

**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**

FACTUM

**(Re: Motion for Employee Representation Order,
returnable January 23, 2020)**

January 22, 2020

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Proposed Representative Counsel to the
Employees of Hyndman Transport Inc.

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

PART I - OVERVIEW

1. This factum is filed in respect of a motion for the appointment of Representative Counsel for all active and former employees of Hyndman Transport Limited, an Ontario Corporation ("**Hyndman Canada**"), including any owner/operator drivers (collectively, the "**Employees**").

2. Hyndman Canada is affiliated with Celadon Group Inc., ("**Celadon U.S.**") a company headquartered at 9503 East 33rd Street, Indianapolis, Indiana, 46235-4207, United States.

3. On December 9, 2019, Celadon U.S. obtained Chapter 11 protection in the United States Bankruptcy Court in Delaware, and named Hyndman Canada (and others) as one of the Applicants in its U.S. proceeding.

4. As a result of Celadon U.S.'s Chapter 11 filing, on December 9, 2019, Celadon U.S. directed Hyndman Canada to immediately cease all trucking operations and to terminate all of the 400 Canadian Employees (except for four individuals who were retained for office work and to collect accounts receivables) without prior notice and without paying them severance pay, bonuses, vacation pay, and other amounts (totaling approximately \$2.3 million). This occurred shortly prior to the holiday season.

Affidavit of Jeff Sippel, sworn January 16, 2020 ("**Sippel Affidavit**"),
para. 2

5. Over the next month, neither Celadon U.S. nor Hyndman Canada sought a Recognition Order in a Court in Canada, nor had they commenced any insolvency proceeding in Canada. The lack of a bankruptcy or receivership in Canada blocked the

terminated Canadian employees from applying for Wage Earner Protection Plan ("WEPP") payments toward their unpaid vacation pay, bonuses, severance pay, termination pay and other amounts owing. WEPP currently pays up to \$7,296.17 per employee. Such payment would provide immediate financial relief.

Sippel Affidavit, paras. 2, 5 to 6, and 28

6. Instead, Celadon U.S. filed motions in the U.S. Bankruptcy Court for approval to sell Canadian properties of Hyndman Canada on January 30, 2020 without any supervision or approval of a Canadian Court. Moreover, Hyndman's accounts were being diverted from Hyndman Canada's accounts for payment of creditors of the U.S. estate, without any supervision or approval of a Canadian Court.

Sippel Affidavit, paras. 30 to 32, and 24-26, Exhibit L – January 14, 2020 media report along with Notices

7. It was only on the evening of January 16, 2020 that Hyndman Canada confirmed that it would bring a motion for a Receivership Order that would allow access to WEPP payments for the terminated Employees. This occurred *inter alia* only after:

- (a) proposed Representative Counsel wrote to counsel for Hyndman Canada on January 5, 2020 detailing their concerns regarding *inter alia* the lack of payment of amounts owing to Employees, and the lack of a Receivership or other insolvency proceeding so as to allow the Employees access to payments from WEPP;

Sippel Affidavit, paras. 28 and 29

- (b) Justice Haaney issued an Endorsement directing that, *inter alia*, Canadian assets are not to be sold without his approval, encouraging Hyndman

Canada to bring a Recognition Order before the court and failing which, he was prepared to order a receivership over Hyndman Canada; and,

Sippel Affidavit, paras. 33 and 34, Exhibit M – January 14, 2020 letter from Mr. Hatnay; Exhibit N – January 15, 2020 endorsement of Justice Hainey

- (c) proposed Representative Counsel served a detailed affidavit on January 16, 2020 on behalf of the Canadian Employees to the lawyer for Hyndman Canada seeking *inter alia* a Receivership Order.

8. On January 20, 2020, Justice Hainey also *inter alia* endorsed that pending the motion by Hyndman Canada to appoint a Receiver, no further funds shall be transferred out of Hyndman Canada's bank accounts to any other Chapter 11 Debtor.

Endorsement of Justice Hainey dated January 20, 2020

9. The appointment of Representative Counsel in this case is appropriate to ensure that all the Employees are represented, their claims are consistently calculated, and that their rights and interests are protected and advanced in the Receivership or other proceedings.

10. The test for the appointment of Representative Counsel in insolvency cases is readily met.

PART II – THE FACTS

Hyndman Canada's background

11. Hyndman Canada is incorporated in Ontario and carried on business throughout Canada and North America as a truckload freight transportation carrier providing long haul, regional, local, dedicated and intermodal transport throughout North America. Hyndman Canada operated in Canada for over 75 years. Its business address is listed as 1001 Belmore Line, RR1, Wroxeter, Ontario, N0G 2X0. Prior to December 9, 2019, it employed almost 400 Employees, most of whom drove trucks.

Sippel Affidavit – para. 8, Exhibit A – Corporate Profile Report

12. Hyndman Canada has offices and terminals in Wroxeter, Ontario, and Ayr, Ontario, and Winnipeg, Manitoba (collectively the "**Properties**"). Hyndman Canada owns these Properties.

Sippel Affidavit – para. 9; Exhibits B and C - parcel registries for the Wroxeter (PIN 41029-0012) and Ayr (PIN 03848-0178) Properties

13. Hyndman Canada has at least six bank accounts. As of December 9, 2019, Hyndman Canada owned:

- (a) about 310 trucks; these trucks are believed to have been encumbered by finance companies who may have taken back possession of all or most of the trucks;
- (b) about 310 owned trailers; these trailers are likely all throughout North America, at least 5 years old and the net book value is about \$1.2 million;

- (c) 41 cattle trailers; these are likely mostly located in Wroxeter and the net book value is about \$1.4 M; and,
- (d) accounts receivable balances of about \$2.06 million USD and \$2.9 million CDN as at the end of November 2019 (the accounts payable balances was about \$20,000 USD and \$310,000 CDN).

Sippel Affidavit – para. 10 Exhibit D – particulars of bank accounts

14. Celadon U.S., the parent company of Hyndman Canada and based in the United States, is a U.S.-based trucking company that operated throughout North America. Celadon U.S. and its related entities were one of the largest North American truckload freight transportation carriers, providing point-to-point shipping, warehousing, supply chain logistics, tractor leasing and other transportation and logistics services for major customers throughout North America. They provided long haul, regional, local, dedicated, intermodal, temperature-protect and expedited freight services across North America. Prior to December 2019, Celadon U.S. operated a fleet of approximately 3,300 tractors and 10,000 trailers across North America, with nearly 4,000 employees. Around 2013, Celadon U.S. acquired Hyndman Canada.

Sippel Affidavit – para. 11

Operations ceased, mass termination of employees and no access to WEPP

15. On or about July 31, 2019, Celadon U.S. announced that it had secured “\$165 million of new financing to pay off our old bank debt and give us a fresh start towards success”, claiming it was “an incredible accomplishment... and we are now position to control our own destiny.”

Sippel Affidavit – para. 13; Exhibit F- July 31, 2019 letter sent by Celadon U.S. along with related press release

16. Only four months later, late in the evening on Sunday December 8, 2019, Denny Darrow, the vice president of Human Resources at Celadon U.S. told Jeff Sippel of Hyndman Canada and Cole Bradley of Celadon U.S. that Hyndman Canada was shutting down all of its operations immediately. Mr. Darrow instructed Mr. Sippel and Mr. Bradley to attend at the Wroxeter and Ayr Properties on Monday morning, close the facilities and advise the Employees that they were terminated. This came as a shock to Mr. Sippel as he had previously been informed by Celadon U.S. that Hyndman Canada was seeking to sell itself as a going concern and/or restructure.

Sippel Affidavit – para. 14

17. Accordingly, around December 9, 2019, Hyndman has ceased all of its operations, including Hyndman Canada. Almost 400 Canadian Hyndman Employees were terminated without prior notice or pay in lieu of notice.

Sippel Affidavit – para. 15

18. At the same time, Celadon U.S. filed for Chapter 11 protection in the United States, and included Hyndman Canada in its application, but, over the next month, failed to take any steps in Canada to obtain a bankruptcy order, a CCAA order, and/or appoint a receiver.

Sippel Affidavit – para. 16; Exhibit G – December 10, 2019 Order directing the Joint Administration of the Chapter 11 cases and Voluntary Petition of Celadon U.S.

Amounts Owed to Employees

19. It is estimated that Hyndman Canada owes about \$2.3 million to its Employees. Namely, \$416,000 for vacation pay, \$683,000 for notice, \$910,000 for severance, \$188,000 for unpaid bonuses, plus \$107,000 for owner/operators. This is broken down as between the three categories of Employees (office, drivers and owner/operator drivers) as follows:

Vacation	
Office	103,428.00
Drivers	313,130.41
Accrued Bonuses	
Office	188,304.80
Lieu of Notice	
Office	186,164.10
Drivers	497,729.94
Severance	
Office	364,036.70
Drivers	<u>544,933.31</u>
	\$2,197,727.26
 Owner Operators	
Holdback	70,800.00
Escrow	<u>36,547.80</u>
	\$107,347.80
TOTAL:	<u>\$2,305,075.06</u>

Sippel Affidavit – paras. 17 to 19; Exhibits H to J – spreadsheets prepared setting out the amounts owed to drivers, office staff, and owner/operators, along with years of service

Employees have statutory priority claims

20. In a bankruptcy or receivership, the amounts owed to employees for unpaid vacation pay and bonuses are priority secured claims up to at least \$2,000 per employee pursuant to sections 81.3 and 81.4 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA").

Sippel Affidavit – para. 20

21. The owner/operators were individuals who worked for Hyndman Canada but who owned their own trucks. They deposited money with Hyndman Canada to be held in trust to be used to reimburse any unpaid fuel or maintenance charges. The arrangement is that when the driver stops working for Hyndman Canada, the balance be returned to the owner/operator. Hyndman Canada failed to return these funds to the owner/operators. This may give rise to trust claims, which rank ahead of all other creditor claims.

Sippel Affidavit – para. 21

Dissipation of Canadian assets

22. Prior to ceasing operations, Celadon U.S. diverted funds from the account(s) of Hyndman Canada without ensuring there will be sufficient cash left to pay amounts owing to Employees as well as other Canadian creditor claims.

Sippel Affidavit – para. 22

23. Over the past few years, Celadon U.S. would routinely transfer profits from Hyndman Canada's accounts to itself or its lenders which may be in other jurisdictions, such as the United States. It is anticipated this may have totaled millions of dollars.

Sippel Affidavit – para. 23

24. From July 2019 onwards, Celadon U.S. entered into new financing arrangements. At that point, almost on a daily basis, any accounts receivable paid to Hyndman Canada was being diverted out of its bank account to Celadon U.S.'s lenders; and then Celadon U.S. would pay an amount needed to pay expenses that day into Hyndman Canada's

account. This appears to have been done to ensure that there would be no cash left in Hyndman Canada's accounts at any given time. It appears that from July 2019 until December 9, 2019, Hyndman Canada was cash positive substantial sums. Hyndman Canada's core business is profitable but its cash was depleted by Celadon U.S.

Sippel Affidavit – para. 24

25. Prior December 9, 2019, Hyndman Canada sought to sell itself. As part of that process, it was determined that for the month of November 2019 alone, Hyndman Canada was approximately \$646,346.49 cash positive. On almost a daily basis, Celadon U.S. had Hyndman Canada's funds diverted and those funds were \$646,346.49 greater than the amounts put into Hyndman Canada's accounts by Celadon U.S.

Sippel Affidavit – para. 25

26. Hyndman Canada's accounts receivables paid post December 9, 2019 were also similarly being diverted from Hyndman Canada's accounts for payment of creditors of the U.S. estate. As of the end of November 2019, these accounts receivables were in excess of \$5 million CDN.

Sippel Affidavit – para. 26

27. As indicated above, Hyndman Canada owns three Properties in Canada that have substantial value and can be liquidated to pay the Employees and other creditor claims.

Sippel Affidavit – para. 27

28. On January 5, 2020, Andrew Hatnay of Koskie Minsky ("KM") sent correspondence to Edmond Lamek, counsel to Hyndman Canada. In that email, Mr. Hatnay explained the amounts owing to the Employees, and their concerns. Notably, he

indicated that Hyndman Canada has failed to pay the amounts owing to Employees and failed to provide any meaningful response to the Employees as to its intentions. He demanded that Hyndman Canada pay these amounts forthwith, alternatively, advise what steps Hyndman Canada intends to take to ensure the Employees are paid, the Properties and all other assets are protected for the benefit of creditors, and whether Hyndman Canada intends to obtain a bankruptcy, receivership or CCAA order in Canada. He also noted that Hyndman Canada's failure to bring an insolvency proceeding in Canada has resulted in the Employees being blocked from applying for WEPP, causing additional financial hardship on the Employees.

Sippel Affidavit – para. 28; Exhibit K – January 5, 2020 email from Mr. Hatnay

29. Hyndman Canada provided no substantive response.

Sippel Affidavit – para. 29

30. Instead, on January 14, 2020, it was learned through media reports and Notices of Auction (and not from Hyndman Canada directly), that Celadon filed motions before the U.S. Bankruptcy Court to sell the Canadian assets and apply the sales proceeds to pay creditors of the U.S. estate. It appears that on January 6, 2020, Celadon obtained a bidding procedures Order from the U.S. Court to substantially sell all assets, including Hyndman's assets in Canada, and is seeking approval of the sale on January 30, 2020. Moreover, it appears that on January 13, 2020, Celadon filed motion material before the US Courts seeking an Order to sell the Ayr Property for \$12 million. However, Celadon U.S. and Hyndman Canada failed to take any steps in the Canadian courts regarding Hyndman Canada or the Canadian assets.

Sippel Affidavit – para. 30; Exhibit L – January 14, 2020 media report, along with Notices

31. The Employees' (and other Canadian creditors) ability to recover amounts owing to them was in serious jeopardy due to impending sale and dissipation of the Canadian assets. The Properties need to be stabilized by court supervision in Canada to ensure that the sales of Canadian assets maximize recoveries for Canadian creditors, including the Employees, and that the distribution of Canadian assets proceed under Canadian court supervision.

Sippel Affidavit – para. 31

32. There was also the concern that Hyndman Canada may be preferring, or is attempting to prefer, other parties including Celadon U.S., at the expense of Canadian creditors. If so, if steps were not forthwith taken, there may have been irreparable harm to the Employees and other Canadian creditors.

Sippel Affidavit – para. 32

Justice Hainey's Endorsements of January 15 and 20, 2020

33. Given the above, on January 14, 2020, Mr. Hatnay of KM scheduled a case conference before this Court the next day to discuss scheduling a hearing to the appointment of a receiver.

Sippel Affidavit – para. 33; Exhibit M – January 14, 2020 correspondence from Mr. Hatnay

34. At the Case Conference, Mr. Justice Hainey issued an Endorsement directing that, *inter alia*, the Canadian Properties are not to be sold without his approval,

encouraging Hyndman Canada to bring a Recognition Order before the court and failing which, he was prepared to order a receivership over Hyndman Canada.

Terminated Canadian Employees have scheduled a case conference with concerns about unpaid severance pay and other amounts owing to them, some of which they claim as priority secured claims, and the absence of any proceedings in Canada.

The Canadian assets shall not be sold without the approval of this court, despite the sale proceedings underway in the U.S. proceedings of the U.S. debtors.

While it is preferable that the U.S. debtors bring a Recognition proceeding and receivership in Canada under Part 13 of the BIA, I am prepared to issue a receivership on the application of the terminated Canadian employees on short notice, and in either case, appoint KSV Kofman as receiver.

Sippel Affidavit – para. 34; Exhibit N – January 15,
2020 endorsement of Justice Hainey

35. Following the Case Conference, Hyndman Canada stated that the Foreign Representative (i.e., Celadon U.S.) would bring an application before this court for an Initial Recognition Order and a Receivership Order.

36. On January 17, 2020, the Employees applied to the Superior Court of Justice (Commercial List) for a second Case Conference. On January 20, 2020, Mr. Justice Hainey further directed that pending the return of the Foreign Representative's motion, no further funds shall be transferred out of Hyndman Canada's bank accounts to any other Chapter 11 Debtor or to any other creditors of the Chapter 11 Debtor (including any creditor of Hyndman Canada) without the approval of the Canadian Court.

37. The court also directed that Hyndman Canada's application for a Recognition Order and receivership be heard on January 23, 2020;

PART III – THE ISSUE

1. **Should Representative Counsel be appointed for the employees in this case?**

Answer: Yes. Appointing Representative Counsel meets the factors in *Canwest* and is appropriate, just, and fair in this case.

PART IV – THE LAW

38. This Court's authority to appoint the Representatives and Representative Counsel for the Employees is derived from a number of sources, including:

- (a) Rules 10.01 and 12.07 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;
- (b) Section 131(1) of the *Courts of Justice Act* (Ontario), R.S.O. 1990, c. C.43; and
- (c) Sections 183(1) and 197(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“**BIA**”).

Rules of Civil Procedure, RRO 1990, Reg 194, Rule 10.01(1) and 12.07; *Courts of Justice Act* (Ontario), R.S.O. 1990, c. C.43, section 131(1); *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, sections 183(1) and 197(1); See also *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 at paras. 10-12 [“**Nortel 3028**”], Representative Counsel's Book of Authorities (“**Rep Counsel's BOA**”), Tab 1; *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169 at para. 7 [“**Fraser Papers**”], Rep Counsel's BOA, Tab 2; *Cash Store Financial Services (Re)*, 2014 ONSC 4567 at para. 12 [“**CashStore**”], Rep Counsel's BOA, Tab 3; *JTI-MacDonald Corp. Re et al*, Court File No. CV-19-615862-00CL, dated January 3, 2020, at paras. 19 to 21, and 26 to 35, Rep Counsel's BOA, Tab 7; May 18, 2016 Order of Justice Conway in the matter of the Bankruptcy of *Danier Leather Inc.* in Court File No. 31-2084381, Rep Counsel's BOA Tab 8; and the Second Report to Court of KSV Kofman Inc. Trustee in Bankruptcy of *Danier Leather Inc.* in Court

File No. 31-2084381, dated May 12, 2016, section 3.0, Rep Counsel's
BOA Tab 9

39. In *Nortel Networks Corporation (Re)*, Mr. Justice Morawetz (as he then was) held that representative counsel should be appointed to allow vulnerable employees and retirees to participate in insolvency proceedings (in that case, the CCAA proceedings of *Nortel Networks*; a liquidating CCAA):

[13] ...[I]t 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.

Nortel 3028, supra note 2 at paras. 7, 13, 15, 36, Rep Counsel's BOA,
Tab 1;

40. In appointing Representative Counsel and the payment of their costs in the *Canwest* CCAA proceeding, Justice Pepall (as she then was) stated:

[24] ... [T]hese 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.... 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.

...

[26] I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time.

Canwest Publishing (Re), 2010 ONSC 1328 at paras. 24 and 26, ["**Canwest Publishing**"] Rep Counsel's BOA, Tab 4.

41. In *Canwest Publishing Inc.*, Madam Justice Pepall also summarized the factors considered by Canadian courts when issuing representative counsel orders in insolvency proceedings (the "**Canwest Factors**"):

- (a) the vulnerability and resources of the group sought to be represented;
- (b) any benefit of the representation to the debtor company;
- (c) any social benefit to the companies subject to insolvency proceedings;
- (d) the facilitating of the administration of the proceedings and efficiencies;
- (e) avoidance of a multiplicity of legal retainers;
- (f) the balance of convenience and whether it is fair and just, including 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 other stakeholders and the Monitor (or in this case Receiver).

42. Pepall J. also stated that it is preferable to grant a representation order early in insolvency proceedings, both for the benefit of the parties to be represented and for the Applicants.

CashStore, at para. 14, Rep Counsel's BOA, Tab 3.

A Representation Order for the Hyndman Canada employees readily meets the *Canwest Factors* and should be ordered:

(a) *The Hyndman Canada employees are a vulnerable group and without a Representation Order will not have representation in the Insolvency Proceedings*

43. In this case, the Employees are current and former employees who may be entitled to (among other amounts) vacation pay, bonuses, severance and termination pay, unpaid trust amounts as well as other amounts as a result of working for Hyndman Canada. The Employees do not have representation in these proceedings.

44. These Employees have not been paid, are out of a job, made modest incomes, and were terminated without warning shortly prior to the Christmas holidays. These Employees are experiencing financial hardship.

Sippel Affidavit, para. 37

45. Current and former employees of a debtor company are generally a vulnerable group of creditors in an insolvency and require assistance in order to be able to participate in the restructuring process.

Nortel 3028, at paras. 13-14, Rep Counsel's BOA, Tab 1; *Fraser Papers Inc., Re*, at para. 7, Rep Counsel BOA, Tab 2.

46. The appointment of representative counsel ensures that the employees receive the legal assistance they require, while also avoiding the added cost and delay associated with a multiplicity of individual employee representations. The appointment of representative counsel in this situation has thus become an acceptable practice in insolvency cases.

Canwest Publishing, at para 20, Rep Counsel's BOA, Tab 4. See also *Canwest Global Communications Corp.*, Re, 2009 CarswellOnt 9398 [“**Canwest Global Order**”], Rep Counsel's BOA, Tab 5; *Hollinger Inc.*, Re, 2009 CarswellOnt 9523, Rep Counsel's BOA, Tab 6; *JTI-MacDonald Corp.* Re et al, Court File No. CV-19-615862-00CL, dated January 3, 2020, at paras. 19 to 21, and 26 to 35, Rep Counsel's BOA, Tab 7; May 18, 2016 Order of Justice Conway in the matter of the Bankruptcy of *Danier Leather Inc.* in Court File No. 31-2084381, Rep Counsel's BOA Tab 8; and the Second Report to Court of KSV Kofman Inc. Trustee in Bankruptcy of *Danier Leather Inc.* in Court File No. 31-2084381, dated May 12, 2016, section 3.0, Rep Counsel's BOA Tab 9

(b) *A Representation Order provides a benefit to the Applicant*

47. But for the involvement of Representative Counsel, Hyndman Canada would have not sought the Receivership Order, and would have continued to have dissipated the Canadian assets of Hyndman Canada for the benefit of the U.S. estate without Canadian Court approval or supervision, and without regard for the Canadian Employees' secured claims.

48. Worse yet, without the involvement of Representative Counsel, the Employees would not now have access to payments from WEPP, which pays up to \$7,296.17 per employee.

49. The appointment of Representative Counsel is also expected to have the following benefits:

- (a) Representative Counsel will be able to inform the Employees, both as a whole and with regard to each person's particular situation, of their rights and of the progression of Hyndman Canada's insolvency proceedings;
- (b) Representative Counsel will be able to provide the advice needed by the Employees to protect their interests and participate in the Hyndman Canada's insolvency proceedings;
- (c) Representative Counsel will be able to represent the interests of the Employees for the purpose of all decisions which might affect their rights in the course of this insolvency proceeding and, if necessary, bring to the Court's attention any matters to be dealt with;
- (d) Representative Counsel will contribute to streamlining of the Receivership process by being the single point of contact for Employees, and as such can provide consistent representation for a variety of employee claims in this insolvency proceeding.

(c) A Representation Order provides a social benefit

50. Granting a Representation Order will provide a social benefit by assisting the Employees, the vast majority of whom have no means to protect their rights and would have little or no assistance in advancing their claims for payment. Representative Counsel will prepare an Omnibus Proof of Claim, inform the Employees of their rights and of the progress of this insolvency proceedings, provide the advice needed by the Employees to protect their interests, and represent them for the purpose of all decisions which might affect their claims and rights in the course of these proceedings and, if necessary, bring matters before the Court as may be required. A Representation Order is the best way to pursue recovery of the Employees' claims and obtain a payment to them

as allowed by law for all creditors of a debtor, and particularly for the Employees, to assist them through a difficult period of sudden unemployment.

(d) A Representation Order facilitates the administration of the insolvency proceeding and enhances its efficiency

51. Representative Counsel will function as one focused point of contact for all Employees and help facilitate the administration of the company's reorganization on liquidation in an efficient manner. It avoids the need for the Applicant to deal with a potentially large number of individual, unrepresented Employees advancing single and inconsistent claims. As Morawetz, R.S.J. stated in *Cash Store*:

[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.

CashStore at para. 20, Rep Counsel's BOA, Tab 3

52. The balance of convenience strongly favours granting a representation order in this case. No stakeholder in the Receivership will be prejudiced by the issuance of a Representation Order. On the other hand, if the Representation Order is not granted, substantial prejudice will likely result to the Hyndman Canada Employees who will not have representation in these proceedings and are at considerable risk that their claims may not be calculated accurately and/or paid in full, or may not be paid at all.

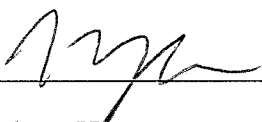
(g) No other Representative Counsel has been appointed

53. No other representation order has been made in these proceedings in respect of the Hyndman Canada employees. Proposed Representative Counsel has over 220 retainers from terminated Employees.

PART V - ORDER REQUESTED

54. The Moving Party respectfully requests an order appointing Jeff Sippel as the Representative of the employees of Hyndman Canada and KM as Representative Counsel to the Employees.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 22nd day of January, 2020.



Andrew Hatnay
Demetrios Yiokaris
Koskie Minsky LLP

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

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028
2. *Fraser Papers Inc., Re*, 2009 CarswellOnt 6169
3. *Cash Store Financial Services (Re)*, 2014 ONSC 4567
4. *Canwest Publishing (Re)*, 2010 ONSC 1328
5. *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 9398
6. *Hollinger Inc., Re*, 2009 CarswellOnt 9523
7. *JTI-MacDonald Corp. Re et al*, Court File No. CV-19-615862-00CL, dated January 3, 2020
8. May 18, 2016 Order of Justice Conway in the matter of the Bankruptcy of *Danier Leather Inc.* in Court File No. 31-2084381
9. Second Report to Court of KSV Kofman Inc. Trustee in Bankruptcy of *Danier Leather Inc.* in Court File No. 31-2084381, dated May 12, 2016

**SCHEDULE “B”
RELEVANT STATUTES**

1. *Rules of Civil Procedure, RRO 1990, Reg 194*

Rule 10.01(1)

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

- (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (b) the determination of a question arising in the administration of an estate or trust;
- (c) the approval of a sale, purchase, settlement or other transaction;
- (d) the approval of an arrangement under the *Variation of Trusts Act*;
- (e) the administration of the estate of a deceased person; or
- (f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

...

PROCEEDING AGAINST REPRESENTATIVE DEFENDANT

12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

2. *Bankruptcy and Insolvency Act, RSC 1985, c B-3*

Security for unpaid wages, etc. — bankruptcy

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of \$2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the period referred to in that subsection, are deemed to have been earned in that period.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the period referred to in subsection (1) is secured, as of the date of the bankruptcy, to the extent of \$1,000 — less any amount paid for those disbursements by the trustee or by a receiver — by security on the bankrupt's current assets on that date.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

...

Definitions

(9) The following definitions apply in this section.

compensation includes vacation pay but does not include termination or severance pay.
(rémunération)

receiver means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1). (séquestre)

...

Security for unpaid wages, etc. — receivership

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 — less any amount paid for those services by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

...

Definitions

(9) The following definitions apply in this section.

compensation includes vacation pay but does not include termination or severance pay.
(rémunération)

person who is subject to a receivership means a person any of whose property is in the possession or under the control of a receiver. (personne faisant l'objet d'une mise sous séquestre)

receiver means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1). (séquestre)

...

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- (a) in the Province of Ontario, the Superior Court of Justice;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

...

197 (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court

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

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

KM-4251181v2

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

FACTUM

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

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Hyndman Transport Limited

KM-4254626v1

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