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

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

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

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

a. breach of the PLA;

b. breach of the *Competition Act*;

c. conspiracy; and

d. unjust enrichment.

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

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

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

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

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

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

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

b. any benefit to the companies under CCAA protection;

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

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

e. the avoidance of a multiplicity of legal retainers;

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

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

h. the position of others stakeholders and the Monitor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Morawetz, R.S.J.

Date: August 26, 2014

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

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

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

PEPALL J.

REASONS FOR DECISION

Relief Requested

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

employees or retirees including beneficiaries and surviving spouses ("the Salaried Employees and Retirees"). They also seek an order that Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.

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

Facts

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

[4] There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former

employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

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

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

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

(b) current services and special payments in respect of the active registered pension plan; and

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

[7] The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders, AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA

proceeding. This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.

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

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

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

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

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

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

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

Issues

[14] The issues on this motion are as follows:

(1) Should the Representatives be appointed?

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

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

Positions of Parties

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

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

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

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

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

Discussion

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

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

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

- any benefit to the companies under CCAA protection;

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

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

- the avoidance of a multiplicity of legal retainers;

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

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

- the position of other stakeholders and the Monitor.

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

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

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

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

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

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

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

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

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

Pepall J.

Released: March 5, 2010

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

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

REASONS FOR DECISION

Pepall J.

Released: March 5, 2010

2009 CarswellOnt 9398
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 9398

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"

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

Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Table of Authorities
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 arc 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 [1] 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 particularly 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 approximately 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.

Footnotes

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

2008 CarswellOnt 9523
Ontario Superior Court of Justice [Commercial List]

Hollinger Inc., Re

2008 CarswellOnt 9523

In The Matter of The Companies' Creditors Arrangement Act, R.S.c. 1985, c. C-36, as amended

In The Matter of a Proposed Plan of Compromise or Arrangement With Respect to Hollinger Inc., 4322525 Canada Inc. and Sugra Limited

Campbell J.

Judgment: November 26, 2008
Docket: Toronto 07-CL-7120

Counsel: Robert I. Thornton, Kyla E.M. Mahar, for Applicants

Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Campbell J.:

1 Having read the Motion Record and heard from counsel — no party affected opposing — I am satisfied that the activities of the companies and the monitor were appropriate and were approved in terms of the 3 orders filed and signed including appointment of representative counsel.

CITATION: 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, 2020 ONSC 61
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-00CL, and CV-19-616779-00CL
DATE: 20200103

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
In The Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, As Amended	*Robert I. Thornton*, *John Finnigan* and *Leanne M. Williams*, counsel for the Applicant, JTI-Macdonald Corp.
AND:	
In The Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.	*Deborah Glendinning* and *Craig Lockwood*, counsel for the Applicant, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited
AND:	
In The Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited	*Paul Steep*, *James Gage* and *Heather Meredith*, counsel for the Applicant, Rothmans, Benson & Hedges Inc.
AND:	
In The Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.	*Avram Fishman, Mark E. Meland, Andre Lesperance, Bruce Johnston* and *Harvey Chaiton*, counsel for Quebec Class Action Plaintiffs
	Jacqueline Wall, counsel for Her Majesty The Queen In Right of Ontario
	Lily Harmer, counsel for Her Majesty The Queen In Right of Alberta and Newfoundland & Labrador
	Michael Eizenga, counsel for the Consortium
	Nicholas Kluse, counsel for Philip Morris International Inc.
	Natasha MacParland, counsel for FTI Consulting Canada Inc., Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

)	Tobacco Canada Limited and Imperial Tobacco Company Limited
)	
)	*Linc Rogers*, counsel for Deloitte Restructuring Inc., Monitor of JTI-Macdonald Corp.
)	
)	*Jane Dietrich*, counsel for Ernst & Young Inc., Monitor of Rothmans, Benson & Hedges Inc.
)	
)	*Adam Slavens*, counsel for the Receiver of JTI-Macdonald Corp. and JTIM Canada LCC
)	
)	*Douglas Lennox*, counsel in certified British Columbia Class Action
)	
)	*Robert Cunningham*, counsel for Canadian Cancer Society
)	
)	*Joel Rochon* and *Peter Jervis*, counsel for Moving Counsel
)	
)	*Nadia Campion*, counsel for Court-Appointed Mediator

HEARD: December 6, 2019

REASONS FOR DECISION

MCEWEN J.

OVERVIEW

[1] JTI-Macdonald Corp. ("JTIM"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited ("Imperial"), and Rothmans, Benson & Hedges Inc. ("RBH") (collectively "the Applicants") have filed for protection pursuant to the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") seeking a resolution of the multiple, significant litigation claims.

[2] These *CCAA* proceedings are complex in nature and involve a number of significant tobacco-related actions that have been brought against the Applicants as well as a number of potential tobacco-related claims which are currently unasserted or unascertained.

[3] On December 6, 2019 the three Monitors (Deloitte Restructuring Inc. in its capacity as court-appointed Monitor of JTIM, FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of Imperial and Ernst & Young Inc. in its capacity as court-appointed Monitor of RBH) (collectively the "Tobacco Monitors") brought a joint motion in all three Applications seeking advice and directions with respect to orders appointing Representative Counsel regarding the unasserted and unascertained claims. The Tobacco Monitors proposed that Representative Counsel – The Law Practice of Wagner & Associates, Inc. ("Wagners") – would advance claims on behalf of individuals (the "TRW Claimants"), with some limited exceptions described below, who have asserted claims or may be entitled to certain claims for a Tobacco-Related Wrong (the "TRW Claims").

[4] The thrust of the joint motion is that the multiplicity of actions against the Applicants across Canada do not provide comprehensive representation for all individuals in these *CCAA* proceedings.

[5] It is therefore necessary to have representation for all of the TRW Claimants so that they may be properly represented with respect to the primary goal of these *CCAA* proceedings – a pan-Canadian global settlement. This will benefit the TRW Claimants, the Applicants and all stakeholders.

[6] The proposed Representative Counsel, Wagners, would represent all individuals outside of those claims that are currently the subject of a previously certified class action. There are currently three certified class actions. Two by the Quebec Class Action Plaintiffs ("QCAP") and one in British Columbia (the "Knight Class Action") (collectively the "Certified Class Actions").

[7] At the hearing of the joint motion, Rochon Genova LLP and The Merchant Law Group (collectively "Moving Counsel") sought permission to appear as co-counsel with Wagners. Moving Counsel seek to become involved in these Applications since The Merchant Law Group issued eight tobacco-related statements of claim, all of which are uncertified (the "Uncertified Actions"), as follows:

- *Suzanne Jacklin v. Canadian Tobacco Manufacturers' Council et al.*, No. 53974/12 (Ontario)
- *Barbara Bourassa on behalf of the estate of Mitchell David Bourassa v. Imperial Tobacco Canada Limited et al.*, No. 10-2780 (British Columbia)
- *Roderick Dennis McDermid v. Imperial Tobacco Canada Limited et al.*, No. 10-2769 (British Columbia)
- *Linda Dorion v. Canadian Tobacco Manufacturers' Council et al.*, No. 0901-08964 (Alberta)

- *Thelma Adams v. Canadian Tobacco Manufacturers' Council et al.*, No. 916 (Saskatchewan)

- *Thelma Adams v. Canadian Tobacco Manufacturers' Council et al.*, No. 1036 (Saskatchewan)

- *Ben Semple v. Canadian Tobacco Manufacturers' Council et al.*, No. 312869 (Nova Scotia)

- *Deborah Kunta v. Canadian Tobacco Manufacturers' Council et al.*, No. CI09-01- 61479 (Manitoba)

[8] Moving Counsel seek to represent the interests of the proposed class members in the Uncertified Actions. In essence, Moving Counsel would partner together, with Rochon Genova LLP acting as lead counsel within their team. Moving Counsel would then act on behalf of individuals who could be included in the Uncertified Actions, while Wagners would act for the remaining individuals in Canada (outside of the Certified Class Actions above).

[9] On December 9, 2019 I granted the Tobacco Monitors' motion and denied the request of Moving Counsel to act as co-counsel with Wagners, with Reasons to follow.

[10] I am now taking the opportunity to provide those Reasons.

THE ADJOURNMENT REQUEST

[11] At the commencement of the motion, Moving Counsel sought an adjournment. It was opposed by the Tobacco Monitors, the Applicants, Quebec, the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (collectively "the Consortium"), QCAP and the Knight Class Action. No stakeholder supported the adjournment request.

[12] The basis for the adjournment request was as follows:

- Rochon Genova LLP had just been retained by The Merchant Law Group on December 4, 2019.

- Moving Counsel wanted to file additional materials to support the position that they be allowed to act.

- Moving Counsel had an important role to play in the ongoing *CCAA* proceedings.

- It was important that the individuals in the Uncertified Actions have their own representation.

- Only a short adjournment was required and there would be no prejudice to the other stakeholders.

[13] After hearing submissions I denied the adjournment request subject to the caveat that if something arose during argument with respect to the appointment of Representative Counsel that, in my view, required an adjournment, I would reconsider the issue. No such issue arose.

[14] In denying the request for an adjournment I accepted the submissions of the Tobacco Monitors and supporting stakeholders as follows:

- The Merchant Law Group had been advised verbally of the motion on November 21, 2019.
- The motion materials were served on both The Merchant Law Group and Rochon Genova LLP on November 25, 2019, with supporting reports being delivered on November 26, 2019, all within the timelines required by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- The Initial Orders in both the JTIM and RBH proceedings provided timelines for service of motions which were met by the Tobacco Monitors' counsel.
- Neither The Merchant Law Group, nor Rochon Genova LLP, complied with the portions of the Initial Orders with respect to the required timelines to file responding materials to a motion.
- A short adjournment would be next to impossible given the number of counsel involved and the pending holiday season.
- There would be prejudice if the motion was adjourned. Significant progress has been made in the court-ordered mediation before the Honourable Warren Winkler, Q.C. This mediation was at a critical stage and any delays would upset significant milestones, some of which have occurred between the date of the hearing and the release of these Reasons.

[15] Moving Counsel did not file any materials to support the request for an adjournment although, in my view, they had a reasonable amount of time to do so. They were, however, able to provide fulsome affidavit evidence in support of their position that they ought to be retained to represent individuals in the Uncertified Actions commenced by The Merchant Law Group.

[16] In these circumstances, an adjournment was not warranted or necessary given the affidavit filed by Moving Counsel and the well-informed submissions they were able to make after the adjournment request was denied.

THE TOBACCO MONITORS' MOTION TO APPOINT REPRESENTATIVE COUNSEL

[17] I will first deal with whether Representative Counsel ought to be appointed and then whether Moving Counsel ought to be able to represent those individuals potentially able to claim in the Uncertified Actions.

[18] At the outset it bears noting that no stakeholder opposes the Tobacco Monitors' motion to appoint Wagners as Representative Counsel to represent all TRW Claimants. The Applicants and

significant stakeholders such as the Consortium, QCAP and the Knight Class Action consent. Other significant stakeholders, being Ontario, Quebec, Alberta and Newfoundland & Labrador, expressly do not oppose.

Jurisdiction

[19] I accept the Tobacco Monitors' submission that Canadian courts have jurisdiction to appoint Representative Counsel in insolvency proceedings pursuant to both s. 11 of the *CCAA* and r. 10.01 of the *Rules of Civil Procedure*. Section 11 of the *CCAA* affords this court broad discretion to make "any order that it considers appropriate in the circumstances" while r. 10.01(f) permits this court to "appoint one or more persons to represent any person or class of persons who are ... unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

[20] On a number of occasions courts have used the aforementioned provisions to appoint counsel to represent a broad range of litigants in complicated *CCAA* proceedings: see *Cash Store Financial Services, Re*, 2014 ONSC 4567; *Montreal, Maine & Atlantic Canada Co., Re* (April 4, 2014), Doc. 450-11-000167-134 (Q.C.S.C.); and *Sears Canada Inc., Re* (January 25, 2018), Court File No. CV-17-11846-00CL (Ont. S.C.).

[21] Based on the above, I am satisfied that I have the jurisdiction to appoint Representative Counsel to represent the TRW Claimants in these proceedings. No one took issue with this court having jurisdiction.

The TRW Claims

[22] The Tobacco Monitors, as noted, propose that Representative Counsel will represent individuals with TRW Claims in all provinces and territories to the extent that they are not currently represented in the Certified Class Actions. These would include various residual tobacco-related disease claims that fall outside the certified class definitions in the Certified Class Actions, claims that are currently the subject of the Uncertified Actions and the tobacco-related claims for which no individual or class proceedings have been commenced. Of course, it would not include the provinces' health cost recovery claims nor the existing, uncertified commercial class actions in Ontario which have been commenced by the tobacco growers and producers.

[23] In order to achieve a pan-Canadian global settlement, the Tobacco Monitors submit it is necessary to appoint Representative Counsel to ensure that the TRW Claims, as defined, are addressed in an efficient, timely and consistent manner. The TRW Claimants are scattered across the country. Most do not have any representation and likely do not have the ability or resources to advance their claims in these complex *CCAA* proceedings.

[24] As mentioned, The Merchant Law Group has commenced Uncertified Actions in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia. No class proceedings or individual proceedings have been commenced in New Brunswick, Newfoundland & Labrador, Prince Edward Island or any of the Territories.

[25] Overall, the TRW Claimants, as defined in the draft order, are individuals who assert or may be entitled to assert claims with respect to a broad range of alleged wrongs generally relating to tobacco-related personal injury. I accept that the broad definition of the TRW Claimants is satisfactory and it can be refined at a later period.

It is Appropriate to Appoint Representative Counsel

[26] In determining whether it is appropriate to appoint Representative Counsel, I agree with the Tobacco Monitors' submission that the relevant factors are set out in *Canwest Publishing Inc.*, 2010 ONSC 1328, at para. 21, as follows:

- The vulnerability and resources of the group sought to be represented.
- Any benefit to the companies under *CCAA* protection.
- The facilitation of the administration of the proceedings and efficiency.
- Any social benefit to be derived from representation of the group.
- The avoidance of a multiplicity of legal retainers.
- Whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and is prepared to act for the group seeking the order.
- The balance of convenience and fairness.
- The position of other stakeholders and the monitors.

[27] In this case I accept that all of the factors have been met.

[28] The TRW Claimants, as noted, are vulnerable individuals in complex proceedings where they are unorganized and likely lack resources. The Applicants and indeed all stakeholders will benefit from a pan-Canadian settlement.

[29] Without Representative Counsel the administration of these proceedings would be cumbersome and perhaps undoable. The appointment of Representative Counsel will facilitate efficiency and make the proceedings more cost effective by providing a clear mechanism for communicating with the TRW Claimants.

[30] The social benefits of access to justice, in the facilitating of a complex restructuring, are met. At this time many of the TRW Claims are unascertained and unasserted. As such, many of the TRW Claimants are likely unaware of these *CCAA* proceedings. The Representation Order sought would further promote access to justice by giving the TRW Claimants a powerful, single voice in the process.

[31] A multiplicity of legal retainers between several counsel is also obviated which will save time and money. The TRW Claimants would also be assisted by Representative Counsel acting as a single point of contact among all of the other stakeholders, the Applicants and the Tobacco Monitors.

[32] The balance of convenience and fairness favour the retainer of Representative Counsel as no firm is currently advancing a certified class action and is prepared to act for the TRW Claimants. None of the other stakeholders object and significant stakeholders consent to the orders sought.

[33] Wagners has the necessary expertise. Once again, no one opposes the appointment of Wagners as Representative Counsel. This includes Moving Counsel, notwithstanding their position that they be appointed as co-counsel with Wagners.

[34] Wagners, which is based in Halifax, is recognized as a leading class action law firm. I am satisfied that, as a result of their experience in the area, they have demonstrated the necessary expertise in class action matters to represent the TRW Claimants. Additionally, I am satisfied that the method proposed by the Tobacco Monitors infuses the necessary degree of independence in Wagners so that they can vigorously represent the TRW Claimants.

[35] Last, Wagners is not conflicted in this matter and will take the necessary steps to ensure that no conflicts arise.

MOVING COUNSEL SHOULD NOT BE APPOINTED AS CO-COUNSEL

Position of Moving Counsel

[36] While Moving Counsel do not oppose Wagners being appointed as Representative Counsel, they submit that they ought to be appointed as co-counsel for the following reasons:

- The court should be hesitant to displace The Merchant Law Group who is counsel of record in the eight Uncertified Actions.
- Rochon Genova LLP, who would be lead counsel, is well qualified to assist.
- Involving Moving Counsel would provide "additional firepower" on behalf of the TRW Claimants, which would be of benefit to them.
- Moving Counsel should not be denied the right to represent the plaintiffs in the Uncertified Actions simply because the actions have not been certified. Rochon Genova LLP has represented plaintiffs in similar circumstances, such as the proposed class members in the well-known *Lac-Mégantic* matter.
- In circumstances where Wagners' appointment is unopposed, Moving Counsel would enjoy greater independence and be in a better position to advocate on behalf of the proposed class members in the Uncertified Actions.

Position of the Tobacco Monitors

[37] The Tobacco Monitors primarily submit as follows:

- The Merchant Law Group is not in a solicitor-client relationship with individuals outside of the eight individuals named in the Uncertified Actions.
- Wagners would represent all TRW Claimants equally and impartially.
- It is important to have a single point of contact. This will ensure efficiency and clarity, and control costs.
- The within motion is not a carriage motion. Therefore, only the *Canwest* factors ought to apply.
- Wagners, pursuant to the terms of the proposed order, can retain additional counsel of its choosing to assist, if need-be.
- Rochon Genova LLP would be acting in a conflict of interest since it already represents plaintiffs bringing claims against Imperial.
- Adding Moving Counsel as co-counsel will only complicate matters, add delay and is contrary to the wishes of the Applicants and significant stakeholders in a scenario where no stakeholder supports the position taken by Moving Counsel.

Analysis

[38] I accept the position of the Tobacco Monitors and the supporting submissions of the Consortium and QCAP.

[39] First, I accept that based on the authority set out in *Pearson v. Inco. Ltd.* (2001), 57 O.R. (3d) 278 (S.C.), leave to appeal to Div. Ct. refused [2002] O.J. No. 2134 (S.C.) (at paras. 13 and 18), The Merchant Law Group is not in a solicitor-client relationship with the proposed class members in the Uncertified Actions. In fact, The Merchant Law Group, on its own website, states that potential class members who provide contact information are not creating a solicitor-client relationship.

[40] We are therefore left with the situation where The Merchant Law Group, and ultimately Moving Counsel, represent eight individual clients at this point in time.

[41] Further, it cannot be ignored that The Merchant Law Group has taken no steps to advance the Uncertified Actions it has commenced. All eight of them have remained dormant since they were issued between 2009 to 2012. Moving Counsel has filed no materials to suggest otherwise. In these circumstances it can hardly be said that any meaningful steps have been taken to the benefit of proposed class members.

[42] I agree with the Tobacco Monitors that a single point of contact is critical in these proceedings. As I have previously indicated, these restructurings are amongst the most complex in *CCAA* history for a number of reasons, which include the vast number and size of the complicated tobacco-related actions that have been, or could be, commenced against the Applicants.

[43] I further agree with the Tobacco Monitors that the most efficient and cost-effective way to deal with the TRW Claimants is to appoint a single law firm which can deal with all of the claims in an even-handed manner throughout Canada. To add Moving Counsel at this stage would unduly complicate matters and add expense and delay. This is particularly true where The Merchant Law Group has taken no steps over several years and now Moving Counsel would have to quickly prepare and become involved as co-counsel representing a discrete group different from the TRW Claimants that would be represented by Wagners. The legal team proposed by Moving Counsel in its filed affidavit has already changed and one of the counsel proposed is no longer prepared to act.

[44] Additionally, Moving Counsel submits that they be paid in the discretion of the Court-Appointed Mediator at the end of the proceedings, which adds an element of uncertainty and added expense in a situation where Wagners has agreed to work for an hourly rate.

[45] These matters are far different from the *Lac-Mégantic* case due to their national scope and number of significant and varied claims. Further, in *Lac-Mégantic*, there was no proposal similar to the one being made by the Tobacco Monitors.

[46] In this regard, it is also important to repeat that this is a purely procedural motion to provide representation for the TRW Claimants to promote a pan-Canadian settlement. It is not a carriage motion.

[47] Rochon Genova LLP would also have to deal with its current conflict, for which it provides no clear path.

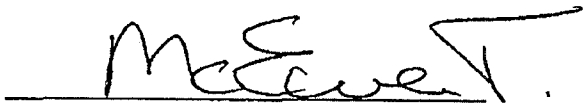
[48] Overall, I am of the view that when all significant stakeholders support, or do not oppose, the appointment of Wagners, and based on the above analysis and submissions by the Tobacco Monitors, the far preferable path is to have Wagners represent all of the TRW Claimants. To add Moving Counsel would unduly complicate matters and would not provide any benefit to the TRW Claimants. Indeed, Moving Counsel propose that they would represent only those individuals potentially within the Uncertified Actions which could lead to division, complication and expense. It could also cause delay if Moving Counsel and Wagners could not agree on important matters. All of these risks are unnecessary and remedied by Wagners acting on behalf of all TRW Claimants.

[49] Taking into consideration all of the factors in appointing Representative Counsel and the very complicated nature of these proceedings, I am of the view that Wagners, an experienced class action litigation firm, is well qualified to be appointed as Representative Counsel. It is preferable that Wagners alone be appointed and be given the discretion, as set out in the draft order, to retain others to assist if necessary.

[50] In this regard, I conclude by stating that there is no reason to believe that Wagners would be any less vigorous in its representation of the TRW Claimants as would Moving Counsel or any other law firm. There is no basis for this submission. The Tobacco Monitors, as court officers, have made a very reasonable recommendation after a long consultation process with the Applicants and all of the stakeholders.

DISPOSITION

[51] Based on the foregoing, as per my December 9, 2019 Endorsement, the Tobacco Monitors' joint motion appointing Representative Counsel in these proceedings was granted. The request of Moving Counsel to appear as co-counsel was denied. The Orders were therefore signed as per the drafts filed in all three Applications.



McEwen J.

Released: January 03, 2020

CITATION: 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, 2020 ONSC 61
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-00CL, and CV-19-616779-00CL
DATE: 20200103

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

In The Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C36, As Amended

AND:

In The Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.

AND:

In The Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

AND:

In The Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.

REASONS FOR DECISION

McEwen J.

Released: January 03, 2020

Court File No. 31-2084381
Estate No. 31-2084381

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE Justice Conway	)	WEDNESDAY, THE 18TH
	)	
	)	DAY OF MAY, 2016

IN THE MATTER OF THE BANKRUPTCY OF DANIER LEATHER INC.

O R D E R

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

ON READING the affidavit of Andrew J. Hatnay sworn May 12, 2016, and the Second Report of KSV Kofman Inc., in its capacity as trustee of Danier Leather Inc. (the "**Trustee**"), and on hearing the submissions of Proposed Representative Counsel, counsel for the Trustee, and such other parties as were present,

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

2. **THIS COURT ORDERS** the appointment of Koskie Minsky LLP as Representative Counsel to represent the former employees (the "**Employees**") of Danier Leather Inc. ("**Danier**") who were terminated on or before the bankruptcy of Danier (the "**Bankruptcy**") on March 21, 2016, in respect of all issues affecting the Employees in the proceedings under

the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 ("**BIA**") or in any other proceeding which may be brought before this Court and relating to any Claim (as defined herein) for the determination of any right, entitlement or benefit of any Employee arising out of the insolvency of Danier, and with the power and authority to act on behalf of the Employees in any subsequent related proceedings (collectively, the "**Insolvency Proceedings**").

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

(a) law or equity; or

(b) federal or provincial legislation, or regulations thereunder, including but not limited to, claims under employment standards legislation or any other provincial or federal legislation, or regulation applicable to employees or otherwise (collectively "**Labour Laws**").

4. **THIS COURT ORDERS** that Representative Counsel may determine, advance or compromise any Claim made by an individual Employee, or group or class of Employees, against Danier or its estate, as the case may be, which Claim now exists or may hereafter arise out of the employment, former employment or termination of employment of the Employees under law or equity or under Labour Laws, subject to the approval of this Court.

5. **THIS COURT ORDERS** that the Representative Counsel shall have access to and the right to examine all relevant records and data kept by Danier in respect of its capacity as an employer of the Employees under law or equity or under the Labour Laws, whether they are kept on paper, electronic or any other form.

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

7. **THIS COURT ORDERS** that Koskie Minsky LLP within 5 days of the date of this Order, shall send written notice ("**Written Notice**") to all of the Employees based on the addresses and contact information provided by the Trustee, by email or regular mail, explaining the terms of its appointment and engagement, explaining the process for opting out of representation by Koskie Minsky LLP, and inviting interested Employees to sit on a representative committee (the "**Committee**") to provide instructions to Koskie Minsky LLP as required. The Written Notice shall also be posted by the Trustee on the website of KSV Kofman Inc., created for this proceeding.

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

9. **THIS COURT ORDERS** that Koskie Minsky LLP is authorized to establish the Committee, in consultation with the Trustee, which, upon establishment, will provide instructions to Koskie Minsky LLP as needed.

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

(a) published by Representative Counsel on its firm's website within 2 calendar days of the date of this Order;

(b) included in the Written Notice described in section [7] above; and

(c) posted by the Trustee to the website created by the Trustee for this proceeding.

11. **THIS COURT ORDERS** that any individual Employee who does not wish to be represented by Koskie Minsky LLP in the Insolvency Proceedings shall, within 30 days of the granting of this Order, notify the Trustee and Koskie Minsky LLP in writing that he or she is opting out of representation by Koskie Minsky LLP and shall thereafter not be bound by the actions of Koskie Minsky LLP or the Committee and is free to represent himself or herself or be represented by any counsel that he or she may retain exclusively at his or her own expense in the Insolvency Proceedings (an "**Opt-Out Individual**").

12. **THIS COURT ORDERS** that from and after May 3, 2016, Representative Counsel's expenses, professional fees and necessary disbursements incurred in representing the Employees (collectively, the "**Costs**") shall be paid by the Trustee on the rendering of accounts by Representative Counsel, subject to the approval of this Court and to the Trustee's right, if the Costs exceed $75,000 (exclusive of taxes and disbursements) to cease paying the Costs and/or to bring a motion to Court to amend the terms of this Order pertaining to the payment of Costs.

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

14. **THIS COURT ORDERS** that Koskie Minsky LLP and the Committee shall be at liberty and are authorized at any time to apply to this Court for advice and directions in the discharge or variation of their powers and duties hereunder, including with respect to the payment of Costs.

Conway J.

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

MAY 18 2016

PER / PAR:

Schedule "A"

Court File No. 31-2084381
Estate No. 31-2084381

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY OF DANIER LEATHER INC.

NOTICE TO ALL DANIER LEATHER INC. EMPLOYEES

On March 21, 2016, Danier Leather Inc. ("**Danier**") made a voluntary assignment into bankruptcy. KSV Kofman Inc. (the "**Trustee**") is the Trustee in Bankruptcy.

TAKE NOTICE THAT, pursuant to Order of the Court dated May 18, 2016:

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

Contact Information for Representative Counsel:

Website: kmlaw.ca/DanierRepCounsel

Email: DanierRepCounsel@kmlaw.ca

Toll-free Hotline: 1-844-819-8528

IF YOU DO NOT WISH TO BE REPRESENTED in the Proceeding by Representative Counsel, you must, before June ●, 2016, provide notice in writing (by letter or email) to both Koskie Minsky LLP and KSV Kofman Inc., indicating that you wish to opt-out of such representation:

Koskie Minsky LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

DanierRepCounsel@kmlaw.ca

KSV Kofman Inc.
150 King Street West
Suite 2308
Toronto, ON M5H 1J9

drapers@ksvadvisory.com

IN THE MATTER OF THE BANKRUPTCY OF DANIER LEATHER INC.

Court File No. 31-2084381
Estate No. 31-2084381

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at **TORONTO**

ORDER
(returnable May 18, 2016)

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay (LSUC# 31885W)
(T) 416-595-2083
(F) 416-204-2872
(E) ahatnay@kmlaw.ca

James Harnum (LSUC# 60459F)
(T) 416-542-6285
(F) 416-204-2819
(E) jharnum@kmlaw.ca

Employee Representative Counsel to
Danier Leather Inc. Employees

Second Report to Court of KSV Kofman Inc. as Trustee in Bankruptcy of Danier Leather Inc.

May 12, 2016

Contents

Appendices

ESTATE FILE NO.: 31-2084381
COURT FILE NO.: 31-2084381

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY OF DANIER LEATHER INC.

SECOND REPORT OF KSV KOFMAN INC. AS TRUSTEE IN BANKRUPTCY OF DANIER LEATHER INC.

MAY 12, 2016

1.0 Introduction

1. On February 4, 2016, Danier Leather Inc. (the "Company") filed a Notice of Intention to Make a Proposal ("NOI") pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and KSV Kofman Inc. ("KSV") was appointed proposal trustee in the Company's NOI proceedings (the "Proposal Trustee").

2. In accordance with an order of the Ontario Superior Court of Justice (Commercial List) ("Court") made on February 8, 2016, the Company, with the assistance of its financial advisor, Consensus Advisory Services LLC and Consensus Securities LLC, and the Proposal Trustee, carried out a sale and investor solicitation process ("SISP").

3. As a result of the SISP, the Company entered into an agency agreement with a contractual joint venture comprised of Merchant Retail Solutions, ULC and Gordon Brothers Canada ULC (jointly, the "Agent") to liquidate the inventory, furniture, fixtures and equipment in 76 of its store locations (the "Sale"). The Agent completed the Sale on May 9, 2016.

4. On March 21, 2016, the Company made an assignment in bankruptcy and KSV was appointed as trustee in bankruptcy of the Company's bankrupt estate ("Trustee").

5. Pursuant to an Order of the Court made on March 21, 2016, KSV became receiver (the "Receiver") of the Company's property, assets and undertaking pursuant to section 101 of the *Courts of Justice* Act, R.S.O. 190, c. C.43, as amended ("Receivership Order").

6. This report is filed by KSV in its capacity as Trustee.

1.1 Purposes of this Report

1. The purposes of this report ("Report") are to:

   a) provide background information about the Company;

   b) discuss a motion by Koskie Minsky LLP ("Koskie") in respect of its proposed appointment as representative counsel to the former employees of the Company ("Representative Counsel"); and

   c) recommend that the Court issue an Order, among other things:

      i. appointing Koskie as Representative Counsel;

      ii. directing Koskie to send a notice to each former employee regarding its role as Representative Counsel ("Notice"), and providing for other mechanisms to notify former employees about the appointment of representative counsel, the process for opting out of representation by Koskie, and inviting interested former employees to sit on a representative committee;

      iii. authorizing the Trustee to provide Koskie with certain personal information required to calculate and file employee claims;

      iv. authorizing Koskie to determine, advance or compromise any claim made by an individual former employee, or group or class of former employees; and

      v. Directing the Trustee to pay the expenses, professional fees and necessary disbursements of Representative Counsel, subject to approval of the Court and the Trustee's right, if Representative Counsel's expenses, fees and disbursements exceed $75,000, to cease paying such amounts and/or to return to Court to amend the terms of the Order pertaining to the payment of such amounts.

1.2 Currency

1. All currency references in this Report are to Canadian dollars.

1.3 Restrictions

1. In preparing this Report, the Trustee has relied upon the Company's books and records and discussions with its representatives and advisors. The Trustee has not performed an audit or other verification of such information.

2.0 Background

1. The Company was founded in 1972. The Company was Canada's largest retailer of leather apparel and accessories. The Company's subordinated voting shares were listed on the Toronto Stock Exchange ("TSX") and, until February 4, 2016, traded under the symbol "DL". On February 4, 2016, the Investment Industry Regulatory Organization of Canada issued a cease trade order in respect of the shares. On March 17, 2016, the Company's shares were delisted from the TSX.

2. The Company leases its Toronto based head office (the "St. Clair Facility"). The St. Clair Facility also served as the Company's manufacturing, warehouse and distribution center. The Company also leases a separate distribution facility in Toronto, which will be disclaimed in due course after a liquidation is completed for the furniture and equipment at those premises.

3. The Company's merchandise was predominantly marketed under the "Danier" brand name and as at the date of bankruptcy was being sold at 76 leased stores across Canada. As at the date of this Report, all stores have been vacated and all leases have been disclaimed, except for a small number which have been or are in the process of potentially being assigned to new tenants.

4. As at the date of bankruptcy, the Company employed approximately 1,000 employees. As a result of the bankruptcy, all of the Company's employees were automatically terminated. Pursuant to the terms of the Receivership Order, the Receiver hired the majority of the Company's former employees on a temporary and day-to-day basis to assist with the Sale and the wind-down of the Company's business. The Company's workforce is not unionized and the Company does not maintain a pension plan. As at the date of this Report, approximately 20 employees continue to be retained by the Receiver.

5. Additional information about the Company's insolvency proceedings is available on the Trustee's website at: http://www.ksvadvisory.com/insolvency-cases-2/danier-leather-inc/.

3.0 Representative Counsel

1. Since the date of bankruptcy, the Trustee has received numerous and frequent inquiries from employees regarding the amounts that may be owing to them and the methodology to file proofs of claim for such amounts.

2. There are certain considerations regarding the calculation of employee claims including:

    - The employees are located across Canada and have different statutory rights based on the province in which they are located, including mass termination rights for certain employees;

    - The majority of the employees are sales associates with varying pay structures, including commission and bonuses;

- English is a second language for a number of the employees; and
- There are a number of long standing employees who did not enter into employment contracts with the Company at their time of hire.

3. In order to economically and efficiently deal with the employee claims, the Trustee recommended to the Inspectors that it be authorized to support the appointment of Koskie as representative counsel. The terms of Koskie's mandate were set out in a letter from Koskie dated April 20, 2016, which was unanimously approved by all Inspectors who attended the Third Inspectors Meeting convened on May 3, 2016[1]. The Inspector resolution, which includes a copy of this letter, is attached as Appendix "A".

4. Pursuant to the letter and other communications from Koskie, Koskie's mandate includes:

   - Establishing a dedicated telephone line and email address to respond to employee inquiries on a timely basis;
   - Establishing a website with information regarding the bankruptcy proceedings, access to relevant documents and guidance on frequently asked questions;
   - If necessary, developing a webcast to provide information on Koskie's role as Representative Counsel and other matters relevant to the employees;
   - Assisting employees with questions about their employment-related rights in relation to the Company's bankruptcy;
   - Assisting employees to determine the amounts owed to them;
   - Analyzing and responding as necessary to any motions or other proceedings in respect of the Company's bankruptcy; and
   - Establishing a representative committee of employees to instruct Koskie.

5. Koskie's mandate provides for an initial fee cap of $75,000, plus applicable taxes and disbursements ("Fee Structure"), to be paid from the estate, with any additional fees being subject to the Trustee's approval and the Trustee's right to cease paying Koskie's fees and/or to return to Court to amend the terms of the Order pertaining to the payment of such amounts. The Trustee has reviewed the hourly rates of the lawyers and staff at Koskie who will be involved in this mandate. The Trustee notes that the hourly rates are reasonable and less than the fees it and its counsel would charge to perform the same services.

6. Koskie is now seeking Court authorization of its appointment as Representative Counsel.

[1] One inspector was absent.

7. The Trustee supports the appointment of Koskie as Representative Counsel for the following reasons:

   - Koskie specializes in representing employees in insolvency proceedings. Determining employee claims may require legal and financial resources. Koskie has expertise to efficiently coordinate such assistance;

   - The arrangement will assist to streamline the claims process which will reduce the fees and costs of the Trustee and its legal counsel and facilitate a more expeditious distribution to all creditors as the Trustee and its counsel will spend less time reviewing the claims and will only be dealing with one law firm (versus several if several employees are individually represented);

   - The Trustee is of the view that the Fee Structure is appropriate and that Koskie's hourly rates are lower than its own and those of its counsel;

   - Koskie will be a single point of contact for employees, which will allow for consistent information to be provided to all employees; and

   - The Trustee may be required to have certain employee claims determined by the Court, in which case it will be preferable to have the claims determined in one hearing as opposed to multiple hearings in the event that several employees retain separate counsel.

8. It is not feasible for Koskie to enter into an engagement letter with each employee. Accordingly, Koskie is seeking Court approval to provide written notice to the employees regarding its role as Representative Counsel. Employees will also have the option to not be represented by Koskie, which will be explained in the Notice. The Notice will also invite interested employees to sit on a representative committee that is to instruct Koskie, as required. Koskie will only represent the employees who have not "opted out".

3.1 Personal Information

1. Koskie will require personal information in order to prepare claims for the employees it is representing, including but not limited to names, wages, last known address and social insurance numbers ("Personal Information").

2. The Trustee recommends that it be authorized to provide Personal Information to Koskie for the purpose of filing employee claims.

3.2 Omnibus Proof of Claim

1. Koskie advised that it may file an Omnibus Proof of Claim on behalf of all employees, in order to reduce the cost of having the Trustee deal with hundreds of employee claims.

2. The Trustee is of the view that dealing with one claim through Koskie is more cost effective than having the Trustee deal with hundreds of claims.

3. It is contemplated that all distributions to employees will be made directly by the Trustee.

4.0 Conclusion and Recommendation

1. Based on the foregoing, the Trustee respectfully recommends that this Honourable Court make an order granting the relief detailed in Section 1.1(1)(c) of this Report.

* * *

All of which is respectfully submitted,

KSV Kofman Inc

KSV KOFMAN INC.
IN ITS CAPACITY AS TRUSTEE IN BANKRUPTCY OF
DANIER LEATHER INC.
AND NOT IN ITS PERSONAL CAPACITY

Appendix "A"

IN THE MATTER OF THE BANKRUPTCY OF
DANIER LEATHER INC.

Estate File No.: 31-2084381

RESOLUTION #1 PASSED AT THE THIRD MEETING OF INSPECTORS HELD TUESDAY, MAY 3, 2016

RESOLVED THAT:

KSV Kofman Inc. as trustee in bankruptcy of Danier Leather Inc. ("Danier") is hereby authorized to fund the costs of Koskie Minsky LLP ("KM") as representative counsel to the employees of Danier on the basis set out in the attached letter from KM.

ENACTED THE 3rd DAY OF MAY, 2016

Olga Koel, Inspector

Rodney Goldberg, Inspector

Steve Waldron, Inspector

Howard Levitt, Inspector

Clark Alexander, Inspector

IN THE MATTER OF THE BANKRUPTCY OF
DANIER LEATHER INC.

Estate File No.: 31-2084381

RESOLUTION #1 PASSED AT THE THIRD MEETING OF INSPECTORS
HELD TUESDAY, MAY 3, 2016

RESOLVED THAT:

KSV Kofman Inc. as trustee in bankruptcy of Danier Leather Inc. ("Danier") is hereby authorized to fund the costs of Koskie Minsky LLP ("KM") as representative counsel to the employees of Danier on the basis set out in the attached letter from KM.

ENACTED THE 3rd DAY OF MAY, 2016

Olga Koel, Inspector

Rodney Goldberg, Inspector

Steve Waldron, Inspector

Howard Levitt, Inspector

Clark Alexander, Inspector

IN THE MATTER OF THE BANKRUPTCY OF
DANIER LEATHER INC.

Estate File No.: 31-2084381

RESOLUTION #1 PASSED AT THE THIRD MEETING OF INSPECTORS
HELD TUESDAY, MAY 3, 2016

RESOLVED THAT:

KSV Kofman Inc. as trustee in bankruptcy of Danier Leather Inc. ("Danier") is hereby authorized to fund the costs of Koskie Minsky LLP ("KM") as representative counsel to the employees of Danier on the basis set out in the attached letter from KM.

ENACTED THE 3rd DAY OF MAY, 2016

Olga Koel, Inspector

Rodney Goldberg, Inspector

Steve Waldron, Inspector

Howard Levitt, Inspector

Clark Alexander, Inspector

KOSKIE MINSKY

JUSTICE MATTERS

April 20, 2016

James Harnum
Direct Dial: 416-542-6285
Direct Fax: 416-204-2819
jharnum@kmlaw.ca

Via E-Mail

KSV Kofman Inc., in its capacity as trustee in bankruptcy of Danier Leather Inc.
150 King St. West, Suite 2308
Toronto, ON M5H 1J9
Attention: Bobby Kofman

Dear Mr. Kofman:

Re: In the Matter of Danier Leather Inc. (in bankruptcy)
Court File No. 31-2084381

Re: Fee Letter for Representative Counsel to Employees of Danier Leather Inc. ("Danier")

We are writing further to our recent discussions regarding Koskie Minsky LLP serving as Representative Counsel to the former employees of Danier ("Employees").

We have advised that in our view it will be necessary at some point to move for a court order to formalize our status as Representative Counsel, however, we understand that the first step is that the trustee wishes to put a resolution before the inspectors to have the estate support our appointment. We will work with the trustee to determine when a court order will be sought, and its terms.

In serving as Representative Counsel to the employees, our mandate will be the following:

1. Our primary initial role in this file will be to assist the Employees with questions about their employment-related rights and obligations in relation to the bankruptcy of Danier. Our firms' bilingual communications department will set up a dedicated telephone line, website and email address which will respond to all Employee inquiries on a timely basis.

2. We will also assist Employees in filing their proofs of claim. We will work with you to determine the most efficient method to do so, which may include filing one Omnibus Proof of Claim for all Employees which would set out each Employee's claim on a uniform and consistent basis and using a consistent methodology. We expect to consult with the trustee

with respect to claims and aim to arrive at an agreed upon calculation methodology to avoid disallowances and appeals therefrom.

3. We will analyze and respond as necessary to any motions or other proceedings brought by the trustee or other creditors, to ensure that the Employees have appropriate representation in such motions to protect their rights and interests.

We believe the above approach will generate efficacies and overall costs savings to the estate, and thus help maximize the amount available for distribution to all creditors, including the Employees. We will at all times and in all respects endeavour to provide our services to the Employees on a cost-efficient basis.

We will be provided an initial fee cap of $75,000, plus taxes and disbursements, which will be paid from the estate on a timely basis. We will issue invoices to the trustee for our reasonable and documented fees and disbursements on a monthly basis. Should our fees exceed $75,000, the trustee will consider a request to increase the initial fee cap on a reasonable basis.

If this letter correctly reflects your understanding of our role as Representative Counsel and the trustee's payment obligation in respect thereof, please so indicate by executing the enclosed copy of this letter in the space provided below and return it to the undersigned.

We understand that the terms of this arrangement are subject to Inspector approval.

Yours truly,

KOSKIE MINSKY LLP

James Harnum
JH:ss

cc. Andrew J. Hatnay, *Koskie Minsky LLP*

Understood and Agreed

this _____ day of _____, 2016

KSV Kofman Inc., solely in its capacity as trustee in bankruptcy of Danier Leather Inc., and not in its personal or any other capacity

By: _____

Name:

Title:

ESTATE FILE NO.: 31-2084381
COURT FILE NO.: 31-2084381

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

SECOND REPORT OF THE TRUSTEE
MAY 12, 2016

BENNETT JONES LLP
3400 One First Canadian Place
Toronto, ON M5X 1A4

Sean Zweig (LSUC #57307I)
Tel: (416) 777-6254
Fax: (416) 863-1716

Counsel to the Trustee, KSV Kofman Inc.