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.

BOOK OF AUTHORITIES

(re: **appointment of Representative Counsel to terminated employees, returnable May 18, 2016)**

May 16, 2016

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INDEX

TAB CASE

Tab 1

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.)

Subject: Insolvency

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

***Morawetz J.*:**

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

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

3 The proposed representative counsel are:

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

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

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

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

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

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

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

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

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

9 These motions give rise to the following issues:

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

(ii) given the 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]).

End of Document

Tab 2

Court File No.
08-CL-7440

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	MONDAY, THE 17TH
	)	
MR. JUSTICE CAMPBELL	)	DAY OF MARCH, 2008

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 AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

B E T W E E N:

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO

Applicants

- and -

METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

Respondents

INITIAL ORDER

THIS APPLICATION, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), made by the investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper (the "Committee") listed in Schedule "B" hereto (each an "Applicant" and collectively, the "Applicants"), as investors in asset-backed commercial paper and related securities issued by the Respondents or their predecessors (all such securities outstanding being hereinafter referred to as the "Affected ABCP") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Purdy Crawford, C.C., Q.C. sworn March 17, 2008 (the "Crawford Affidavit") and the Exhibits thereto and the Report of Ernst & Young Inc. ("EYI") dated March 17, 2008 (the "First Report") prepared in contemplation of EYI's appointment as monitor of the Respondents (hereinafter referred to as the "Monitor") and on hearing the submissions of counsel for the Committee, and on hearing counsel for the Respondents 4446372 Canada Inc., 6932819 Canada Inc., Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp. and. Metcalfe & Mansfield Alternative Investments XII Corp., the issuer trustees of the trusts listed on Schedule "A" hereto (such trusts being herein referred to as the "Conduits"), who do not oppose this Application, and on hearing counsel for ● and counsel for EYI in its capacity as proposed Monitor, and on reading the consent of EYI to act as the Monitor,

SERVICE

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

APPLICATION

2. THIS COURT ORDERS AND DECLARES that each of the Respondents is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Plan of Compromise and Arrangement (hereinafter referred to as the "Plan" which term shall include amendments thereto) presented by the Committee and annexed to the Crawford Affidavit be and is hereby accepted for filing and, unless otherwise ordered by this Court, the Committee shall have the exclusive authority to (i) file with this Court amendments to and/or amended and restated versions of the Plan and (ii) propose meetings of creditors to consider and vote on the Plan.

POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that:

(a) the Respondents and the Conduits (collectively, the "CCAA Parties") shall remain in possession and control of their respective title and interests in the Conduits' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property");

(b) subject to any other provision of this Order or further order of this Court, the CCAA Parties, the Administrative Agents and the Financial Services Agents (as such parties are defined in Schedule "C") shall continue to act in a manner consistent with the administration of the Property in accordance with past practices; and

(c) any Respondent is authorized and directed to effect a sale or sales of Traditional Assets (as defined in the First Report) to the Originators (as defined in the First Report) of such assets, free and clear of the security interest held by the Existing Note Indenture Trustee (as defined in Schedule "C") in respect of the relevant Conduit provided that: (i) the security interest of the Existing Note Indenture Trustee shall and is deemed to attach to the net proceeds of such sale; (ii) the Monitor is satisfied that the sale price for such assets represents an amount that would enable the repayment of all related Affected ABCP and all other indebtedness incurred in connection with the original purchase by the Respondent of the assets sold and accrued interest on such amounts to the date of such sale;

and (iii) the net proceeds shall be received by the respective Respondent (or its respective Administrative Agent or Financial Services Agent) and shall be subject to the provisions of this Order.

5. THIS COURT ORDERS that, with respect to any and all obligations of the Respondents payable under this Order, recourse shall be limited to the Property.

6. THIS COURT ORDERS that, all fees payable to and expenses incurred by the CCAA Parties, the Existing Note Indenture Trustees, the Administrative Agents and the Financial Services Agents in connection with these proceedings or the administration of the Property or the Conduits or their trust indentures before and after this Order and in carrying out the provisions of this Order shall be paid (to the extent accrued and unpaid) and shall continue to be paid in the ordinary course and, where applicable, pursuant to the provisions of any applicable declarations of trust, trust indentures, financial services agreements, administration agreements and other agreements governing the administration and operation of the Conduits (collectively, for the purposes of this Order, the "Administrative Agreements"), which expenses shall include:

(a) all expenses reasonably necessary for the administration of the Property (whether payable directly by the CCAA Parties or on their behalf by the Administrative Agents or Financial Services Agents) and payments on account of insurance (including existing directors and officers liability insurance for the Respondents, the Administrative Agents and the Financial Services Agents);

(b) fees and reimbursement of expenses as provided under the Administrative Agreements; and

(c) the reasonable fees and disbursements of counsel for the Respondents, counsel for the Existing Note Indenture Trustees, counsel for the Administrative Agents and counsel for the Financial Services Agents in connection with these proceedings whether or not specifically provided for under the Administrative Agreements, in each case at their standard rates and charges.

7. THIS COURT ORDERS that, except for payments described in paragraph 6 or as otherwise specifically permitted herein, the CCAA Parties are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of Affected ABCP owing by any of the CCAA Parties as of this date or accruing after this date;

(b) to grant no security interests, trusts, liens, charges or encumbrances upon or in respect of any of the Property except as provided for in this Order or subsequent order of this Court; and

(c) to not grant credit or incur liabilities except in the ordinary course of the administration of the Conduits or the Property, and for greater certainty nothing in this Order shall prohibit payments in respect of existing derivative contracts, securitization agreements, asset purchase agreements, pooling and servicing agreements, and similar existing arrangements.

NO PROCEEDINGS AGAINST THE CCAA PARTIES OR THE PROPERTY

8. THIS COURT ORDERS that until and including April 16, 2008, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each a "Proceeding") shall be commenced or continued against or in respect of the CCAA Parties (including any of the respective affiliates, and present and former directors, officers, employees, associated individuals, advisors, agents and representatives (collectively, "Representatives") of the Respondents) or the Monitor or its Representatives, or affecting the Property, except with prior leave of this Court, on at least seven (7) days' notice to any subject Respondent or the Monitor, as applicable, and any and all Proceedings currently under way against or in respect of the CCAA Parties or their respective Representatives or affecting the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing collectively being "Persons" and each being a "Person") against or in respect of any of the CCAA Parties (including any of the Respondents' respective Representatives) or the Monitor, or affecting the Property, are hereby stayed and suspended except with prior leave of this Court, on at least seven (7) days' notice to any subject Respondent or the Monitor, as applicable, provided that nothing in this Order shall (i) empower the CCAA Parties to carry on any business which the CCAA Parties are not lawfully entitled to carry on, (ii) exempt the CCAA Parties from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

10. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, obligation, contract, agreement, licence or permit in favour of or held by any of the CCAA Parties, except with the written consent of the Monitor, in consultation with the Committee and the applicable Respondent, or leave of this Court.

CONTINUATION OF SERVICES

11. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements (including the Administrative Agreements) with any or all of the CCAA Parties or statutory or regulatory mandates for the supply of goods and/or services, including all financial services, administration services, computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to any of the CCAA Parties, are hereby restrained until further order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the CCAA Parties, and that the CCAA Parties shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet

addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the CCAA Parties in accordance with normal or existing payment practices of the CCAA Parties, or such other practices as may be agreed upon by the supplier or service provider and the applicable Respondent and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

12. THIS COURT ORDERS that, notwithstanding anything else contained herein, no creditor of the CCAA Parties shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to any of the CCAA Parties. Nothing in the Order shall derogate from the rights conferred and obligations imposed by the CCAA, including the provisions of section 11.1 concerning eligible financial contracts.

RESTRUCTURING

13. THIS COURT ORDERS that the CCAA Parties shall have the right, subject to the prior written consent of the Monitor, in consultation with the Committee, and upon an order of this Court being obtained, to repudiate such of their arrangements or agreements of any nature whatsoever, whether oral or written, as the CCAA Parties deem appropriate on such terms as may be agreed upon between the CCAA Parties and the counter-parties to such arrangements or agreements, or failing such agreement, to deal with the consequences thereof in the Plan subject to paragraph 3 hereof. For the purposes of this Order, the CCAA Parties shall provide thirty (30) days prior written notice of any repudiation of an Administrative Agreement with an Existing Note Indenture Trustee, an Administrative Agent or a Financial Services Agent if such repudiation is to be effective prior to implementation of the Plan.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

14. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Respondents, the Original Issuer Trustees (as defined in Schedule "C"), the Administrative Agents and the Financial Services Agents (collectively, the "Directors and Officers") with respect to any claim against any of the Directors

and Officers that arose before or arises after the date hereof and that relates to any obligations of any of the CCAA Parties or to the Property, whereby any of the Directors and Officers are alleged under any law to be liable in their capacity as Directors or Officers for the payment or performance of such obligations, until the Plan is sanctioned by this Court or is refused by the creditors of the CCAA Parties or this Court.

PROCEEDINGS AGAINST THE COMMITTEE AND OTHERS

15. THIS COURT ORDERS that the Applicants (including their respective Representatives) shall not incur any liability or obligation as a result of acting in their capacity as investors represented on the Committee or as Applicants in these proceedings, including acting in connection with the preparation for and the commencement of these proceedings, acting in connection with presenting and filing the Plan and proposing meetings and soliciting proxies in connection therewith, provided that nothing herein shall relieve an Applicant from its obligations specifically assumed or undertaken while acting in this capacity.

16. THIS COURT ORDERS that the Committee, the Chairman of the Committee (the "Chairman") and each other individual member of the Committee (each, a "Member") shall not incur any liability or obligation from and after the date hereof as a result of acting in that capacity in accordance with this order and subsequent orders herein.

17. THIS COURT ORDERS that during the Stay Period no action or other proceeding shall be commenced against the Committee, the Chairman, a Member or an Applicant (including, in each case, their respective Representatives) relating to their acting as such, except with prior leave of this Court, on at least seven (7) days' notice to (i) the Committee and its counsel, (ii) the Chairman and his counsel (iii) any subject Applicant or Member and their counsel and (iv) the Monitor and its counsel, and upon further order requiring payment of security for costs, to be given by the plaintiff for the costs, on a substantial indemnity basis, of the Committee, the Chairman, a Member or an Applicant, if any, in connection with any such action or proceeding.

18. THIS COURT ORDERS that the Respondents, the Original Issuer Trustees, the Existing Note Indenture Trustees, the Administrative Agents, the Financial Services Agents and the Sponsors (as described in the Crawford Affidavit) (including, in each case, their respective

Representatives) shall have no liability or obligation as a result of their role in the replacement of the Original Issuer Trustees by certain of the Respondents or in connection with any other actions, activities and transactions undertaken, or refrained from being undertaken, at the request of the Committee or otherwise to assist the Committee in preparation for or to facilitate these proceedings including, entering into the Support Agreements (as described in the Crawford Affidavit), if applicable, provided that nothing herein shall relieve any party from its obligations specifically assumed or undertaken pursuant to such actions, activities or transactions.

19. THIS COURT ORDERS that the Respondents, the Existing Note Indenture Trustees, the Administrative Agents and the Financial Services Agents (including, in each case, their respective Representatives) shall not incur any liability or obligation as a result of acting in their capacity as trustees or as agents of the CCAA Parties during the pendency of these proceedings or complying with an order of this Court.

20. THIS COURT ORDERS that no action or other proceeding shall be commenced against any of the Existing Note Indenture Trustees, the Original Issuer Trustees, the Administrative Agents, the Financial Services Agents and the Sponsors (including, in each case, their respective Representatives) relating in any way to their acting as such except with prior leave of this Court, on at least seven (7) days' notice to any subject Existing Note Indenture Trustee, Original Issuer Trustee, Administrative Agent or Financial Services Agent and its counsel and the Monitor and its counsel, and, if any intended action or proceeding relates to any of the matters set out in paragraphs 18 and 19, upon further order requiring payment of security for costs, to be given by the plaintiff for the costs, on a substantial indemnity basis, of the applicable Existing Note Indenture Trustee, Original Issuer Trustee, Administrative Agent or Financial Services Agent (including, in each case, its Representatives), if any, in connection with any such action or proceeding.

21. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any Person against the Existing Note Indenture Trustees, the Original Issuer Trustees, the Administrative Agents, the Financial Services Agents, the Asset Providers (as defined in Schedule "C"), the Canadian Banks (as defined in Schedule "C") and the Sponsors (including, in each case, their respective Representatives) in those capacities are hereby stayed and suspended

except with prior leave of this Court, on at least seven (7) days' notice to any subject Existing Note Indenture Trustee, Original Issuer Trustee, Administrative Agent, Financial Services Agent, Asset Provider, Canadian Bank or Sponsor and its counsel, and the Monitor and its counsel, provided that nothing in this Order shall (i) empower any Existing Note Indenture Trustee, Original Issuer Trustee, Administrative Agent or Financial Services Agent, Asset Provider, Canadian Bank or Sponsor to carry on any business which they are not lawfully entitled to carry on, (ii) exempt any Existing Note Indenture Trustee, Original Issuer Trustee, Administrative Agent, Financial Services Agent, Asset Provider, Canadian Bank or Sponsor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

SUPPORT AGREEMENT TERMINATION RIGHTS

22. THIS COURT ORDERS that nothing in this Order shall stay or interfere with the right of any party to a Support Agreement to exercise that party's right to terminate a Support Agreement or any standstill provided thereunder, pursuant to and in accordance with the terms of such Support Agreement. In connection with the Support Agreements, until further order of this Court, the Respondents shall not exercise any rights against Asset Providers that are counter-parties under any liquidity agreements with any Respondents.

APPOINTMENT OF MONITOR

23. THIS COURT ORDERS that Ernst & Young Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property and the CCAA Parties' conduct with the powers and obligations set out in the CCAA or set forth herein.

24. The CCAA Parties and their respective Representatives shall advise the Monitor of all material steps taken by the CCAA Parties pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations.

25. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the CCAA Parties' receipts and disbursements to the extent it deems necessary to preserve and protect the Property and to enable the Monitor to review and, if appropriate, consent to expenditures by the CCAA Parties pursuant to paragraph 7(a) or 13 above and, in connection therewith, the CCAA Parties, the Administrative Agents and the Financial Services Agents shall upon written request provide the Monitor with the particulars of all such receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property and such other matters as may be relevant to the proceedings herein;

(c) engage in discussions with, and, if appropriate, attend negotiations with any stakeholder concerning matters that may arise during these proceedings;

(d) disseminate to the Respondents or the Committee, and their respective counsel, such reports and information as they may request with respect to any and all matters pertaining to the CCAA Parties, any Property, or any other matter required by the Respondents or the Committee;

(e) advise the CCAA Parties (and, where relevant, their respective Administrative Agents and Financial Services Agents) in their preparation of cash flow statements for the Conduits and reporting required by the Court, which information shall be reviewed with the Monitor;

(f) have full and complete access to the books, records and management, employees and advisors of the CCAA Parties and the Property to the extent required to perform its duties arising under this Order;

(g) be at liberty to engage independent legal counsel, consultants, agents, experts, financial advisors, including in each case affiliates of the Monitor, or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(h) advise the Committee, to the extent requested by the Committee, in the Committee's development of any amendments to the Plan;

(i) assist the Committee, to the extent requested by the Committee, with the holding and administering of creditors' meetings for voting on the Plan;

(j) consider, and if deemed advisable by the Monitor, prepare a report on and assessment of the Plan;

(k) perform such other duties as are required by this Order; and

(l) perform such other duties as may be agreed to by the Monitor and approved by the Court.

26. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the administration or management of the CCAA Parties and shall not, by fulfilling its obligations hereunder, be deemed to have taken part in the administration or management of the CCAA Parties or to have taken or maintained possession or control of the Property, or any part thereof.

27. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

28. THIS COURT ORDERS that the Monitor shall provide any creditor of the CCAA Parties with information provided by the CCAA Parties or the Committee in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the party providing the confidential information may agree.

29. THIS COURT ORDERS that, in addition to the rights and protections afforded to the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded to the Monitor by the CCAA or any applicable legislation.

30. THIS COURT ORDERS that the First Report be and the same is hereby accepted and approved.

31. THIS COURT ORDERS that EYI shall not incur any liability or obligation as a result of its activities described in the First Report.

PAYMENT OF FEES AND THE CCAA PROFESSIONALS CHARGE

32. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the CCAA Parties, counsel to the Committee, PricewaterhouseCoopers Inc. in its role as Financial Advisor ("PwC") to the Ad Hoc Committee of Holders of Non-Bank Sponsored ABCP (the "AHC") as appointed by the Order of this Court of even date herewith) and its counsel and counsel to the AHC as appointed by the Order of this Court of even date herewith, shall be paid their reasonable fees and disbursements in connection with these proceedings, in each case at their standard rates and charges, from and after the filing of this Application (and in the case of PwC and its counsel for services provided to the AHC prior to their appointment of even date, from and after March 1, 2008 to the date preceding their appointment), by the CCAA Parties as part of

the costs of these proceedings, subject to a series by series allocation (the "Allocation"). The Allocation shall be reviewed and approved by the Monitor and will be based, in first instance, on the face values at scheduled maturity of the outstanding Affected ABCP in respect of each series. The Allocation will, at all times and for all purposes, be conditional on the Monitor's confirmation that there is sufficient cash held or deposited during these proceedings in the trust accounts of the Respondents ("Cash on Hand") in respect of a series to pay that series' portion of the Allocation, failing which the Allocation will be adjusted by the Monitor as necessary to ensure payment of the total amount of the said fees and disbursements. The CCAA Parties are hereby directed to pay their portion, pursuant to the Allocation, of the accounts of counsel to the Monitor, the Monitor, counsel to the CCAA Parties, counsel to the Committee, PwC, counsel to PwC and counsel to the AHC forthwith after such accounts are presented and in any event no later than ten (10) days after such accounts are presented and, in addition, each of the CCAA Parties is hereby authorized and directed to pay forthwith its portion, pursuant to the Allocation, of a retainer in the aggregate amount of $10,000,000.00 to be held by the Monitor as security for the payment of the foregoing respective fees and disbursements of the Monitor, counsel to the Monitor, counsel to the CCAA Parties, counsel to the Committee, PwC, counsel to PwC and counsel to the AHC outstanding from time to time.

33. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

34. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the CCAA Parties, counsel to the Committee, PwC, counsel to PwC and counsel to the AHC shall be entitled to the benefit of and are hereby granted a charge (the "CCAA Professionals Charge"), on the Cash on Hand, which charge shall be allocated on a series by series basis in accordance with the Allocation and shall not exceed in the aggregate in respect of all Conduits the amount of $10,000,000.00 as security for their reasonable fees and disbursements described in paragraph 32 of this Order incurred at their standard rates and charges. The CCAA Professionals Charge shall have the priority set out in paragraphs 40 and 41 hereof and any subsequent enforcement thereof shall be administered by the Monitor in accordance with the Allocation. For the purposes of

paragraph 32 and this paragraph 34, the Administrative Agents and Financial Services Agents shall have no responsibility to review accounts for reasonableness.

ADMINISTRATION CHARGE

35. THIS COURT ORDERS that with respect to the payment of fees and expenses described in paragraph 6 hereof, the payees shall be entitled to the benefit of and are hereby granted a charge not to exceed in the aggregate in respect of all Conduits the amount of $10,000,000.00 (the "Administration Charge") on the Cash on Hand, which charge shall be allocated by the Monitor on a series by series basis in accordance with the Administrative Agreements to the extent the related fees and expenses are payable thereunder, as security for payment by the CCAA Parties of such fees and expenses. The Administration Charge shall have the priority set out in paragraphs 40 and 41 hereof and any subsequent enforcement thereof shall be administered by the Monitor.

DIRECTORS AND OFFICERS INDEMNIFICATION AND CHARGE

36. THIS COURT ORDERS that the applicable CCAA Parties shall, on a Conduit by Conduit basis, indemnify the Directors and Officers relating to such Conduit from all claims, costs, charges and expenses of any nature whatsoever which may arise from the failure of such CCAA Parties to pay amounts arising and coming due after the date hereof or from other circumstances arising on or after the date hereof in respect of such Conduit, which they may sustain or incur on or after the date hereof in respect of such Conduit, by reason of or in relation to their respective capacities as Directors and/or Officers except to the extent that, with respect to any Director or Officer, such Director or Officer is found, by a final determination of a court of competent jurisdiction, to have actively participated in the breach of any related fiduciary duty or to have been grossly negligent or guilty of wilful misconduct.

37. THIS COURT ORDERS that, in respect of each Conduit, the Directors and Officers relating to such Conduit shall be entitled to the benefit of and are hereby granted a charge on the Cash on Hand relating to such Conduit, which charges shall not exceed in the aggregate in respect of all Conduits the amount of $5,000,000.00 (collectively, the "Directors' Charge") and shall be allocated by the Monitor, subject to further order of this Court, on a Conduit by Conduit

basis as security for the indemnity provided in paragraph 36 of this Order. The Directors' Charge shall have the priority set out in paragraphs 40 and 41 herein and any subsequent enforcement thereof shall be administered by the Monitor.

38. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, the Directors and Officers shall only be entitled to the benefit of the applicable Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 36 of this Order.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

39. THIS COURT ORDERS that the filing, registration or perfection of the CCAA Professionals Charge, the Administration Charge and the Directors' Charge (collectively, the "CCAA Charges") shall not be required, and that the CCAA Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the CCAA Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. THIS COURT ORDERS that the priorities of the CCAA Charges, as among them, shall be as follows:

First – CCAA Professionals Charge;

Second – Administration Charge;

Third – Directors' Charge.

41. THIS COURT ORDERS that the CCAA Charges shall each constitute a charge on the applicable Cash on Hand and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.

42. THIS COURT ORDERS that, except as otherwise expressly provided for herein, or as may be approved by this Court, the CCAA Parties shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the CCAA Charges.

43. THIS COURT ORDERS that the CCAA Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the CCAA Charges (collectively, the "Chargees") thereunder shall not otherwise be limited or impaired in any way by (i) the pendency of these proceedings and the declarations of insolvency made herein; (ii) any application for a bankruptcy order issued pursuant to the *Bankruptcy and Insolvency Act* ("BIA"), or any bankruptcy order made pursuant to such applications; (iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (iv) the provisions of any federal or provincial statutes; or (v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan document, indenture or other agreement (collectively, an "Agreement") which binds any of the CCAA Parties, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the CCAA Charges shall not create or be deemed to constitute a breach by any of the CCAA Parties of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the CCAA Charges; and

(c) the payments made by the CCAA Parties pursuant to this Order and the granting of the CCAA Charges do not and will not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

APPROVAL OF AGREEMENTS

44. THIS COURT ORDERS that

(a) the amended and restated fee agreements between Newshore Financial Services Inc. and Aria Trust, Encore Trust, Newshore Canadian Trust, Opus Trust and Symphony Trust,

(b) the following Global Amending Agreements: (i) Global Amending Agreement made as of August 1, 2007 in respect of each of the administration agreements between Coventree Administration Corp. and each of Apollo Trust, Aurora Trust, Comet Trust, Gemini Trust, Planet Trust, Rocket Trust and Slate Trust; (ii) Global Amending Agreement made as of August 1, 2007 in respect of each of the financial arrangement agreements between Coventree Capital Inc. and each of Apollo Trust, Aurora Trust, Comet Trust, Gemini Trust, Planet Trust, Rocket Trust and Slate Trust; (iii) Global Amending Agreement made as of August 1, 2007 in respect of each of the administration agreements between 1614723 Ontario Inc. and each of Structured Asset Trust and Structured Investment Trust III; (iv) Global Amending Agreement made as of August 1, 2007 in respect of each of the financial agent agreements between Nereus Financial Inc. and each of Structured Asset Trust and Structured Investment Trust II; and (v) Amending Agreement (Constellation FAA's) No. 2 dated as of August 1, 2007 between 1462888 Ontario Inc. ("1462888") and Coventree Capital Inc. ("Coventree") to the Base Financial Arrangement Agreement dated as of July 9, 2002 between Coventree Capital Group Inc. and 1462888, as amended by the Amending Agreement (Constellation FAAs) made as of April 1, 2007 between 1462888 and Coventree, and

(c) the fee arrangement amendments between Securitus Capital and Selkirk Funding Trust,

all as described in the First Report and the payments provided for therein are hereby ratified, authorized and approved and the effectiveness of such agreements and the

payments provided for therein shall not be limited or impaired in any way by (i) the pendency of these proceedings and the declarations of insolvency made herein, or (ii) any order issued pursuant to the *Bankruptcy and Insolvency Act*, or (iii) the provisions of any federal or provincial statute.

SERVICE AND NOTICE

45. THIS COURT ORDERS that the Monitor shall, within ten (10) business days of the date of entry of this Order, send a copy of this Order to the CCAA Parties' known creditors, other than employees and creditors to which the CCAA Parties owe less than $100,000.00, at their addresses as they appear on the CCAA Parties' records, and shall promptly send a copy of this Order to any Person requesting a copy of this Order, and the Monitor is relieved of its obligation under Section 11(5) of the CCAA to provide similar notice, other than to supervise this process.

46. THIS COURT ORDERS that the Respondents, the Applicants, the Committee and the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the CCAA Parties' creditors or other interested parties at their respective addresses as last shown on the records of the CCAA Parties and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing without the necessity of any acknowledgement of receipt being delivered or proven in respect of such service.

47. THIS COURT ORDERS that the Respondents, the Applicants, the Committee, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Monitor shall post a copy of any or all such materials on its website www.ey.com/ca/commercialpaper.

GENERAL

48. THIS COURT ORDERS that all uses of the word "include" or "including" in this Order shall mean "include without limitation" or "including without limitation".

49. THIS COURT ORDERS that references to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.

50. THIS COURT ORDERS that any of the Monitor, Respondents, the Applicants or the Committee may from time to time apply to this Court for advice and directions.

51. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the CCAA Parties, the Applicants, the Committee and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the CCAA Parties, the Applicants, the Committee and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the CCAA Parties, the Applicants, the Committee and the Monitor and their respective agents in carrying out the terms of this Order.

52. THIS COURT ORDERS that the Monitor, the CCAA Parties, the Applicants and the Committee shall not, without further order of this Court, seek or apply for the commencement of a foreign main proceeding in respect of the CCAA Parties.

53. THIS COURT ORDERS that each of the CCAA Parties, the Applicants, the Committee and the Monitor is at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

54. THIS COURT ORDERS that any interested party (including the CCAA Parties, the Applicants, the Committee and the Monitor) may apply to this Court to vary or amend this Order

on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

55. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Daylight Saving Time on the date of this Order.

R.A. Campbell J.

ENTERED
MAR 17 2009
PER/PAR:

SCHEDULE "A"

Conduits

Apollo Trust
Apsley Trust
Aria Trust
Aurora Trust
Comet Trust
Encore Trust
Gemini Trust
Ironstone Trust
MMAI-I Trust
Newshore Canadian Trust
Opus Trust
Planet Trust
Rocket Trust
Selkirk Funding Trust
Silverstone Trust
Slate Trust
Structured Asset Trust
Structured Investment Trust III
Symphony Trust
Whitehall Trust

SCHEDULE "B"

Applicants

ATB Financial
Caisse de Dépôt et Placement du Québec
Canaccord Capital Corporation
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of British Columbia
Credit Union Central of Canada
Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank Financial Inc./National Bank Of Canada
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

SCHEDULE "C"

Definitions

"**Administrative Agents**" means, collectively, the entities that administer the Conduits and their respective assets as agents for the Respondents;

"**Asset Providers**" means, collectively, the dealer banks, commercial banks and other entities which have entered into credit default swaps with and/or have sold Collateralized Debt Obligation assets to one or more of the Conduits directly or indirectly through satellite trusts, including: ABN AMRO; Bank of America, N.A.; Canadian Imperial Bank of Commerce; Citibank; Deutsche Bank AG; HSBC Bank USA, National Association; Merrill Lynch International; Swiss Re Financial Products Corporation; UBS AG and Wachovia Bank N.A. and their respective affiliates;

"**Canadian Banks**" means, for the purposes hereof, collectively, Bank of Montréal, Canadian Imperial Bank of Commerce, Royal Bank of Canada, The Bank of Nova Scotia and Toronto-Dominion Bank;

"**Existing Note Indenture Trustees**" means, collectively, the note indenture trustees under the trust indentures entered into in respect of the Conduits, namely BNY Trust Company of Canada, (as successor to the Trust Company of Bank of Montréal), CIBC Mellon Trust Company, Computershare Trust Company of Canada (as note indenture trustee or as agent for The Canada Trust Company, as the case may be) and Natcan Trust Company with regard to the Conduits;

"**Financial Services Agents**" means, collectively, the entities that provide or cause to be provided financial, originating, structuring and/or analytical services to the Conduits as agents for the Respondents, including Securitus Capital Corp. (in that capacity for both Selkirk Funding Trust and its sub-trust);

"**Original Issuer Trustees**" means BNY Trust Company of Canada, Computershare Trust Company of Canada, Metcalfe & Mansfield I and Montreal Trust, as former issuer trustees of certain of the ABCP Conduits, and includes Computershare as agent or attorney for Montreal Trust in such capacity, and "**Original Issuer Trustee**" means any one of them;

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 AND ARRANGEMENT OF METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP. ET AL.

Court File No.: ●

08-CL-7740

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

INITIAL ORDER

Goodmans LLP
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, Canada M5B 2M6

Benjamin Zarnett (LSUC#: 17247M)
Fred Myers (LSUC#: 26301A)
Brian F. Empey (LSUC#: 30640G)

Tel: 416.979.2211
Fax: 416.979.1234

Counsel for the Applicants

Tab 3

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

Tab 4

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

SUPERIOR COURT OF JUSTICE - ONTARIO

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

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

BEFORE: Regional Senior Justice Morawetz

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

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

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

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

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

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

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

HEARD: June 16, 2014

ENDORSEMENT

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

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

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

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

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

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

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

a. breach of the PLA;

b. breach of the *Competition Act*;

c. conspiracy; and

d. unjust enrichment.

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

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

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

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

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

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

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

b. any benefit to the companies under CCAA protection;

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

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

e. the avoidance of a multiplicity of legal retainers;

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

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

h. the position of others stakeholders and the Monitor.

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

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

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

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

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

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

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

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

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

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

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

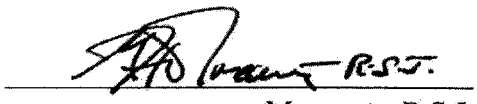
[24] With respect to the argument that the motion is to protect Class Counsel fees not proposed class members, this argument has to be considered with the statement that the moving party is not seeking funding for the cost of Representative Counsel at this time.

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

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

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

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



Morawetz, R.S.J.

Date: August 26, 2014

Tab 5

Dugal et al., as Trustees of Ironworkers Ontario Pension Fund v. Research in Motion Ltd. et al.

[Indexed as: Ironworkers Ontario Pension Fund (Trustees of) v. Research in Motion Ltd.]

87 O.R. (3d) 721

Ontario Superior Court of Justice (Commercial List),
C. Campbell J.
November 15, 2007

Corporations -- Oppression -- Settlement -- Applicant alleging improprieties in respect of company's option granting practices and accounting and seeking oppression remedy -- Parties reaching settlement -- Parties applying for court approval of settlement agreement and for representation order under Rule 10 of Rules of Civil Procedure -- Application granted. -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 10

Alleging improprieties in respect of option granting practices and related accounting, the applicant sought relief under s. 247(1) of the Business Corporations Act, R.S.O. 1990, c. B.16. The parties reached a settlement. During the course of the settlement negotiations, a Special Review Committee reviewed the granting of certain stock options, all directors and senior officers who benefited from incorrectly priced options agreed to return the benefits, and changes were made to stock option granting practices. The parties applied for court approval of the settlement. Because the relief sought in the oppression claim and proposed derivative action was not unique to the applicant, the parties agreed to seek a representation order under Rule 10 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

Held, the application should be granted.

The settlement was the product of difficult, protracted and contentious arm's-length negotiations. There was likely merit in the claim and there were real risks that liability might not be established. Continued litigation might take inordinate time and involve undue cost.

Cases referred to

Hollinger International Inc. v. American Home Assurance Co., [2006] O.J. No. 140, [2006] O.T.C. 35, 34 C.C.L.I. (4th) 17 (S.C.J.); Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, [1988] O.J. No. 1745, 41 B.L.R. 22 (H.C.J.)

Other cases referred to

Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc., [2006] O.J. No. 4520, 152 A.C.W.S. (3d) 601, 2006 CarswellOnt 7072 (S.C.J.); Muscletech Research and Development Inc. (Re), [2006] O.J. No. 3300, 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131 (S.C.J.); Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245, 37 C.P.C. (4th) 175 (S.C.J.); Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board (1997), 35 O.R. (3d) 177, [1997] O.J. No. 3086 (Gen. Div.); Ryan v. Ontario (Municipal Employees Retirement Board), [2006] O.J. No. 618, 29 C.P.C. (6th) 24, 51 C.C.P.B. 237 (S.C.J.)

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 247(1), 249
Class Proceedings Act, 1992, S.O. 1992, c. 6

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 10 [as am.] [page722]

APPLICATION for a court approval of a settlement agreement.

Michael D. Wright and A. Dimitri Lascaris, for applicant.

Robert W. Staley and Derek J. Bell, for Research in Motion, James Estill and John Richardson.

[1] C. CAMPBELL J.: -- The court has been asked to approve a settlement reached between the applicant, Ironworkers Ontario Pension Fund, and Research In Motion Limited ("RIM") and other individual respondents.

[2] The applicant alleged improprieties in respect of option granting practices and accounting for the same with respect to a number of individuals. Among other remedies, the applicant sought various relief under the oppression remedy section of the Business Corporations Act, R.S.O. 1990 c. B.16 (the "BCA"), s. 247(1). In addition, the relief sought leave to commence a derivative action in the name of RIM against certain individuals, including members of the audit committee, for breach of fiduciary duty and negligence in the administration of and financial reporting relating to RIM's stock option program.

[3] During the period in which demands were made to RIM by the applicant, certain changes were made on a voluntary basis at RIM by its Board of Directors. Many of the specific allegations contained in the applicant's claim for relief were vehemently denied by RIM and individual directors, as was the grounds for the remedies of oppression and a derivative action. As the litigation documentation developed, the court expressed concern that protracted hotly contested litigation could have the undesirable result of adversely affecting shareholder value regardless of the outcome.

[4] To the credit of the parties and their counsel, they agreed to commence discussion and negotiation to see if a settlement could be achieved.

[5] From progress reports to the court from time to time, I am satisfied that the settlement that has been reached and for which approval is sought, is the product of difficult, protracted and contentious negotiations at every level. Counsel and their clients are to be congratulated for achieving a resolution that did not risk shareholder value or faith in the Company.

[6] Since the settlement is specifically without admission of wrongdoing on the part of the Company or named individuals, it is not necessary to comment on the allegations, but only on the terms of the settlement themselves and whether they meet the test for approval.

[7] During the course of litigation and the negotiations, a Special Committee of RIM reviewed the facts and circumstances of [page723] stock options granted to RIM employees between December 1996 and August 2006.

[8] As a result of the Special Committee Review, all directors and senior officers who benefited from incorrectly priced options agreed to return the benefits. Changes were made to stock option granting practices and organizational changes were made at the board level, including new independent directors.

[9] In addition, Messrs Balsillie and Lazaridis each volunteered and paid $5 million to RIM to defray costs.

[10] The essential terms of the Settlement Agreement are as follows:

(a) Balsillie and Lazaridis have each agreed to pay $2.5 million to RIM in order to defray the costs of the Review -- this sum is in addition to the $5 million that each of them agreed to pay to RIM after the application

was commenced but before the Settlement Agreement was concluded;

(b) RIM will not compensate the independent members of its Board with stock options;

(c) RIM will retain Towers Perrin, a compensation consultant, to: (i) draft a new Compensation Committee Charter; and (ii) render an opinion to the Compensation Committee on whether it would constitute a material improvement to RIM's current corporate governance practices to assess the effectiveness of the Compensation Committee and its members;

(d) In drafting the new Compensation Committee Charter, Towers Perrin will be required to consult in good faith with a leading corporate governance expert retained by the applicant, Dr. Richard Leblanc of York University;

(e) Dr. Leblanc will be permitted to make a presentation to the Compensation Committee about the use of position descriptions for members of the Board and its committees;

(f) At any Board meeting where the compensation of C-Level Officers is determined, the Board will meet in executive session and in the absence of inside directors and other RIM executives, and appropriate minutes will be maintained of matters addressed in the executive session;

(g) For so long as it is extant, the Oversight Committee of RIM's Board will, in cooperation with its Audit Committee, periodically review and assess the adequacy of internal controls over: (i) the use of corporate property by RIM management; [page724] (ii) directorial conflicts of interest; and (iii) related party transactions, and the review, approval and reporting thereof;

(h) RIM has agreed to pay legal fees and disbursements,

inclusive of GST, to Ironworkers' counsel in the total amount of $1.09 million, and also to pay the costs of disseminating the notice of the settlement and the settlement approval hearing; and

(i) Ironworkers has given, subject to court approval of the Settlement Agreement, a full and final release to RIM and to the Proposed Defendants in respect of claims relating to RIM's stock option practices and reporting thereof, is seeking herein a dismissal of the application with prejudice and without costs, and is seeking herein a representation order whereby Affected Persons who do not validly exclude themselves will be bound by the release given by Ironworkers.

[11] Because the relief sought in the oppression claim and proposed derivative claim was not unique to the applicant (in that none of the allegations involved any allegations of special damage unique to the applicant), the parties have agreed to seek a representation order from this court.

[12] The parties have provided adequate notice of this settlement hearing to all affected persons. In fact, much more direct notice was provided in this case than is customarily employed in class proceedings in this province. The notice took the form of:

(a) Press Release: On October 5, 2007, RIM issued a joint press release of the parties announcing the settlement and describing its terms. The press release resulted in significant coverage in newspapers and newswires, including the Globe and Mail, Report on Business, Reuters, the Canadian Press and the Associated Press.

(b) Newspaper Advertisements: On October 15, 2007, RIM published a "short form notice" in English in each of the Globe and Mail (National Edition), the National Post, the Montreal Gazette and the Wall Street Journal and in French in La Presse.

(c) Direct Shareholder Mailing: RIM directly mailed a "long

form notice" in English and French (along with an erratum correcting the domain name for the applicant's counsel's [page725] website) to each RIM shareholder (representing approximately 560 million shares) as at October 5, 2007.

(d) Internet Publication: A copy of the Settlement Agreement and the long-form notice was published on the websites of Siskinds LLP and Cavalluzzo Hayes Shilton McIntyre & Cornish LLP.

[13] While an opt-out right is not necessary for a Rule 10 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] representation order, in order to ensure that any such order is binding outside of Ontario, the parties agreed to a 35-day opt-out period. That period began on October 15, 2007 (the date when newspaper ads ran and the long-form notices were mailed) and will expire on November 19, 2007. To date, 42 shareholders located throughout the U.S. and Canada, holding a combined 8,817 shares (0.0015 per cent of the total issued and outstanding shares) have opted out. The fact that there have been opt-outs demonstrates that the notice has been effective in reaching shareholders. Some of the opt-outs appear to be motivated by a desire to have nothing to do with a lawsuit against RIM.

[14] Section 249 of the BCA requires the court to give approval to any settlement on such terms as the court thinks fit and may take into account any shareholder approval.

[15] Two lines of cases were put forward as setting the test for shareholder approval. The first test is found in Sparling v. Southam Inc., [See Note 1 below] a derivative settlement hearing under s. 249. The criteria include (i) there is an overriding public interest in favour of settlement; (ii) on a settlement approval motion, the court should be satisfied that the proposal is fair and reasonable to all shareholders; (iii) in considering the settlement, the court must recognize that settlements by their nature are compromises and may not satisfy every single concern of all affected parties; (iv) acceptable settlements may fall within a broad range of upper and lower limits; (v) it is

not the court's function to substitute its judgment for that of the parties who negotiate the settlement; (vi) while the court does not simply rubber-stamp the settlement, it is not the court's function on a settlement approval motion to litigate the merits of the action; (vii) the court must consider the nature of the claims that were advanced in the action, the nature of the defences to those [page726] claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement; and (viii) the court should also consider the nature of the risks involved in establishing the liability claimed.

[16] The second line adopts the test enunciated by Winkler J. (as he then was) in Ontario New Home Warranty Program v. Chevron Chemical Co. [See Note 2 below] (a class action settlement) and adopted in Hollinger International Inc. v. American Home Assurance Co. [See Note 3 below] (an insurance settlement and related derivative class action), which includes (i) likelihood of recovery or likelihood of success; (ii) amount and nature of discovery, evidence or investigation; (iii) settlement terms and conditions; (iv) recommendation and experience of counsel; (v) future expense and likely duration of the litigation; (vi) recommendation of neutral parties, if any; (vii) number of objectors and nature of objections; and (viii) the presence of arm's-length bargaining and the absence of collusion.

[17] In my view, there is nothing inconsistent with the two lists of factors; indeed, they are largely compatible. Some, such as the number of objectors, are clearly restricted to Class Proceedings. The lists referred to in Chevron and in Hollinger reflect the emphasis on time and cost associated with modern-day litigation and the need for parties to be mindful of the extent to which continued litigation may take inordinate time and undue cost. That would certainly occur in this action but for the settlement.

[18] A court in these circumstances should in my view be satisfied that there is likely merit in the claim and be aware that there are real risks that liability may not be established. As noted above, I am so satisfied and as well recognize that there was arm's-length bargaining without any

suggestion of collusion.

[19] The settlement is therefore approved. To implement the settlement, the parties have sought a Representative Order under Rule 10 of the Rules of Civil Procedure, which gives the court authority to appoint a person to represent others who may be affected by the proceeding.

[20] The rule is described as the ". . . . 'simplified procedure' version of proceeding under the Class Proceedings Act . . .". [page727] Rule 10 is "designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 [Class Proceedings Act, 1992, S.O. 1992, c. 6] order". As such, a number of Rule 10 orders have been issued since the advent of the Class Proceedings Act. [See Note 4 below]

[21] The test for granting a Rule 10 representation order is a simple balance of convenience test. The court is to consider the inconvenience that would be experienced by each party if the order were or were not granted:

> . . .the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted. [See Note 5 below]

[22] I conclude that the Representative Order, which is hereby granted, is particularly appropriate given the opt-out provision that has been exercised by a very small minority of shareholders.

[23] An Order will issue in terms of the draft Order filed as well as in the action in Court File No. 07-CL-6799. Once again, counsel are to be thanked for their effective efforts giving rise to this settlement.

Application granted. [page728]

Notes

Note 1: Sparling v. Southam Inc. (1998), 66 O.R. (2d) 225, [1988] O.J. No. 1745 (H.C.J.).

Note 2: Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245 (S.C.J.).

Note 3: Hollinger International Inc. v. American Home Assurance Co., [2006] O.J. No. 140, 34 C.C.L.I. (4th) 17 (S.C.J.).

Note 4: See Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 10; Muscletech Research and Development Inc., Re., [2006] O.J. No. 3300, 25 C.B.R. (5th) 218 (S.C.J. (Commercial List)), at para. 42; Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board (1997), 35 O.R. (3d) 177, [1997] O.J. No. 3086 (Gen. Div.), at p. 183 O.R.; Ryan v. Ontario Municipal Employees' Retirement Board, [2006] O.J. No. 618, 29 C.P.C. (6th) 24 (S.C.J.); Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc., [2006] O.J. No. 4520, 2006 CarswellOnt 7072 (S.C.J.).

Note 5: Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board), supra, at p. 183 O.R.
