TAB 16

COURT FILE NO.: 06-CL-6241
DATE: 20060206

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

BEFORE: FARLEY J.

COUNSEL: J.A. Carfagnini and Caterina Costa, for the Applicants

Derrick Tay, for the Iovate Companies, the DIP Lender and Gardiner personally

Jay Swartz and Natasha MacParland, for the Monitor

Steven Golick, for Zurich Insurance Company

Jeffrey Carhart and A. Sambasivan, for the Ad Hoc Committee of the MuscleTech Tort Claimants

Bill Baldiga and Stephen Smith, U.S. counsel for the Ad Hoc Committee of MuscleTech Tort Claimants

Tom Ringe, U.S. counsel for the Applicants

David Rothwell, Canadian counsel for the Jaramillo plaintiffs

Jere Smith, U.S. counsel for the Jaramillo plaintiffs

HEARD: February 6, 2006

ENDORSEMENT

[1] This endorsement should be read in conjunction with my endorsement of January 18, 2006.

[2] The essential aspects of the motion before me today were for an extension of the stay of proceedings to March 15, 2006, the sealing of the unredacted version of the Monitor's Second Report and recognition the U.S. Protective Orders. Allow me to deal with the two non-contentious aspects. Firstly, I note that there has been minimal redaction of the Monitor's Second Repot as to sensitive commercial financial information, all in accordance with the principles *Sierra Club v. Canada* (2002), 211 D.L.R. (4th) 193 (SCC).

The draft order contemplates a sealing of the unredacted version pending further order of the court; thus any interested person could apply to the court for an unsealing on proper grounds. The unredacted version may be made available to any party which executes a suitable confidentiality/non-disclosure agreement. Similarly, with respect to the recognition of the U.S. Protective Orders, this makes common sense and is in general accord with the principles of *Sierra Club*.

[3] That leaves the question of the extension of the protective stay to March 15, 2006. Let me observe that all the parties represented before me today, except for counsel for the Jaramillos, were supportive of this request. Those supportive indicated that very significant progress had been made since the January 18, 2006 Initial Order with respect to the mechanics concerning a global resolution and as to initial discussions concerning substance; in contrast, the Jaramillos were concerned that this CCAA filing was designed to derail their trial scheduled for April 3, 2006 in New Mexico. In defence of the attitude of the Jaramillos in this regard, I would observe that I can understand their frustration and suspicion that, vis-à-vis them, the CCAA filing was a ploy and/or a stall designed to defeat a looming trial date. If that were shown to be the case, then this (Canadian) court would not tolerate such tactical game playing. However, I am satisfied on the evidence before me (and as supported by the other parties represented here today, including the Monitor, being an officer of the court – appointed by the court, with special responsibilities to the court, including neutrality as to all stakeholders (including the Jaramillos)) that the CCAA applicants have been proceeding in good faith with due diligence towards a CCAA resolution (and with the timetable addressed in the material having to be met demonstrating that they are presently proceeding in good faith and with due diligence) that it would be appropriate in these circumstances to extend the stay to March 15, 2006. I pause to note that at any time and from time to time any interested person may employ the comeback clause provision of the Initial Order and in this regard the Jaramillos (or others) are perfectly at liberty to request that the stay be terminated even before the March 15, 2006 date. One would ordinarily assume that that use of the comeback clause would be triggered by some adverse happening or negative result; however, the comeback clause is not so restricted.

[4] Allegations by the Jaramillos of bad faith as to <u>past activities</u> have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in <u>these CCAA proceedings</u>.

[5] It was suggested by U.S. counsel for the Jaramillos (I would observe that US counsel were variously present in the courtroom as shown in the list of counsel) that the CCAA applicants were attempting to pit this (Canadian) court off against the U.S. court (this would include Judge Rakoff's court and the court in New Mexico). I would observe that this court has a long tradition of comity and cooperation with the courts of the U.S. and it will not engage in such an activity. As discussed in Judge Rakoff's hearing transcript of January 25, 2006, he would be calling me and I would confirm that he and I had a very pleasant and productive discussion as to coordination and cooperation – and we will continue with that liaison and endeavour. I know that he is waiting to see how this hearing in Canada goes, before dealing with the matter in New York on February 9.

[6] In that regard, and as I pointed out, I have absolutely no difficulty with the element of Judge Rakoff having to be satisfied as to the appropriateness of how to deal with the Jaramillo litigation in New Mexico. It will be up to him to assess whether that litigation should be carved out, as to which see his previous consideration in this regard. I advised counsel (and Mr. Ringe specifically acknowledged) that they would have to be up to speed re the New Mexico case if Judge Rakoff did not find favour with the process as presently contemplated.

[7] In that regard, I would also advise that I impressed upon all parties/counsel that they would have to continue with the lightning (choice of that word being that of one supportive counsel) progress that had been made to date. I found it very helpful to have the Monitor's interim report as to transactions affecting the CCAA applicants with related parties. That report will have to be finalized forthwith, including all aspects of "reviewable transactions". I was advised by the Monitor that the CCAA applicants and the other Gardiner entities plus Mr. Gardiner personally recognized the importance of this and that the Monitor was receiving full cooperation and candour in this respect. I am certain that the Supplemental Objection to Motion For Temporary Restraining Order and Preliminary Injunction (headed up with the style of proceedings in the CCAA matter, but clearly addressed to the U.S. court) of the Jaramillos will be of assistance in allowing the Monitor to give special attention to the concerns addressed there. Originally, it was thought that the final report could be completed by February 15, 2006, but with the additional workload forthcoming, it was suggested that February 22, 2006 would be a more manageable date. I would therefore expect a draft interim report by February 15, 2006 to demonstrate that real progress is being made in this regard. Given the future dates in question, it would be better to consider February 22, 2006 as an outside date and better to provide same earlier.

[8] I understand that later this week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]

[9] I would reiterate my observations in *Re Grace Canada Inc.*, [2005] O.J. No. 4868 (Ont. S.C.J.) at paragraph 5 and 11:

> 5. It would seem to me that the various class proceedings would benefit from cooperation and coordination – using the 3 Cs of the Commercial List (communication, cooperation and common sense). Otherwise, they will be faced with the practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and therefore susceptible to being conquered.
>
> 11. It would seem to me that the insolvency adjudicative proceedings would, at least under presently anticipated circumstances, result in a more effective efficient process than would a full-blown class action proceeding.

[10] As well, it is helpful to recall what Blair J. (as he then was) said concerning CCAA stays of proceedings against third parties in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraphs 13, 17, 20, 24 and 25:

> 13. The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.
>
> 17. By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangement between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangements with such creditors.
>
> 20. I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.
>
> 24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with – at least for the purposes of that proceeding – in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York – whose alleged misdeeds are the real focal point of the attack on both sets of defendants – is able to participate.
>
> 25. In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see Attorney General v. Arthur Andersen & Co. (1988), [1989] E.C.C. 224 (C.A.), cited in Arab Monetary Fund v. Hashim, supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

[11] I am satisfied on a balancing of interests, weighing the benefits and the detriments, that it is appropriate to exercise my discretion to extend the stay. Order is to issue as per my fiat.

[12] This endorsement was written over the lunch hour. I directed counsel to have their lunch together usefully discussing how this matter may productively proceed. I then returned to court to give them this endorsement and read it to them. I was advised that counsel (including those for the Jaramillos) had had an open and frank discussion.

J.M. Farley

DATE: February 6, 2006

TAB 17

1999 CarswellOnt 3234
Ontario Superior Court of Justice [Commercial List]

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re

1999 CarswellOnt 3234, 12 C.B.R. (4th) 194, 39 C.P.C. (4th) 362

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

In the Matter of a Plan of Compromise or Arrangement of the Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge

The Canadian Red Cross Society/La Société Canadienne de la Croix-Rouge, Applicant

Blair J.

Judgment: July 28, 1999
Docket: 98-CL-002970

Counsel: *Benjamin Zarnett* and *Jessica Kimmel*, for applicant, Red Cross.
Charles M. Wright, for respondent, Barbara Baker et al.
John Spencer, for respondent, Attorney General of Canada.
Michael Kainer, for respondent, SEIU.
Carlton Mathias, for respondent, Bayer Corp.
Mary Margaret Fox, for respondent, Dominion of Canada General Insurance Company.
D. Ward, for respondents, Provinces & Territories (except Que.).
P. Huff, for respondent, 1986-1990 Hemophiliac, HCV claimants.
Jeff Carhart, for respondents, Québec Government & Hema-Québec.
Ken Arenson, for respondents, Certain Individual Claimants.
D. Harvey, for respondents, pre-86/post 90 HCV claimants.
J.H. Grout, for respondent, Monitor, Ernst & Young Inc.
Gary Smith, for respondents, pre86/post 90 BC HCV claimants.

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Proving claim — Practice and procedure — Miscellaneous issues

Motion by individual for order lifting Companies' Creditors Arrangement Act stay in order to permit her leave to to file class proof of claim in this proceeding, on her own behalf and on behalf of class of persons said to be exposed to infection as result of receiving transfusions of blood tainted or contaminated by Creuzfeld-Jakob Disease — Motion dismissed — This was not case to consider whether class proofs of claim were permissible in Canadian insolvency

proceedings — It was matter for discretion of insolvency judge whether to permit filing of class proof of claim — Would not exercise discretion in circumstances to permit such filing.

Practice --- Parties — Representative or class actions — General

Motion by individual for order lifting Companies' Creditors Arrangement Act stay in order to permit her leave to commence class action proceeding on her own behalf and on behalf of class of persons said to be exposed to infection as result of receiving transfusions of blood tainted or contaminated by Creuzfeld-Jakob Disease — Motion dismissed — Potential CJD claimants have received adequate notice of claims filing procedure designed to enable claimants to vote on proposed plan — Red Cross proceedings have been ongoing for more than year with very high profile — CCAA schedule was modified so timing of it and Red Cross proceedings would mesh — Didn't want to impose another feature into CCAA procedure which might upset timing — Claims procedure for voting purposes which had already been put in place with concurrence of various groups of transfusion claimants was one which was founded upon individual voting by claimants with respect to plan.

Table of Authorities

Cases considered by *Blair J.*:

Matter of American Reserve Corp. (1988), 840 F.2d 487, 56 U.S.L.W. 2497, 10 Fed. R. Serv. 3d 868, 17 Bankr. Ct. Dec. 504 (U.S. 7th Cir. Ill.) — referred to

Reid v. White Motor Corp. (1989), 886 F.2d 1462 (U.S. C.A. 6th Cir.) — referred to

Statutes considered:

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

MOTION by individual for order lifting *Companies' Creditors Arrangement Act* stay in order to permit her leave to commence class action proceeding and to file class proof of claim.

***Blair J.*:**

1 This Motion is brought on behalf of Ms. Barbara Baker for an Order lifting the CCAA stay in order to permit her leave to commence a class action proceeding, and to file a class proof of claim in this proceeding, on her own behalf and on behalf of a class of persons said to be exposed to infection as a result of receiving transfusions of blood tainted or contaminated by Creuzfeld-Jakob Disease ("CJD"). CJD is a terrible malady — an infectious, rapidly progressive, fatal brain-deteriorating disease for which there is apparently no known treatment or cure.

2 The issue to be considered here is not the tenability of such a class action proceeding or the question of whether or not

the proposed class would be certified. These are matters for the class action proceeding itself, if it is to proceed. The issue here is whether it would be helpful and effective from the perspective of blood claimants exposed to CJD *and* with respect to the overall processing of the Red Cross CCAA proceeding itself — including, of course, the timely and fair compensation of Transfusion Claimants as a whole from the proceeds made available through the proposed Plan, if accepted and approved — to lift the stay for the reason proposed.

3 In the particular circumstances of this restructuring proceeding I am not satisfied that it is necessary, or that it would be appropriate, to grant the relief sought. The motion is therefore dismissed.

4 There are a number of reasons for arriving at this conclusion.

5 First, the real issue is whether or not the potential CJD claimants have received adequate notice of the claims filing procedure designed, initially, to enable claimants to vote on the proposed Plan. A carefully constructed and elaborate notification procedure has been established and put into effect. It was arrived at after extensive negotiations amongst the myriad of claimants' representatives and finalized after full argument in Court. It included nation-wide notification in the national newspaper media on three occasions. It is readily apparent from the introductory words of the Notice itself that those who should claim included *anyone* with a direct or indirect blood claim against the Red Cross. A number of CJD claimants have already filed claims and numerous others have contacted the Red Cross or the Monitor. Ms Baker herself is Plaintiff in an Alberta action commenced against the Red Cross in 1996 and she received direct notification through her solicitors, as did other similar claimants. There is really no evidence that there have been any difficulties from inadequate notice to CJD claimants.

6 Secondly, I am not satisfied that any notification procedure evolving out of a commenced but then stayed class action proceeding would yield any different results. Neither the Red Cross nor the Monitor knows who the potential claimants are. Ms Baker's proposed class action solicitors appear not to know either.

7 Thirdly, the Red Cross proceedings have been ongoing now for more than a year. They have had a very high profile, accompanied by wide spread publicity. This factor in itself carries with it a certain momentum for the discovery and assertion of claims.

8 Fourthly — and against the background of the foregoing — the Red Cross proceedings themselves have developed a certain taut dynamic between the assertion of claims within the CCAA umbrella and the pending settlement of claims between at least a large group of the Transfusion Claimants and the various Governments. The proposed Plan is closely related to the successful completion of the Government settlement, and the timing of these proceedings is being synchronized with the timing of the approval and implementation of the latter. In an earlier motion today the CCAA schedule was modified so that the timing of the two would mesh.

9 There are two implications arising from this fourth point. In the first place, I am reluctant to impose another feature into the CCAA procedure which might upset the current timing, particularly where — as I have indicated — I think the helpfulness of the proposed class action proceeding would be marginal at best in respect of the individual CJD claimants and in respect of the CCAA proceedings. Moreover, the claims procedure for voting purposes which has already been put in place — with the concurrence of the various groups of Transfusion Claimants — is one which is founded upon individual voting by

claimants with respect to the Plan.

10 I am not sure how individual voting would work in the context of the "class proof of claim" which Mr. Wright proposes should be filed, and I am not prepared to run the risk of upsetting the present procedure which is clearly underway and which has already absorbed a great deal of the time, energy and resources of the various Transfusion Claimants, at this late stage. There is an imperative at work here which demands that this proceeding be advanced and that voting and completion of the Plan (if accepted and approved) take place in as timely a fashion as possible, in order that Claimants receive what compensation they are entitled to as early as possible.

11 This is not the case, in my view — because it is not necessary to do so — to consider carefully and determine whether class proofs of claim are permissible in Canadian insolvency proceedings. There are apparently no examples in Canada yet where such a procedure has been permitted. In the United States, which has — as Mr. Wright's factum put it — "a lengthier history of class proceedings," class proofs of claim have sometimes been allowed in principle in the bankruptcy context: see, for example, In the *Matter of American Reserve Corp.*, 840 F.2d 487 (U.S. 7th Cir. Ill. 1988) (Feb. 18, 1988) (No. 87-1768), and *Reid v. White Motor Corp.*, 886 F.2d 1462 (U.S. C.A. 6th Cir. 1989), (Sept. 28, 1989). As I understand these cases, it is a matter for the discretion of the insolvency judge as to whether to permit the filing of a class proof of claim. For the reasons I have articulated, I would not exercise my discretion in the circumstances of this case to permit such a filing, even if I were to apply the principles to be drawn from the American authorities.

12 The Motion is therefore dismissed. I do not rule out, by this disposition, the possible appointment of Representative Counsel for the CJD claimants in this proceeding (similar to those already appointed for the various groups of Transfusion Claimants) should it be felt and determined to be necessary or appropriate in the future.

Motion dismissed.

End of Document

TAB 18

TAB 3F

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 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

BETWEEN:

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

ORDER
(RE APPOINTMENT OF REPRESENTATIVE COUNSEL AND FINANCIAL ADVISOR)

THIS MOTION MADE by the Ad Hoc Committee (the "**Ad Hoc Committee**") of Holders of Non-Bank Sponsored Asset-Backed Commercial Paper ("**ABCP**") for an order appointing representative counsel and a financial advisor in these proceedings was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Ad Hoc Committee dated the 17th day of March, 2008 and the affidavit of Jay M. Hoffman, sworn the 17th day of March, 2008 (the "**Hoffman Affidavit**"), filed, and on hearing the submissions of counsel for the Ad Hoc Committee, counsel for investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper, 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, and other counsel appearing,

1. **THIS COURT ORDERS** that all parties entitled to notice of this motion have been served with notice of this motion and that the time for service is hereby abridged such that service effected on the parties served with notice of this motion shall be good and sufficient notice of this motion.

2. **THIS COURT ORDERS** that (a) Miller Thomson LLP ("**Miller Thomson**") is appointed in these proceedings to represent the Ad Hoc Committee ("**Representative Counsel**") and PricewaterhouseCoopers Inc., in its capacity as Financial Advisor (as herein defined) and (b) PricewaterhouseCoopers Inc. is hereby appointed as financial advisor ("**Financial Advisor**") to the Ad Hoc Committee, including any holders of ABCP who are not members of either the Ad Hoc Committee or the Pan-Canadian Investors Committee For Third-Party Structured Asset-Backed Commercial Paper and choose to become members of the Ad Hoc Committee, provided that nothing in this paragraph shall impair the right, if any, of any individual holder of ABCP to retain and instruct counsel in these proceedings on his, her or its own behalf.

3. **THIS COURT ORDERS** that, subject to further order of the Court, the Representative Counsel shall represent the interest of and the Financial Advisor shall advise those on whose behalf they are hereby appointed in all aspects of these proceedings, without any obligation to consult with or seek instructions from those on whose behalf they have been appointed to represent unless otherwise ordered by the Court.

4. **THIS COURT ORDERS** that neither the Representative Counsel nor the Financial Advisor (which term shall include PricewaterhouseCoopers affiliates and related entities and firms providing services to the Financial Advisor) shall be liable for any act or omission in respect of their appointment or the fulfillment of their duties in carrying out the provisions of this Order and that no action or other proceedings shall be commenced against either the Representative Counsel or the Financial Advisor relating to their acting as such, except with prior leave of this Court, on at least 7 day's notice to the Representative Counsel or the Financial Advisor, as may be applicable, and upon further order in respect of security for costs, to be given by the plaintiff for the costs, on a substantial indemnity basis, of the Representative Counsel or the Financial Advisor in connection with any such action or proceeding.

5. **THIS COURT ORDERS** that the Representative Counsel and the Financial Advisor may from time to time apply to this Court for advice and directions in respect of their appointment or the fulfilment of their duties in carrying out the provisions of this Order, upon notice to the Applicants, to the CCAA Parties and to other interested parties, unless otherwise ordered by the Court.

6. **THIS COURT ORDERS** that the Representative Counsel and the Financial Advisor shall be given notice of all motions to which holders of ABCP are entitled in these proceedings and that they shall be entitled to represent those on whose behalf they are hereby appointed in all such proceedings.

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

MAR 19 2008

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

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-7440

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER

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Solicitors for the Ad Hoc Committee of Holders
of Non-Bank Sponsored Asset Backed Commercial Paper

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

Court File No.

Having read the motion record & on being advised that no party with notice opposes the order sought is granted in terms of the draft filed & signed

J. C. Campbell J.

Dec. 19/08

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

MOTION RECORD

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Solicitors for the Ad Hoc Committee of Holders of Non-Bank Sponsored Asset Backed Commercial Paper

TAB 19

Court File No. CV-09-8201-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MADAM JUSTICE PEPALL	) THURSDAY, THE 20TH) DAY OF AUGUST 2009

IN THE MATTER OF SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, C. C. 30, AS AMENDED

B E T W E E N:

WESTLB AG, TORONTO BRANCH

Applicant

- and -

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

O R D E R

THIS MOTION, made by Alvarez & Marsal Canada ULC, in its capacity as Court-appointed receiver and manager pursuant to section 101 of the Courts of Justice Act (Ontario) (the "CJA") and trustee and receiver and manager under the Construction Lien Act (Ontario), and McIntosh & Morawetz Inc., in its capacity as interim receiver pursuant to section 47(1) of the Bankruptcy and Insolvency Act (the "BIA"), (jointly and collectively, the "**Receiver**"), of the undertaking, property and assets of The Rosseau Resort Developments Inc. ("**RRDI**") for an Order: (i) approving and ratifying the retention of Miller Thomson LLP as representative counsel ("**Representative Counsel**") to represent those persons (the "**Represented Unit Owners**") who have entered into a rental pool management agreement with The Rosseau Resort Management Services Inc. ("**RRMSI**") and are either current owners (the "**Unit Owners**") of the condominium units at the Hotel or existing purchasers of Units who have not closed outstanding

agreements of purchase of sale with RRDI (the "**Existing Unit Purchasers**") unless a Represented Unit Owner provides written notice to Representative Counsel that they do not wish to be included as a Represented Unit Owner in these proceedings and (ii), an Order abridging the time for bringing this motion and dispensing with any further service of this Motion Record; was heard this day, at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Receiver dated August 19, 2009 containing the Fifth Report to Court of the Receiver dated August 19, 2009, the Second Report to Court of the Receiver dated July 3, 2009 and the Fourth Report to Court of the Receiver dated August 12, 2009 ("**Fourth Report**"), filed and on hearing the submissions of independent counsel for the Receiver, counsel for WestLB AG, Toronto Branch and the Receiver, counsel for the Ad Hoc Committee of Unit Owners, counsel for Marriott Hotels of Canada Ltd., and counsel for Fortress Credit Corp. not opposing, no one appearing for any other person on the service list,

1. **THIS COURT ORDERS** that the timing and method of service of the motion record is hereby abridged and validated such that service on effected on the parties served with notice of this motion shall be good and sufficient notice of this motion record.

2. **THIS COURT ORDERS** that Miller Thomson LLP ("**Representative Counsel**") is appointed in these proceedings to represent the Represented Unit Owners, unless and until written notice is provided by a particular Represented Unit Owner to Representative Counsel that such Represented Unit Owner does not wish to be a Represented Unit Owner, and that, subject to further order of the Court, the mandate of Representative Counsel pursuant to this Order shall be limited to (i) responding to the motion brought by RRMSI to vary or amend paragraph 6 of the Order of the Honourable Madam Justice Pepall made in these proceedings on August 18, 2009; and (ii) to bring or participate in a motion to be brought to appoint a receiver over certain assets of RRMSI. For greater certainty and without limitation, Representative Counsel shall not be charged with the responsibility for dealing with any individual Unit Owner or Existing Unit Purchaser's purchase of or agreement to purchase a unit or units in the Hotel (as defined in the Fourth Report).

3. **THIS COURT ORDERS** that the Receiver of RRDI shall provide the last known e-mail addresses for each Represented Unit Owner to Representative Counsel who shall then provide to all Represented Unit Owners, within seven (7) days of the date of this Order, a copy of this Order, and that no further notice is required to be sent to the Represented Unit Owners in respect of the granting of this Order and the appointment of Representative Counsel.

4. **THIS COURT ORDERS** that the fees and disbursements of Representative Counsel are not to exceed $50,000, absent further order of this Court approving additional fees and disbursements.

5. **THIS COURT ORDERS** that Representative Counsel shall be paid its reasonable fees and disbursements by the Receiver out of the RRDI assets in a timely manner for fulfilling its mandate in accordance with this Order, on the provision of invoices by the Representative Counsel, to the Receiver. Representative Counsel shall have the benefit of the Receiver's Charge, established pursuant to the Amended and Restated Appointment Order of the Honourable Madam Justice Pepall dated June 2, 2009 in these proceedings in respect of its fees and disbursements. Upon the request of the Receiver, or any other party, Representative Counsel shall seek the approval of its fees and disbursements by this Honourable Court.

6. **THIS COURT ORDERS** that the Representative Counsel may from time to time apply to this Court for advice and directions in respect of its appointment or the fulfilment of its duties in carrying out the provisions of this Order or variation of the powers and duties of Representative Counsel, upon notice to the Receiver and to other interested parties, unless otherwise ordered by the Court.

7. **THIS COURT ORDERS** that, the Representative Counsel shall not be liable for any act or omission in respect of its appointment or the fulfillment of its duties in carrying out the provisions of this Order and that no action or other proceedings shall be commenced against Representative Counsel relating to its acting as such, except with prior leave of this Court, on at least seven (7) day's notice to the Representative Counsel and upon further order in respect of security for costs, on a substantial indemnity basis, of Representative Counsel in connection with any such action or proceeding.

8. **THIS COURT ORDERS** that the Representative Counsel shall be given notice of all motions relating to the matters identified in paragraph 2, to which Unit Owners or Existing Unit Purchasers are entitled in these proceedings and that Representative Counsel shall be entitled to represent those on whose behalf it is hereby appointed in all such proceedings.

Joanne Nicoara
Registrar, Superior Court of Justice

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

AUG 2 0 2009

PER / PAR:

Court File No. CV-09-8201-00CL

WESTLB AG, TORONTO BRANCH **Applicant**	**V.**	**THE ROSSEAU RESORT DEVELOPMENTS INC.** **Respondent**

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ORDER

(August 20, 2009)

FRASER MILNER CASGRAIN LLP
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Toronto, Ontario
M5X 1B2

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Independent Lawyers for Alvarez & Marsal Canada ULC, and McIntosh & Morawetz Inc., in their respective capacities as Court-appointed Interim Receiver, Trustee, Receiver and Manager

TAB 20

I.I.C. Ct. Filing 379177368006

MF Global Canada Co. — Court File No. 207854-T
6. — **Order — (Re Customer Representative Counsel), November 14, 2011**

MF Global Canada Co., Court File No. 207854-T (Ontario Superior Court of Justice (in Bankruptcy and Insolvency))

In the Matter of the Bankruptcy of MF Global Canada Co., of the City of Toronto, in the Province of Ontario

ONTARIO SUPERIOR COURT OF JUSTICE (IN BANKRUPTCY AND INSOLVENCY)

THE HONOURABLE MR.	)	MONDAY, THE 14TH DAY
	)	
JUSTICE COLIN L. CAMPBELL	)	OF NOVEMBER, 2011

Order — (Re Customer Representative Counsel)

THIS MOTION made on shortened notice by KPMG Inc., in its capacity as the trustee in bankruptcy (the "*Trustee*") of MF Global Canada Co. ("*MF Global Canada*") was heard on Monday, November 14, 2011 at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Trustee and on hearing the submissions of counsel for the Trustee and the proposed Customer Representative Counsel (as defined below):

1. *THIS COURT ORDERS* that the time for service of the notice of motion and the motion record is abridged, service of notice of motion material and the motion record is validated, all such that this motion is properly returnable on November 14, 2011.

2. *THIS COURT ORDERS* that, subject to further Order of the Court, Callidus Capital Corporation and XL Foods Inc. collectively, the "*Customer Representative*") is hereby appointed to represent all "customers" (as such term is defined in the *Bankruptcy and Insolvency Act* (Canada) (the "*BIA*")) of MF Global Canada as at November 4, 2011, other than MF Global Inc. (collectively, the "*Customers*") in all matters relating to MF Global Canada's proceedings under the BIA (collectively, the "*Proceedings*").

3. *THIS COURT ORDERS* that Stikeman Elliott LLP is hereby appointed as counsel (the "*Customer Representative Counsel*") to represent the Customers in respect of all matters affecting the Customers in the Proceedings.

4. *THIS COURT ORDERS* that any individual Customer who does not wish to be represented by the Customer Representative Counsel and to be bound by this Order and all other related orders which may subsequently be made in these proceedings shall by December 14, 2011, notify the Customer Representative Counsel and the Trustee in writing by facsimile, mail or delivery, in the form attached as *Schedule "A"* hereto, and shall thereafter not be so represented and shall represent themselves as an independent individual party to the extent they wish to appear in the Proceedings.

5. *THIS COURT ORDERS* that, subject to further Order of the Court, the Customer Representative Counsel shall have no obligation to consult with or seek instructions from the Customers other than the Customer Representative.

6. *THIS COURT ORDERS* that pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Trustee is hereby authorized and directed to provide to the Customer Representative Counsel as soon as possible after the granting of this Order, without charge,

(a) all available information from the books and records of MF Global Canada under the Trustee's control with respect to the names, last known addresses, last known phone numbers and e-mail addresses (if any) of all Customers. The Customer Representative Counsel shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it only for the purpose of facilitating its communications with the customers; and

(b) upon request of the Customer Representative Counsel, such documents and data as the Customer Representative Counsel deems necessary or desirable in order to perform its role as counsel to the Customers in the Proceedings. The Customer Representative Counsel is authorized to provide information obtained under this paragraph to the Customer Representative for the purpose of seeking and obtaining instructions in connection with carrying out its responsibilities as Customer Representative Counsel.

7. *THIS COURT ORDERS* that any Customer whose personal information is provided to the Customer Representative Counsel by the Trustee pursuant to this Order is deemed to have consented to such provision for the purposes of any applicable privacy legislation to the Trustee providing such information, and to the collection, use, and disclosure by the Customer Representative Counsel of such information, provided that such information will be used or disclosed by the Customer Representative Counsel solely for the purposes of representing the Customers' interests in the Proceedings.

8. *THIS COURT ORDERS* that the reasonable legal fees of and incidental fees and disbursements incurred by the Customer Representative and Customer Representative Counsel shall be paid by the Trustee on a periodic basis, forthwith upon the rendering of accounts (redacted to preserve any claim for privilege) to the Trustee and that, in the event of any disagreement regarding such fees and disbursements, such matters may be remitted to this Court for determination.

9. *THIS COURT ORDERS* that, subject to further order of the Court, and without limitation to any other right or protection in favour of the Customer Representative Counsel: (a) the Customer Representative Counsel shall not be required to take any step or action if it reasonably believes that there will not be sufficient funds available to it to complete such step or action; and (b) Stikeman Elliott LLP may apply to be discharged from its role as Customer Representative Counsel at any time in its sole discretion, including, without limitation, on the basis that it reasonably believes that there are insufficient funds available to it to carry out the terms of this Order or otherwise fulfill its role as Customer Representative Counsel.

10. *THIS COURT ORDERS* that Callidus Capital Corporation and XL Foods Inc. may resign as Customer Representative at any time in its sole discretion and that in the event of either Callidus Capital Corporation's &XL Foods Inc. resignation, the Trustee may appoint another Customer as the Customer Representative to replace Callidus Capital Corporation on XL Foods Inc.

11. *THIS COURT ORDERS* that the Trustee shall provide notice of this Order to the Customers by: (a) publishing a notice in the form attached as *Schedule "B"* hereto (the "*Notice*") in the national edition of *The Globe and Mail* and in *La Presse* (in French) as soon as practicable after the granting of this Order; (b) e-mailing or mailing a copy of the Notice, together with the Notice of Bankruptcy required by Section 102(c) of the BIA and a copy of this Order, after the granting of this Order to the Customers to the e-mail or physical address of the Customer as last shown in the books and records of MF Global Canada; and (c) posting a copy of the Notice on the Trustee's website as soon as practicable after the granting of this Order.

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

13. *THIS COURT ORDERS* that the Customer Representative and the Customer Representative Counsel shall have no liability as a result of their appointment or the fulfillment of their duties in carrying out the provisions of this Order, save and except for any gross negligence or unlawful misconduct on their part and that no action or other proceedings shall be commenced against the Customer Representative and/or the Customer Representative Counsel relating to their acting as such, except with prior leave of this Court to be obtained on at least seven (7) days' notice to the Customer Representative and/or the Customer Representative Counsel and upon further order in respect of security for costs, to be given by the plaintiff for the costs on a substantial indemnity basis, of the Customer Representative and/or the Customer Representative Counsel in connection with any such action or proceeding.

14. *THIS COURT ORDERS* that the Customer Representative and the Customer Representative Counsel shall be at liberty and are authorized at any time to apply to this Honourable Court for advice and directions in the discharge or variation of their powers and duties.

15. *THIS COURT ORDERS* that in the event that this Order is later amended by further Order of the Court, the Trustee may post such further Order on the Trustee's website and such posting shall constitute adequate notice to the Customers of such

amended Order.

Schedule "A"

In the Matter of the Bankruptcy of MF Global Canada Co., of the City of Toronto, in the Province of Ontario

ONTARIO SUPERIOR COURT OF JUSTICE (IN BANKRUPTCY AND INSOLVENCY)

Opt-Out Letter

KPMG Inc.,
Trustee in Bankruptcy of
MF Global Canada Co.
333 Bay Street, Suite 4600
Bay Adelaide Centre
Toronto, Ontario
M5H 2S5

—

Attention: Elizabeth Murphy
Telephone: (416) 777-8500
Fax: (416) 777-8818
elizabethmurphy@kpmg.ca

STIKEMAN ELLIOTT LLP
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Ontario
M5L 1B9

Attention: Maria Konyukhova
Telephone: (416) 869-5230
Fax: (416) 947-0866
mkonyukhova@stikeman.com

I, ..., am a Customer of MF Global Canada Co., as defined in the Order of Mr. Justice Campbell dated November 14, 2011 (the "*Order*").

Under paragraph 4 of that Order, Customers who do not wish Stikeman Elliott LLP to act as their representative counsel may opt out.

I hereby notify Stikeman Elliott LLP and the Trustee that I do not wish to be bound by the Order and will be represented as an independent individual party at my own expense to the extent I wish to appear in these proceedings.

Date Signature

Schedule "B"

On November 1, 2011, an Application for Bankruptcy Order was issued by the Canadian Investor Protection Fund against MF Global Canada Co. ("*MF Canada*"). On November 4, 2011 MF Canada consented to the immediate making of a Bankruptcy Order and KPMG Inc. was appointed as trustee in bankruptcy of MF Canada (the "*Trustee*"). As a result, the Trustee has a mandate to administer the estate of MF Canada in accordance with Part XII of the *Bankruptcy and Insolvency Act* (the "*BIA*").

Pursuant to an order of the Ontario Superior Court of Justice dated November 14, 2011, Callidus Capital Corporation (the "*Customer Representative*") was appointed as representative of all "customers" (as such term is defined in the BIA) of MF Canada as at November 4, 2011, other than MF Global Inc. (collectively, the "*Customers*") in all matters relating to MF Canada's proceedings under the BIA (collectively, the "*Proceedings*"). Stikeman Elliott LLP was appointed as representative counsel for the Customers ("*Customer Representative Counsel*").

The reasonable legal fees of and incidental fees and disbursements incurred by the Customer Representative and Customer Representative Counsel shall be paid by the Trustee on a periodic basis. Accordingly, *you are not required to contribute to the fees of the Customer Representative Counsel.*

If you do not wish to be bound by this order, you must notify the Trustee, KPMG Inc. and Stikeman Elliott LLP, in writing, by mail, e-mail or delivery on or before *December 14, 2011*. Your notice that you do not wish to be bound by this order must be in the form of a fully completed "Opt-Out Letter" substantially in the form attached as Schedule "A" to the Order dated November 14, 2011 and available on the Trustee's website at *www.kpmg.ca/mfglobalcanada.*

Additional information concerning the Proceedings, including previous orders granted in the Proceedings, can be found on the Trustee's website at *www.kpmg.ca/mfglobalcanada.*

Customers may contact Stikeman Elliott LLP in confidence directly at — mkonyukhova@stikeman.com or by telephone to Ms. Maria Konyukhova at 416-869-5230.

End of Document

TAB 21

2007 CarswellOnt 7565
Ontario Superior Court of Justice [Commercial List]

Dugal v. Research in Motion Ltd.

2007 CarswellOnt 7565, [2007] O.J. No. 4535, 37 B.L.R. (4th) 112, 50 C.P.C. (6th) 398, 87 O.R. (3d) 721

Mark Dugal, Aaron Murphy, Doug Smees, John O'Malley, Gaetan Siguoin, William Jemison, Paul Mitchell, Steven Moffatt, David Thompstone and John Boote, as Trustees of IRONWORKERS ONTARIO PENSION FUND (Applicant) and RESEARCH IN MOTION LIMITED, JAMES L. BALSILLIE, MIKE LAZARIDIS, DOUGLAS E. FREGIN, DOUGLAS WRIGHT, JAMES ESTILL, E. KENDALL CORK, and JOHN RICHARDSON (Respondents)

C. Campbell J.

Heard: November 5, 2007
Judgment: November 15, 2007
Docket: 07-CL-6844

Counsel: Michael D. Wright, A. Dimitri Lascaris for Applicant
Robert W. Staley, Derek J. Bell for Research in Motion, James Estill, John Richardson

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — Miscellaneous issues

Trustees of Pension Fund alleged improprieties in respect of option granting practices and accounting for same with respect to number of individuals — Trustees sought various relief under oppression remedy section of Business Corporations Act, including leave to commence derivative action in name of R Ltd. against individuals for breach of fiduciary duty and negligence in administration and financial reporting regarding R Ltd.'s stock option program — Parties negotiated settlement — Parties asked court to approve settlement between Trustees, R Ltd. and individual respondents — Parties also sought representative order under R. 10 of Rules of Civil Procedure in order to implement settlement — Settlement approved — Test for shareholder approval of settlement was met — There was arm's length bargaining without suggestion of collusion — Parties provided adequate notice of settlement hearing to all affected persons — Representative order was granted — Representative order was particularly appropriate given opt-out provision that had been exercised by very small minority of shareholders.

Table of Authorities

Cases considered by *C. Campbell J.*:

Hollinger International Inc. v. American Home Assurance Co. (2006), 34 C.C.L.I. (4th) 17, 2006 CarswellOnt 188 (Ont. S.C.J.) — considered

Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc. (2006), 2006 CarswellOnt 7072 (Ont. S.C.J.) — referred to

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]) — referred to

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 37 C.P.C. (4th) 175, 46 O.R. (3d) 130, 1999 CarswellOnt 1851 (Ont. S.C.J.) — considered

Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board) (1997), 35 O.R. (3d) 177, 1997 CarswellOnt 3084, 17 C.C.P.B. 49 (Ont. Gen. Div.) — followed

Ryan v. Ontario (Municipal Employees Retirement Board) (2006), 51 C.C.P.B. 237, 29 C.P.C. (6th) 24, 2006 CarswellOnt 883 (Ont. S.C.J.) — referred to

Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, 1988 CarswellOnt 121, 41 B.L.R. 22 (Ont. H.C.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
s. 246(1) — referred to

s. 249 — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 10 — considered

REQUEST for court approval of settlement between parties and for representative order.

***C. Campbell J.*:**

1 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 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; (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 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 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% 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.*,[1] 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 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.*[2] (a class action settlement) and adopted in *Hollinger International Inc. v. American Home Assurance Co.*[3] (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*..." 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*] order." As such, a number of Rule 10 orders have been issued since the advent of the *Class Proceedings Act*. [4]

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. [5]

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.

Order accordingly.

Footnotes

1 *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.)

2 *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.)

3 *Hollinger International Inc. v. American Home Assurance Co.* (2006), 34 C.C.L.I. (4th) 17 (Ont. S.C.J.)

4 See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 190, R. 10; *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 218 (Ont. 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 (Ont. Gen. Div.) at p. 183; *Ryan v. Ontario (Municipal Employees Retirement Board)* (2006), 29 C.P.C. (6th) 24 (Ont. S.C.J.); *Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc.*, 2006 CarswellOnt 7072 (Ont. S.C.J.)

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

End of Document

TAB 22

1997 CarswellOnt 3084
Ontario Court of Justice, General Division

Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board

1997 CarswellOnt 3084, 17 C.C.P.B. 49, 35 O.R. (3d) 177

Police Retirees of Ontario Incorporated, Plaintiff and The Ontario Municipal Employees' Retirement Board, The Waterloo Regional Police Services Board, The Waterloo Regional Police Association, and The Waterloo Regional Police Senior Officers' Association, Defendants

Kiteley J.

Heard: March 20, 1997
Judgment: July 23, 1997
Docket: Toronto 1443/96

Counsel: *Donna E. Campbell*, counsel for the plaintiff.
David Stamp, counsel for OMERS.
Steven L. Moate, counsel for the Waterloo Regional Police Services Board.
Martin Doane, counsel for the Waterloo Regional Police Association and Waterloo Regional Senior Officers' Association.

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Under police pension benefits programs surplus of funds was created — Allocation of funds was decided by police services board and police associations — Retired members who contributed to fund and representative of local retiree's association were not consulted — Organization of police retirees brought action for entitlement to share in excess funds and moved for representation order — Defendant police associations objected on basis that organization was corporation rather than natural person — Corporation was as entitled as natural person to representation order under Interpretation Act — Balance of convenience favoured granting of representation order because of lack of financial resources of individual retirees and desire to end matter expeditiously — Substantial information existed in regard to essential characteristics of members of retiree organization dedicated to their concerns — Retiree organization had requisite solvency and authority to proceed with action — Representation order granted — Rules of Civil Procedure, R.R.O. 1990, Reg. 194 — Interpretation Act, R.S.O. 1990, c. I.11, s. 29(1).

Under the police pension plan and the supplementary benefits plan, a surplus of funds was created. The police

associations and the police services board came to an agreement with respect to the allocation of the excess funds. No representative from the plaintiff police retirees organization or retired members who had contributed to the funds were present when the decision on how to allocate the funds was made. Only active members of the police force were allowed to vote on the use of the funds. The organization of police retirees brought an action for the entitlement of the police retirees to a share of the excess funds. The police retirees organization made a motion for a representation order allowing them to represent the police retirees in the action. The defendant police associations objected to the motion on the basis that the retirees organization was a corporation rather than a natural person.

Held: The motion was granted.

The *Rules of Civil Procedure* provide no definition for the word "person". However, the *Interpretation Act*, s. 29(1), defines "person" to include a corporation. That definition applied to R. 10.01 governing representative actions. The plaintiff, as a corporation, was therefore as entitled as a natural person to a representation order.

The balance of convenience favoured the granting of the order. The lack of financial resources of the individual retirees was a prohibitive factor if they had to proceed on an individual basis. There was desire to end the matter expeditiously, which was more likely to result if a representation order was granted. Substantial information existed in regard to the essential characteristics of the members of the retiree organization, providing a clear definition of the class of persons to be represented. The plaintiff was an established and important organization dedicated to the concerns of its members. The retiree organization had the requisite solvency and authority of its members to proceed with the action. Although the plaintiff organization lacked the same characteristics as the members of the class it purported to represent, that requirement was not essential when the representative plaintiff was a corporation, as a corporation was never able to have the same characteristics as its individual members. The representation order was granted.

Table of Authorities

Cases considered by *Kiteley J.*:

Bruce (Township) v. Thornburn (1986), 17 O.A.C. 127, 57 O.R. (2d) 77 (Ont. Div. Ct.) — distinguished

Hardy v. Clancy (June 30, 1993), Doc. 48355/90Q (Ont. Gen. Div.) — referred to

Toronto Fire Department Pensioners' Assn. v. Fitzsimmons (1995), 40 C.P.C. (3d) 298 (Ont. Gen. Div.) — distinguished

Statutes considered:

Interpretation Act, R.S.O. 1990, c. I.11
s. 29(1) "person" — considered

Ontario Municipal Employees Retirement System Act, R.S.O. 1990, c. O.29
Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 10 — referred to

R. 10.01 — referred to

R. 10.01(1) — referred to

R. 10.01(1)(f) — considered

R. 10.01(2) — referred to

R. 12 — referred to

R. 22 — referred to

Regulations considered:

Ontario Municipal Employees Retirement System Act, R.S.O. 1990, c. O.29
General, R.R.O. 1980, Reg. 724

Generally

MOTION by plaintiff corporation for representation order.

Kiteley J.:

1 The issue in this motion is the circumstances in which a representation order should be issued pursuant to Rule 10.01(1)(f) of the *Rules of Civil Procedure*.

Factual Background

2 The *Ontario Municipal Employees Retirement System Act*, R.S.O. 1990, c. O. 29 (the "*OMERS Act*") creates a multi-employer defined benefit pension plan for employees of local governments in Ontario. Participation in and contribution to the pension plan is obligatory on the part of the employee and the employer. Members of the Waterloo Regional Police Force participate in, contribute to and benefit from the OMERS pension plan which is subject to the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*Pension Benefits Act*"), and is administered by the OMERS Board, a corporation created by the *OMERS Act*. OMERS offers two categories of pension benefits to employees: (a) basic benefits, which are specified in the OMERS Regulations; and (b) supplementary benefits, which employees may receive if their employers enter into supplementary agreements with OMERS as provided under the OMERS Regulations.

3 In 1973 the Waterloo Regional Police Services Board (the "Police Board") entered into a supplementary benefit agreement with OMERS (the "supplementary agreement") to provide a permanent partial disability supplementary benefit to

its employee police officers. The supplementary agreement was amended on January 13, 1977, to provide an additional supplementary benefit which enabled police officers who were within ten years of normal retirement age to retire on a full unreduced pension after 30 years of service. The amendment made that benefit effective January 1, 1976. Although that benefit was initially paid for by contributions from both the Police Board and the police officers, an amendment to Regulation 724, R.[R.]O. 1980, effective January 1, 1983, eliminated direct contributions from employees who were covered by that benefit. Direct contributions that had been made by police officers from January 1, 1976, to December 31, 1982, were, on an optional basis, transferred to the contributor's R.R.S.P.'s or used to provide additional retirement benefits for the police officers who made such contributions. Employers continued to contribute. The amending regulation also provided that any supplementary agreement in force as of December 31, 1982, was deemed to be amended as of January 1, 1983, until it was amended in fact to accord with the form and content of any agreement as determined by the Board. In November 1983, the OMERS Board approved the form and content of a supplementary agreement to reflect the amendment. Although the agreement was approved, the Police Board and the OMERS Board never executed it.

4 In December 1991, the events began which led to this lawsuit. The supplementary benefit became part of the basic benefit package offered by OMERS, and was funded through employer contributions to the basic plan. All members became eligible to retire on an unreduced pension within 10 years of normal retirement date, after 30 years of qualifying service. This change to the OMERS basic plan removed the need to provide the supplementary benefit, funded by the supplementary pension plan. The money remaining in the fund, which had a value of $5,722,742.05 as of December 31, 1991, was declared "largely superfluous" by the OMERS Board. The funds required for the early retirement of those who retired after January 1, 1976, and before December 31, 1991, were transferred to the basic plan upon retirement of the member and are not reflected in the surplus fund.

5 In April 1992 the OMERS Board wrote to the contributing employers who had entered into a supplementary agreement and offered five options for use of the funds remaining in the supplementary benefit fund. It took the position that a clause which appears in the 1983 agreement, which characterized such monies as "excess funds on account", permitted the use of the funds in a manner to be agreed upon by the OMERS Board and the employer. The Police Board and the Police Associations elected to leave $2,000,000 in the account in anticipation of supplementary benefits yet to be introduced and to use the balance to offset the Police Board's basic plan contributions (ie employer contribution holidays).

6 Contrary to the plaintiff's initial understanding which is reflected in the Statement of Claim, the funds were not disbursed directly into the OMERS fund. Rather, the funds were applied to pay the employer's contribution to the basic pension plan. Although there was no direct payment out of the funds, the contribution holiday freed up monies which the Police Board had set aside for payment to the basic pension plan, and it is these funds to which the retired members claim a proportional entitlement. The employer contribution holiday ended in September 1995.

7 Around the time of the discussions concerning the surplus funds, the provincial government enacted legislation that required a social contract agreement to be entered into between the Police Board and the Police Associations to minimize the effect of an expenditure reduction programme. The Police Services Board and the Associations agreed to access the funds held by OMERS with respect to the members covered by the social contract agreement. It was agreed that $4,065,000 (the amount available because of the employer contribution holiday) would be used to fund, among other things, early retirement incentive payments and sick leave gratuities, and would also be allocated to achieve the social contract targets for the Board and the Associations. No representative of the local retirees' association or of the plaintiff was present during the negotiations between the Police Board and the Police Associations. None of the retired members who contributed to the fund were consulted either before or at the time the social contract agreement was negotiated and signed. Only active members of the force were permitted to vote on the use of the funds. On August 6, 1993, the date the social contract agreement was signed, the funds were valued at $6,343,628.97 (the "Excess Funds").

The Issue

8 The issue in this *action* is whether the police retirees are entitled to a share in the Excess Funds. If the Court should determine that the police retirees are entitled to a share, the question then becomes the amount to which they are entitled.

9 The issue for determination on this *motion* is whether a representation order should be issued pursuant to Rule 10.01(1)(f) authorizing the Police Retirees of Ontario Incorporated ("P.R.O.") to represent the police retirees in their action claiming an entitlement to the Excess Funds.

Analysis

10 Rule 10.01 (1) and (2) are as follows:

> Proceedings in which Order May be Made
>
> 10.01(1) In a proceeding concerning,
>
> (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> (b) the determination of a question arising in the administration of an estate or trust;
>
> (c) the approval of a sale, purchase, settlement or other transaction;
>
> (d) the approval of an arrangement under the Variation of Trusts Act;
>
> (e) the administration of the estate of a deceased person; or
>
> (f) any other matter where it appears necessary or desirable to make an order under this subrule,
>
> a judge may by order appoint one or more *persons* to represent any *person* or class of *persons* who are unborn or *unascertained* or *who have a present, future, contingent or unascertained interest in or may be affected by the proceeding who cannot be readily ascertained, found or served.*
>
> Order Binds Represented Persons
>
> (2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03.

(1) Definition of the sub-classes within the class: the threshold issue

11 In paragraph 15 of her factum, counsel for the plaintiff identified five possible sub-classes within the class of retirees. Suffice it to say that not all those sub-classes will be represented. For purposes of the motion for a representative order, I accepted the position advanced by counsel for the plaintiff, supported by counsel for OMERS, namely that the *liability* issue,

that is, the entitlement of retired members to share in the monies, is a threshold issue. The order I make on the representative issue is for purposes only of progressing to and through the threshold issue.

12 As indicated below, counsel for the Police Associations raise the conflict between and among the sub-classes. I agree with the plaintiff and OMERS that the issue of conflict between and among the sub-classes does not need to be addressed at this time. Should the court find that no entitlement exists for any retired member, the possibility of conflicting entitlements of the sub-classes need not be considered. If the court does find entitlement, the potential for conflict between the sub-classes will need to be addressed.

(2) Definition of "person" in s. 10 of the Rules of Civil Procedure:

13 Counsel for the Waterloo Regional Police Association and the Waterloo Regional Police Senior Officers' Association, submitted that the motion should fail on the basis that P.R.O. is a corporation rather than a natural person and thus may not represent the police retirees.

14 The *Rules of Civil Procedure* do not provide a definition of the word "person." However, s. 29(1) of the *Interpretation Act* R.S.O. 1990, c. I.11, contains the following definition: "person includes a corporation and the heirs, executors, administrators, or other legal representatives of a person to whom the context can apply according to law." That definition applies to Rule 10.01. In *Toronto Fire Department Pensioners' Assn. v. Fitzsimmons* (1995), 40 C.P.C. (3d) 298 (Ont. Gen. Div.), at 301, Pitt J. held in an application pursuant to Rule 10 that he was not prepared to find, nor did he think it necessary to find, that "no corporation could be a 'person' contemplated by the rule". Accordingly, I find that there is no compelling reason why a corporation cannot be granted a representation order.

(3) The standard which the plaintiff must meet in order to be granted a representation order

15 The onus is on the plaintiff to satisfy the Court that this is a proper case for a representation order: see *Hardy v. Clancy* (June 30, 1993), Doc. 48355/90Q (Ont. Gen. Div.) per McNeely J.

16 The wording of R. 10.01(1)(f) indicates that a representation order will be granted where the group of persons affected by the order may not be "readily ascertained, found, or served". OMERS can create a list of all retirees potentially affected by this action. The respondents (other than OMERS) therefore suggest that since the proposed class constitutes a group which can be readily ascertained, found or served, the representation order ought not to be made. However, an analysis of the cases in which the wording of this provision has been considered suggests that a liberal interpretation of this requirement has been employed by the courts. In two recent decisions in which representation orders were made pursuant to s. 10.01(1)(f), the group of persons could be readily ascertained and/or found, but the court determined that it would be inconvenient for each member of the group to be individually served. In *Bathgate v. N.H.L. Pension Society*, (26 June 1991), Toronto RE 785/91, Potts J. granted a representation order to seven retired hockey players as representatives of the player participants in a pension plan. Potts J. mandated that a copy of the notice indicating that a representation order had been granted be sent by regular mail to all of the player participants as well as to the beneficiaries of deceased player participants under the plan. A representation order was made although the group of persons could be readily ascertained, found and served.

17 Similarly, in *Qit-Fer & Titane Inc. v. Dorr-Oliver Canada Ltd.* (9 January 1997), Toronto B177/96, Cameron J.

granted a motion for a representation order to four natural persons to represent members of a pension plan for employees of Dorr Canada. As was the case in *Bathgate* supra, the individuals on whose behalf the representation order was made could be ascertained and found.

18 These cases suggest that the test to be applied in considering a request for a representation order is not whether the individual members of the group can be found or ascertained, but rather whether the balance of convenience favours the 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 analysing the balance of convenience, I must consider the inconvenience which would be experienced by each party if the representation order were or were not granted. There is no evidence of the financial resources of the members of P.R.O. But, by definition, retirees live on income less than previous wages. I assume that the individual police retirees are of modest means. To require that an individual police retiree assume financial responsibility for the representation of all of the police retirees for the purpose of resolving the threshold issue would impose an undue burden. It would be prohibitive. OMERS is in favour of the granting of a representation order, and, in fact, suggests that it would be "practical" to do so. Mr. Stamp has indicated that the issue is an important one which OMERS wishes to have determined as quickly and efficiently as possible. There are several other supplementary agreements being negotiated and progress will be hampered until this action is resolved. That resolution is likely to be more expeditious if a representation order is made. There is no evidence to suggest that individual members of the respondent Waterloo Regional Police Services Board, the Waterloo Regional Police Association, or the Waterloo Regional Police Senior Officers' Association would experience inconvenience in the event that a representation order is granted. As a result, I find that the balance of convenience favours the issuance of a representation order. Furthermore, as advocated by OMERS, it is in the interests of justice to make the order.

(4) Definition of the "class of persons" in s. 10.01[(1)](f) of the Rules of Civil Procedure

19 In order to obtain a representation order under Rule 10.01 of the *Rules of Civil Procedure*, the proposed plaintiff must provide a certain amount of information in regard to the essential characteristics of the group. In *Bruce (Township) v. Thornburn* (1986), 57 O.R. (2d) 77 (Ont. Div. Ct.), Southey J., writing for the Court, overturned a representation order which had been made in regard to subscribers of the Bruce Municipal Telephone System. Southey J. determined that the class of persons which the "Bryce group" had been appointed to represent was not an appropriate one for a representation order under rule 10.01 since no attempt had been made to describe the essential characteristics of the members of the "Bryce group "which would give them the claim to subscriber status which they asserted, nor was any attempt made to limit the class being represented to persons having the same characteristics.

20 Similarly, in *Toronto Fire Department Pensioners' Assn. v. Fitzsimmons* (1995), 40 C.P.C. (3d) 298 (Ont. Gen. Div.), an application was made to appoint a corporation without share capital to represent all retired members of a fire department. The applicant had been incorporated by six retired firefighters for the purpose of "promoting and protecting the best interest of the Toronto Fire Department pensioners and their families." Nothing more of substance was known of the corporation. Pitt J. held that the applicant was not the appropriate representative for the purpose of this proceeding. At p. 301, he observed that it should not be difficult to find a small group of persons who could obtain leave of the court to institute representative proceedings after providing satisfactory evidence of their representative nature, their commonality of interest and their ability to satisfy costs awards or to provide a satisfactory mechanism for satisfying such awards.

(5) P.R.O. is the appropriate representative:

21 In contrast to the proposed representative plaintiffs in *Bruce (Township)* supra, and *Toronto Fire Department*

Pensioners' Assn., *supra*, substantial information exists in regard to the essential characteristics of the members of P.R.O.. P.R.O. was incorporated on December 30, 1992. It is administered by an elected Board of Directors consisting of retired police personnel. Sydney Brown is the President and was one of the founding members. As of October 1996, P.R.O. had over 6000 members. Membership is restricted to retired police officers and spouses, retired police civilian employees and spouses, and the widows and widowers of both active and retired personnel. Police officers are automatically enrolled in the organization upon their retirement from the police force. Individuals pay annual dues of $5.00 while local retirees' associations pay fees of $25.00. A failure to pay dues does not result in removal from the membership list, but a written request for removal will. In other words membership is based on status, not on the member taking initiative to join. Mr. Doane and Mr. Moate describe the membership as "illusory". While it would be more comforting if membership were actively pursued rather than passively bestowed, the method of ascribing membership status does not mean that it is any the less representative.

22 P.R.O. is the only provincial organization which is primarily concerned with the advancement and protection of retired police personnel including assisting members in dealing with government boards and agencies. It has a written constitution and by-laws. It circulates a newsletter. It has a permanent office in Kitchener, Ontario. Members from the Waterloo Regional Police Force form part of the organization. The most recent address list compiled by P.R.O. of retired members in the Waterloo Regional Police Force lists approximately 176 retired police officers and/or their surviving spouses.

23 P.R.O. is recognized by OMERS. In his capacity as President of P.R.O., Sydney Brown has been invited by OMERS to attend consultation meetings held by the OMERS Board. Since September 1995, the OMERS Board has held four such consultation meetings, the purpose of which is to discuss with member representatives proposed changes to OMERS affecting the governance of that organization. As it is not possible to invite all members, the plaintiff asserts that the OMERS Board focuses on who they perceive to be representatives of those members, as a way of obtaining effective input. OMERS did not take issue with that assertion. Mr. Brown has attended each meeting and has been the only representative of the police retirees present. At the most recent meeting, two groups of retirees were represented: the Municipal Retirees of Ontario and P.R.O. No one from the Waterloo Regional Police Association or the Waterloo Regional Senior Officers Association attended.

24 Based on the foregoing. I find that P.R.O. is an established and important organization dedicated to the concerns of its members. This litigation is consistent with it's mandate. It is respected and consulted by OMERS.

25 The defendants have suggested that the plaintiff does not have the requisite solvency for the purpose of this representative action. During the year ending December 31, 1995, P.R.O. generated $1,771,104 in revenues as a result of ticket sales for the Garden Bros. Circus which it sponsors. Most of those funds are expended on the circus. The modest profit and very minor membership fees are used for administration expenses which for that year, totalled $162,173. P.R.O.'s net income on December 31, 1995, was $58,415. I conclude that P.R.O.'s financial statements as of December 31, 1995, reveal that it is a solvent corporation with the financial resources necessary to permit it to litigate this matter and to pay costs if necessary.

26 I do not accept the submission that since P.R.O. earns 95% of its revenue from running circuses for children, that if P.R.O. is ultimately ordered to pay costs, those costs would come from the children. The point is that P.R.O. generates significant revenue. I accept the evidence of Sydney Brown about it's solvency.

27 Mr. Doane submitted that P.R.O. is not an appropriate representative since it has not been given proper authority to

bring this action by the Waterloo police retirees. On September 14, 1995, at a quarterly general meeting of the Waterloo Regional Police Retirees Association, a motion was passed which requested that P.R.O. provide the Association with a loan for legal assistance to obtain a portion of the Excess Funds. Sydney Brown was present.

28 Following that request, Sydney Brown reported the request to the P.R.O. board which decided to take the action on behalf of the Waterloo Regional Retirees. P.R.O. did not pass its own resolution authorizing the legal proceedings and accepting responsibility for the legal expenses incurred on behalf of P.R.O. and the legal expenses to which it would be exposed if costs were ordered against P.R.O. Mr. Doane is correct in raising this formal deficiency. But I accept the uncontradicted evidence of the President that he has the requisite authority.

29 Mr. Doane asserts that P.R.O. cannot be appointed because it does not have the same characteristics as the members of the class whom it purports to represent: P.R.O. isn't a retiree and P.R.O. doesn't have a claim against the Excess Funds. If the proposed plaintiff were a natural person, that argument would be attractive. But if a corporation has status as a person pursuant to Rule 10, it follows that there must be some leniency in considering the extent to which the representative plaintiff shares the characteristics of the class. Without that leniency, a corporation could never succeed as representative plaintiff. Accordingly, the lack of shared characteristics is not fatal.

30 Mr. Doane also asserts that P.R.O. cannot be appointed because of the potential for conflict. Some of the members of P.R.O. have received benefits attributed to the social contract agreement. Mr. Doane raised the prospect that his clients would counterclaim against all of those who received such benefits (which he calculated as 70 of the P.R.O. members) to recover the benefits.

31 Once the representation order is made, the "threshold issue" will be addressed. At that point, P.R.O. will specify which of the five possible sub-classes summarized at paragraph 15 of the plaintiff's factum will be pursued. Conflict may then arise. At this stage, however, the possibility of conflict among the members represented does not prevent P.R.O. from acting in a representative capacity for purposes of addressing the threshold issue.

32 The statement of claim includes allegations against all defendants of breach of fiduciary duty and unjust enrichment. There are other claims such as breach of statutory duty and breach of constitution. The three police associations opposed the representation order. But OMERS supported the request for the limited purpose of determining the threshold issue as a matter of law or on the basis of a special case under Rule 22. The basis upon which OMERS supports the request are summarized in paragraph 31 of its factum.

33 I am particularly influenced by the support from OMERS. It must deal with all OMERS recipients throughout Ontario. If OMERS is content with the representation order, the opposition by the Police Associations should not be determinative.

Conclusion

34 For purposes of bringing a motion to establish entitlement only, an order will issue pursuant to Rule 10 appointing P.R.O. as representative of the retired members of the Waterloo Regional Police Force who were employed when contributions were made to fund a Supplementary Early Retirement Benefit (the SERB) provided under a Supplementary

Agreement between the Waterloo Regional Police Services Board and OMERS. I have not specified the period during which contributions were made. In paragraphs 14 and 15 of the Factum, Ms. Campbell enlarged the interval to cover the period 1976 to the present. Mr. Stamp opposed some of the sub-classes in paragraph 15 while Mr. Doane opposed others. If I circumscribed the time frame, I would indirectly restrict the sub-classes. I am confident that counsel will be able to agree on which of the sub-classes are unaffected by such conflict. If they are unable to agree, I will hear further submissions.

Security for Costs

35 In his submissions, Mr. Moate raised the prospect of the court making an order for security for costs as a condition of the representation order. He argues that since the granting of a representation order is discretionary, that the court could exercise the discretion but on conditions. I have found that P.R.O. has sufficient solvency to justify a representation order. An order compelling P.R.O. to post security for costs would be inconsistent with that finding.

Costs of this Motion

36 If counsel are unable to agree as to the costs of this motion, I will hear submissions. Toward that end, Ms. Campbell should attempt to elicit consensus. Failing such consensus, counsel should agree on a schedule for filing brief written submissions with Ms. Campbell and Mr. Stamp initiating and Mr. Moate and Mr. Doane responding. All submissions should be forwarded to me within 40 days unless the summer plans of counsel necessitate a more expanded timetable.

Motion granted.

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